JUDICATURE AMENDMENT BILL

EXPLANATORY NOTE

THIS Bill makes miscellaneous amendments to the Judicature Act 1908.

Clause 1 relates to the Short Title.

Clause 2 increases from 19 to 21 the maximum number of puisne Judges that may be appointed to the Supreme Court.

Clause 3 repeals section 54 (2) of the principal Act which makes it an offence to serve or execute any writ or other Court process on a Sunday. Such service or execution, however, remains a nullity unless authorised by any Rule of Court.

Clause 4 foreshadows proposed changes in the Code of Civil Procedure relating to subpoenas. The amendments substitute references to orders of subpoena for references to writs of subpoenas. The clause will not come into force until a date to be appointed by the Governor-General by Order in Council. This will allow the proposed changes to the Code to be effected.

Clause 5 empowers the Court to waive various rules of evidence relating to certain matters in non-contentious civil proceedings.

Clause 6 abolishes juries of 4 in civil cases.

Clauses 7 to 12 amend Part I of the Judicature Amendment Act 1972, and references in the succeeding part of this note to "the Act" are references to that Act.

Clause 7 amends the definitions of "statutory power" and "statutory power of decision" in section 3 of the Act for the purpose of ensuring that the procedure by way of application for review is available in certain cases where the older common law remedies are available. These cases are set out below.

Subclause (1): The effect of the existing definition of "statutory power" is to limit the application of the Act to the exercise of functions under statutory authority. The result is that the procedure for review under the Act is not available to a member of a non-statutory body who wishes to challenge the exercise of a power by that body, for example, a decision expelling or disciplining him. This subclause extends the definition to apply to the powers or rights specified in the definition if they are conferred either under statute or under the constitution or other instrument of incorporation, rules, or by-laws of any body corporate.

Subclause (2): Another effect of the present definition of "statutory power" is to prevent the application of the Act to a review of the legality of investigative functions, as distinct from an act or decision that has a final and determinative effect. This subclause extends the list of powers set out in the

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definition to include the power to make an investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person. The effect of the amendment is that a review may be obtained in respect of the exercise of such a power.

Subclause (3) amends the definition of "statutory powers of decision". The existing definition relates only to a power or right to make a decision "deciding or prescribing" the rights, powers, privileges, immunities, duties, or liabilities of a person, or his eligibility to receive a benefit or licence, etc. This is too restrictive, because a person's rights may be detrimentally affected by a decision without being actually decided or prescribed by it. This subclause amends the definition to include a decision "affecting" the matters mentioned above. At the same time it consequentially amends the definition to bring it into line with the amended definition of "statutory power" (see *subclause (1)*).

Clause 8: Subclause (1) makes it clear that it is not a bar to the grant of relief that the tribunal whose act or omission is challenged was not under a duty to act judicially.

Subclause (2) amends section 4 (5) of the Act, under which the Court has power to direct the tribunal to reconsider the whole or part of its decision. Doubts have arisen whether this is a power exercisable only when relief is granted under subsection (1) or independently of the grant of such relief. This amendment makes it clear that it is not just an ancillary power. So long as the Court is satisfied that the applicant is entitled to relief, it may direct reconsideration either in addition to or instead of granting any other relief under the section.

Subclause (3): If the Court directs reconsideration under section 4 (5), it may make interim orders for the purpose of preserving the status quo pending the final determination of the matter.

Clause 9: At present, section 8 provides that on an application for review the Court may make such interim order as it thinks proper pending the final determination of the application. Doubts have arisen as to the extent of the Court's powers under this section, and as to when they may be exercised. This clause rewrites the section. First, it is made clear that an interim order may be made at any time before the final determination of an application for review. Secondly, it is provided that for the purpose of preserving the position of the applicant the Court may make an interim order prohibiting the respondent from taking further action that is or would be consequential on the exercise of the statutory power, prohibiting or staying any civil or criminal proceedings in connection with the matter, and continuing in force any licence that has been revoked or suspended in the exercise of the statutory power or that would otherwise expire by effluxion of time.

Clause 10: Under sections 4 and 9 of the Act, an application for review is made by motion stating the grounds for relief and the nature of the relief sought. In other respects the rules of Court are applied by section 12. These provisions have led to some uncertainty as to the procedure, in particular as to the statement of facts and of the grounds for relief. This clause replaces sections 9 and 12 by a new section 9 requiring a motion accompanied by a statement of claim, setting out the requirements for the statement of claim, requiring a supporting affidavit, and (subject to any direction of a Judge under the new section 10 (*clause 11*)) requiring every respondent to file a statement of defence.

