Judicature Amendment Bill (No 3)

Government Bill

As reported from the Government Administration Committee

Commentary

Recommendation

The Government Administration Committee has examined the Judicature Amendment Bill (No 3) and recommends that it be passed with the amendments shown.

Introduction

This bill will address the workload pressures facing the Court of Appeal and remove a residual barrier to accessing the Supreme Court. The bill provides for an increase in the number of Judges to be appointed to the Court of Appeal so that workload pressures can be eased, enabling the Court of Appeal to hear appeals in a more timely manner. It also allows the Court of Appeal greater flexibility in the way its judgments may be delivered.

Clause 3—Constitution of Court of Appeal

Clause 3 amends section 57 of the Judicature Act 1908 to increase the maximum number of permanent Court of Appeal Judges from seven to nine, including the President.

Submitters raised concerns that problems could arise from appointing retired Judges on acting warrants to the High Court to cover for High Court Judges serving in the Court of Appeal. It was suggested this could lead to "double dipping", where a retired Judge receives a pension and is also paid for service as an acting Judge.

There were also concerns about the implications for judicial independence, as acting Judges may be concerned for their reappointment, and that an increase of two Judges may not sufficiently ease current workloads.

Although the number of criminal appeals has increased in recent years, this has been offset by a decline in the number of civil appeals. The number of miscellaneous motions—on both criminal and civil matters—has also tended to increase. However, most civil appeals and all miscellaneous motions are heard by permanent members. We are satisfied that by increasing the maximum number of permanent members of the Court of Appeal from seven to nine Judges, together with the continued use of High Court Judges, will provide sufficient judicial resources for the foreseeable future, easing predicted workload pressures enabling the Court of Appeal to hear appeals more promptly.

We are also satisfied that this clause will not compromise judicial independence. Since 1980, the judicial resources of the Court of Appeal have been regularly augmented by the use of High Court Judges. We recommend no change to clause 3.

Clauses 4 and 5—Delivery of judgments

Clauses 4 and 5 provide for Court of Appeal judgments to be delivered in a manner provided by the High Court Rules and Supreme Court Rules, which allow judgments to be delivered in any manner and by any number of Judges as provided for in the Rules. Submitters suggested that if the bill aims to promote the efficient use of judicial resources in the Court of Appeal, a procedure similar to that of the High Court should be adopted, where judgments can be given by the Judges and delivered through the registrar. Another submitter recommended that the words "and by any number of Judges" in clause 5 be deleted, which would remove any doubt as to the validity of rules allowing judgments to be delivered without the involvement of a Judge.

Clause 5 is almost identical to section 27(3) of the Supreme Court Act 2003, under which judgments of that Court are delivered in accordance with the Supreme Court Rules 2004. The Supreme Court Rules require the delivery of a judgment in open court. The High Court Rules do not have an equivalent statutory provision governing the delivery of judgments for the High Court. Having the Rules set down the requirements for delivery of Court of Appeal judgments is

consistent with current practice in both the Supreme Court and High Court.

It is not necessary that the method of delivery be set out in primary legislation. However, we agree that the phrase "and by any number of Judges" in clause 5 might lead to an unintended interpretation that would require a Judge to be involved in the process of delivering a judgment. We recommend that clause 5 be amended by deleting those words.

Practitioners have raised concerns with us that Judges are not being identified in court minutes and interlocutory judgments. The President of the Court of Appeal has confirmed that it is the practice of the court to identify Judges in court minutes and interlocutory judgments, and that if there have been cases where this has not happened that it will have arisen through inadvertence rather than there being a lack of the requirement to do so. The President has since formally reminded Judges and registry officers that each judgment, minute or direction, (including decisions made under section 392A of the Crimes Act 1961) should identify the Judge who made the decision. We welcome this action. However, given that problems can arise where deciding Judges are not named, we recommend that the Rules Committee consider amending the Rules accordingly.

Clause 6—Decision of Court of Appeal final

Clause 6 amends section 65 of the Act by removing the ability to appeal to the Privy Council. It was submitted that the removal of this provision should be replaced with a right of appeal to the Supreme Court on the grounds that, although the issue of finality should preclude a further right of appeal, proceedings under section 65 may raise issues of public importance. It was argued that in dealing with these proceedings, the Court of Appeal would not have the benefit of the considered view of the High Court.

We agree that parties to proceedings before the Court of Appeal should have the opportunity to appeal to the Supreme Court. However, as all parties seeking leave to appeal to the Supreme Court must first apply to that Court for leave, we do not agree that there should be an automatic right of appeal to the Supreme Court. Therefore we recommend section 65 of the Act be repealed in its entirety. This will enable any party to the proceedings to seek leave to appeal to the Supreme Court.

Clause 7—Leave to appeal

Clause 7 replaces section 67 of the Act outlining how a party may seek leave to appeal a decision of the High Court on an appeal from an inferior court. New section 67 will allow a party to a civil proceeding originating in an inferior court and initially appealed to the High Court, to apply to the Supreme Court for leave to appeal, usually after an appeal to the Court of Appeal.

A submitter expressed concern that new section 67 may not be sufficient to overcome the finality of subsection (1) and that the reference to finality be removed. Although we are satisfied that subsection (1) establishes that the decision of the High Court is final, unless a party to the proceedings obtains leave to appeal the High Court's decision from either the Court of Appeal or the Supreme Court, we recommend that subsection (4) be amended to clarify that a party may seek leave to appeal to the Supreme Court, following a decision of the Court of Appeal.

A submitter suggested that new section 67 be made retrospective to the date on which the Supreme Court was established. It was submitted that any party so affected by a decision of the Court of Appeal made prior to this bill becoming law will be denied an opportunity to seek leave to appeal to the Supreme Court. We were informed that there are examples of the Supreme Court granting leave to appeal from civil proceedings originating in inferior courts, but there remains a need to clarify the provisions of this section. There is a general principle that legislative amendments are prospective. Extraordinary grounds must be made for retrospectivity in any new legislation, and we are not satisfied that sufficient grounds have been made in this case. We recommend no change in this regard.

Appendix

Committee process

The Judicature Amendment Bill (No 3) was referred to the committee on 21 June 2005. The closing date for submissions was 22 July 2005. We received and considered 5 submissions. We heard one submission. Hearing of evidence took 15 minutes and consideration took a further two hours and 15 minutes.

We received advice from the Ministry of Justice.

Committee membership

Shane Ardern (Chairperson)

HV Ross Robertson (Deputy Chairperson)

Brian Connell

Russell Fairbrother

Sandra Goudie

Hon Dover Samuels

Key to symbols used in reprinted bill

As reported from a select committee

Struck out (unanimous) Subject to this Act,	Text struck out unanimously
New (unanimous) Subject to this Act,	Text inserted unanimously
(Subject to this Act,)	Words struck out unanimously
Subject to this Act,	Words inserted unanimously

Hon Rick Barker

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The Parliament of New Zealand enacts as follows:

1 Title

(1) This Act is the Judicature Amendment Act (No 3) **2005**.

(2) In this Act the Judicature Act 1908 is called "the principal Act".

2 Commencement

This Act comes into force on the day after the date on which it receives the Royal assent.

Part 1
Procedures and constitution of Court of Appeal

3 Constitution of Court of Appeal

Section 57(2)(b) of the principal Act is amended by omitting the expression "6", and substituting the expression "8".

4 Court of Appeal to sit in divisions

(1) Section 58(1) of the principal Act is amended by omitting the words "in subsection (2) and".

(2) Section 58 of the principal Act is amended by repealing subsection (2).

5 Judgment of Court of Appeal

Section 59 of the principal Act is amended by adding the following subsection:

"(3) The delivery of the judgment of the Court of Appeal may be effected in any manner(, *and by any number of Judges,*) provided by rules made under section 51C."

Part 2
Further amendments to principal Act

6 (*Decision of Court of Appeal final as regards tribunals of New Zealand*) Section 65 repealed

Section 65 of the principal Act is (*amended by repealing the proviso*) repealed.

7 New section 67 substituted

The principal Act is amended by repealing section 67, and substituting the following section:

"**67 Appeals against decisions of High Court on appeal**

"(1) The decision of the High Court on appeal from an inferior court is final, unless a party, on application, obtains leave to appeal against that decision—

"(a) to the Court of Appeal; or

"(b) directly to the Supreme Court (in exceptional circumstances).

"(2) An application under **subsection (1)** for leave to appeal to the Court of Appeal must be made to the High Court or, if the High Court refuses leave, to the Court of Appeal.

"(3) An application under **subsection (1)** for leave to appeal directly to the Supreme Court must be made to the Supreme Court.

Struck out (unanimous)

"(4) **Subsection (1)** does not affect any right to seek leave to appeal to the Supreme Court from a decision of the Court of Appeal on appeal from the High Court.

New (unanimous)

"(4) If leave to appeal referred to in **subsection (1)(a)** is obtained, the decision of the Court of Appeal on appeal from the High Court is final unless a party, on application, obtains leave to appeal against that decision to the Supreme Court.

"(5) **Subsections (1), (3), and (4)** are subject to the Supreme Court Act 2003."

8 Section 68 repealed

Section 68 of the principal Act is repealed.

Legislative history

10 May 2005	Introduction (Bill 262–1)
21 June 2005	First reading and referral to Government Administration Committee

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