Clause 11: Section 10 of the Act empowers the Court to direct the filing of the whole or any part of the record of the proceedings in which a challenged decision was made. This clause rewrites the section to enable a Judge at any time, either on application or without an application, to call a conference of parties or their counsel, and to settle the issues and give directions on a number of specified matters, for the purpose of ensuring that an application or intended application for review may be determined conveniently and expeditiously and that all matters in dispute may be effectively and completely determined.

Clause 12: The purpose of this clause is to ensure that the Court is not prevented from making an interim order under the new section 8 (*clause 9*) by reason of the fact that the Crown or an officer of the Crown is the respondent.

Hon. Mr Thomson

JUDICATURE AMENDMENT

ANALYSIS

A BILL INTITULED

An Act to amend the Judicature Act 1908

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title—This Act may be cited as the Judicature Amendment Act 1976, and shall be read together with and deemed part of the Judicature Act 1908* (hereinafter referred to as the principal Act).

*Reprinted, 1957, Vol. 6, p. 699
Amendments: 1958, No. 40; 1960, No. 109; 1961, No. 11; 1963, No. 133; 1965, No. 62; 1966, No. 67; 1968, No. 18; 1968, No. 59; 1969, No. 86; 1970, No. 72; 1972, No. 130; 1973, No. 8; 1973, No. 69; 1974, No. 57

2. Judges of Supreme Court—(1) Section 4 of the principal Act (as inserted by section 4 (1) of the Judicature Amendment Act 1957 and amended by section 2 of the Judicature Amendment Act 1974) is hereby amended by omitting from subsection (1) the expression "19", and substituting the expression "21".

(2) Section 2 of the Judicature Amendment Act 1974 is hereby consequentially repealed.

3. Service of process on Sundays—(1) Section 54 (1) of the principal Act is hereby amended by omitting the word "No", and substituting the words "Subject to any Rule of Court, no".

(2) Section 54 (2) of the principal Act is hereby repealed.

4. Order of subpoena—(1) Section 56A of the principal Act (as inserted by section 2 of the Judicature Amendment Act 1960 and amended by section 10 of the Judicature Amendment Act 1961) is hereby amended by omitting from subsection (3) the words "writ of subpoena", and substituting the words "order of subpoena".

(2) The said section 56A (as amended by section 7 of the Decimal Currency Act 1964) is hereby amended by omitting the expression "$100", and substituting the expression "$500".

(3) Section 56BB of the principal Act (as inserted by section 11 of the Judicature Amendment Act 1961) is hereby amended by omitting the words "writ of subpoena", and substituting the words "order of subpoena".

(4) Every reference to a writ of subpoena in any other Act or in any regulation, rule, bylaw, order, or other enactment or in any deed, instrument, notice, or other document whatsoever shall hereafter be read as a reference to an order of subpoena.

(5) This section shall come into force on a date to be fixed by the Governor-General by Order in Council.

5. Court may waive proof in certain cases—The principal Act is hereby amended by inserting, before section 72, the following section:

"71B. At any stage in any civil proceedings the Court may—

"(a) Waive any rule of evidence relating to the proof of any matter that is not, in the Court's opinion, genuinely in dispute between the parties or any of them, including, but without limiting the generality of this power, proof of any handwriting, or of any document, or of the identity of any person or thing, or of any authority:

"(b) Waive any rule of evidence relating to the taking of evidence on commission, or to any other matter as the Court thinks fit, if the Court is satisfied that compliance with that rule is likely to involve unreasonable delay or expense, having regard to the subject-matter of the proceedings and to the respective interests of the parties."

6. Juries of 4 abolished—(1) The principal Act is hereby amended by inserting, after section 19, the following sections:

"19A. **Certain actions may be tried by jury**—(1) This section applies to actions in which the only relief claimed is payment of a debt or pecuniary damages or the recovery of chattels.

"(2) If the debt or damages or the value of the chattels claimed in any action to which this section applies exceeds $100, either party may have the action tried before a Judge and a jury on giving notice to the Court and to the other party, within the time and in the manner prescribed by the rules of the Supreme Court, that he requires the action to be tried before a jury.

"(3) Notwithstanding anything in subsection (2) of this section, in any case where, after notice has been given pursuant to that subsection but before the trial has commenced, the debt or damages or the value of the chattels claimed is reduced to $100 or less, the action shall be tried before a Judge without a jury.

"(4) If, in any action to which this section applies, the defendant sets up a counterclaim, then, unless pursuant to this section the action and the counterclaim are both to be tried before a Judge without a jury, the following provision shall apply:

"(a) On the application of either party made with the consent in writing of the other party, both the action and counterclaim shall be tried before a Judge without a jury, or before a Judge with a jury, whichever is specified in the application:

"(b) If no such application is made, the action and the counterclaim shall, subject to any direction of the Court or a Judge under section 19B of this Act, be tried in accordance with the foregoing provisions of this section:

"Provided that if the Court or a Judge orders that the action and the counterclaim be tried together, they shall be tried before a Judge with a jury.

"(5) Notwithstanding anything to the contrary in the foregoing provisions of this section, in any case where notice is given as aforesaid requiring any action to be tried before a jury, if it appears to a Judge before the trial—

"(a) That the trial of the action or any issue therein will involve mainly the consideration of difficult questions of law; or

"(b) That the trial of the action or any issue therein will require any prolonged examination of documents or accounts, or any investigation in which difficult questions in relation to scientific, technical, business, or professional matters are likely to arise, being an examination or investigation which cannot conveniently be made with a jury,—

the Judge may, on the application of either party, order that the action or issue be tried before a Judge without a jury.

"(6) Nothing in this section shall apply in respect of any action to be heard by the Court in its admiralty jurisdiction, or when sitting as a Prize Court.

"19B. **All other actions to be tried before Judge alone, unless Court otherwise orders**—(1) Except as provided in section 19A of this Act, every action shall be tried before a Judge alone.

"(2) Notwithstanding subsection (1) of this section, if it appears to the Court at the trial, or to a Judge before the trial, that the action or any issue therein can be tried more conveniently before a Judge with a jury the Court or Judge may order that the action or issue be so tried."

(2) The Juries Act 1908 is hereby amended by repealing section 62, and substituting the following section:

"62. **Common juries in civil cases**—Where a civil action in the Supreme Court is to be tried by a common jury the jury shall consist of 12 persons whose names shall be taken from the common jury book of the district in which the trial is to take place."

(3) The Juries Act 1908 is hereby consequentially amended—

(a) By omitting from section 64 (as amended by section 6 (1) of the Juries Amendment Act 1963) the words "if the jury is of twelve, and not less than twelve persons if the jury is of four":

(b) By repealing section 83:

(c) By omitting from section 159 (1) (as amended by section 2 (1) of the Juries Amendment Act 1959) the words "Different sums may be so prescribed according to whether the trial or assessment is by a jury of twelve or by a jury of four.".

(4) Section 6 of the Juries Amendment Act 1951 is hereby consequentially amended—

(a) By omitting from subsection (1) the words "seventy-five, seventy-six, and eighty-three", and substituting the expression "75 and 76":

(b) By omitting from paragraph (a) of that subsection the words "in the case of a special jury of twelve, and not less than thirty-two in the case of a special jury of four":

(c) By omitting from paragraph (b) of that subsection the words "in the case of a special jury of twelve, and to eight in the case of a special jury of four":

(d) By omitting from subsection (4) the words "seventy-three to eighty-three", and substituting the expression "73 to 82".

(5) The Juries Amendment Act 1963 is hereby consequentially amended by repealing so much of the Schedule as relates to section 62 of the Juries Act 1908.

(6) The following enactments are hereby consequentially repealed:

(a) The Judicature Amendment Act (No. 2) 1955:

(b) Section 4 of the Judicature Amendment Act 1960:

(c) Section 8 of the Judicature Amendment Act 1961:

(d) Section 3 of the Judicature Amendment Act (No. 2) 1973:

(e) Section 3 of the Judicature Amendment Act 1974.

Amendments of Judicature Amendment Act 1972

7. Interpretation—(1) Section 3 of the Judicature Amendment Act 1972 is hereby amended by inserting in the definition of the term "statutory power", after the words "by or under any Act", the words "or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate".

(2) The said section 3 is hereby further amended by adding to paragraph (d) of the definition of the term "statutory power" the word "or", and by adding to the definition the following paragraph:

"(e) To make any investigation or inquiry into the rights, powers, privileges, immunities, duties, or liabilities of any person."

(3) The said section 3 is hereby further amended by omitting from the definition of the term "statutory power of decision" the words "to make a decision deciding or prescribing", and substituting the words ", or by or under the constitution or other instrument of incorporation, rules, or bylaws of any body corporate, to make a decision deciding or prescribing or affecting".

8. Application for review—(1) Section 4 of the Judicature Amendment Act 1972 is hereby amended by inserting, after subsection (2), the following subsection:

"(2A) Notwithstanding any rule of law to the contrary, it shall not be a bar to the grant of relief in proceedings for a writ or order of or in the nature of certiorari or prohibition, or to the grant of relief on an application for review, that the person who has exercised, or is proposing to exercise, a statutory power was not under a duty to act judicially; but this subsection shall not be construed to enlarge or modify the grounds on which the Court may treat an applicant as being entitled to an order of or in the nature of certiorari or prohibition under the foregoing provisions of this section."

(2) The said section 4 is hereby further amended by omitting from subsection (5) the word "may", and substituting the words "if it is satisfied that the applicant is entitled to relief, may, in addition to or instead of granting any other relief under the foregoing provisions of this section,".

(3) The said section 4 is hereby further amended by inserting, after subsection (5), the following subsection:

"(5A) If the Court gives a direction under subsection (5) of this section it may make any order that it could make by way of interim order under section 8 of this Act, and that section shall apply accordingly, so far as it is applicable and with all necessary modifications."

9. Interim orders—The Judicature Amendment Act 1972 is hereby amended by repealing section 8, and substituting the following section:

"8. (1) At any time before the final determination of an application for review, and on the application of any party, the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the applicant, make an interim order for all or any of the following purposes:

"(a) Prohibiting any respondent to the application for review from taking any further action that is or would be consequential on the exercise of the statutory power:

"(b) Prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the application for review relates:

"(c) Declaring that any licence that has been revoked or suspended in the exercise of the statutory power, or that will expire by effluxion of time before the final determination of the application for review, to continue and, where necessary, to be deemed to have continued in force.

"(2) Any such order may be made subject to such terms and conditions as the Court thinks fit, and may be expressed to continue in force until the application for review is finally determined or until such other date, or the happening of such other event, as the Court may specify."

10. Procedure—(1) The Judicature Amendment Act 1972 is hereby further amended by repealing section 9, and substituting the following section:

"9. (1) An application for review shall be made by motion accompanied by a statement of claim.

"(2) The statement of claim shall—

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

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

"(c) State the relief sought:

"(d) Be supported by an affidavit, sworn by the applicant, verifying the facts set out in the statement.

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

"(4) The person whose act or omission is the subject-matter of the application for review, and, subject to any direction given by a Judge under section 10 of this Act, every party to the proceedings (if any) in which any decision to which the application relates was made, shall be cited as a respondent.

"(5) For the purposes of subsection (4) of this section, where the act or omission is that of any 2 or more persons acting together under a collective title, they shall be cited by their collective title.

"(6) Subject to any direction given by a Judge under section 10 of this Act, every respondent to the application for review shall file a statement of his defence to the statement of claim.

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

(2) The said Act is hereby further amended—

(a) By omitting from section 4 (1) the words "by motion":

(b) By repealing section 12.

11. Powers of Judge to call conference and give directions— The Judicature Amendment Act 1972 is hereby further amended by repealing section 10, and substituting the following section:

"10. (1) For the purpose of ensuring that any application or intended application for review may be determined in a convenient and expeditious manner, and that all matters in dispute may be effectively and completely determined, a Judge may at any time, either on the application of any party or intended party or without any such application, direct the holding of a conference of parties or intended parties or their counsel presided over by a Judge.

"(2) At any such conference the Judge presiding may—

"(a) Settle the issues to be determined:

"(b) Direct what persons shall be cited, or need not be cited, as respondents to the application for review, or direct that the name of any party be added or struck out:

"(c) Direct what parties shall be served:

"(d) Direct by whom and within what time any statement of defence shall be filed:

"(e) Require any party to make admissions in respect of questions of fact:

"(f) Fix a time by which any affidavits or other documents shall be filed:

"(g) Fix a time and place for the hearing of the application for review:

"(h) Require further or better particulars of any facts, or of the grounds for relief, or of the relief sought, or of the grounds of defence, or of any other circumstances connected with the application for review:

"(i) Require any party to make discovery of documents, or permit any party to administer interrogatories:

"(j) In the case of an application for review of a decision made in the exercise of a statutory power of decision, determine whether the whole or any part of the record of the proceedings in which the decision was made should be filed in Court, and give such directions as he thinks fit as to its filing:

"(k) Exercise any powers of direction or appointment vested in the Court or a Judge by the rules of Court in respect of originating applications:

"(l) Give such consequential directions as may be necessary.

12. Application of Crown Proceedings Act 1950—Section 14 (2) of the Judicature Amendment Act 1972 is hereby amended by adding the following proviso:

"Provided that nothing in this subsection or in section 17 of the Crown Proceedings Act 1950 shall be construed to prevent the Court from making any interim order under section 8 of this Act."

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