Regulatory Impact Statement

Review of the Judicature Act and consolidation of courts legislation

Agency Disclosure Statement

1. This Regulatory Impact Statement has been prepared by the Ministry of Justice. It provides an analysis of a package of work forming the government response to the Law Commission report *Review of the Judicature Act 1908: Towards a consolidated Courts Act* and other associated matters.

2. We are time constrained due to the intended enactment date before the end of 2013. In the time available, the approach has been to use the Commission's analysis, considering and testing that work against government objectives in determining whether to accept the Commission's recommendations or take another approach. We rely on the Commission's analysis in some technical areas where the Commission has not recommended a change to the status quo, and in relation to some provisions which the Commission has identified as redundant.

3. The Commission carried out thorough consultation, and we refer to its report to determine likely stakeholder views. However, limited consultation has been taken in relation to the options which go further than the Commission's recommendations – management of court information, and the indicator interest rate for interest on court-ordered debt repayments.

4. The analysis of options about management of court information, particularly the status quo, is limited because decisions about whether or not to release information are made on a case-by-case basis.

5. For 1987 to 1996, Auckland commercial list case numbers are for the April-March year. For the remaining years, the numbers are for calendar years. The numbers of Auckland commercial list cases in 2002 and 2003 are not reliable because of the introduction of a new data collection system.

6. In analysing options about the upper limit of the District Court's civil jurisdiction, it is difficult to predict the behaviour of litigants in future. The Ministry of Justice does not record the value claimed in every case. The following assumptions have been made:

   - Ten to 21 percent of civil litigants who could choose either the District Court or the High Court will choose the High Court (based on current behaviour) if the upper limit of the District Court's civil jurisdiction was increased to $350,000.
   - Similarly, between 10 to 21 percent of civil litigants with claims up to $350,000, and 62 percent of civil litigants with claims up to $500,000, would choose the High Court if the upper limit of the District Court's civil jurisdiction was increased to $500,000.
   - Auckland statistics are indicative of the national statistics.
   - If the upper limit of the District Court's civil jurisdiction was increased, litigants who would choose the District Court are more likely to require judge time, based on current behaviour of District Court litigants with higher value claims.

7. The policy options are not likely to:

   - impose additional costs on businesses, or
   - impair private property rights, market competition, or the incentives on businesses to innovate and invest.

8. The policy options are not likely to override fundamental common law principles (as referenced in Chapter 3 of the Legislation Advisory Committee Guidelines). In reaching this conclusion, we have considered whether options regarding vexatious litigants would affect the principle of access to the courts.

9. Some elements of the overall reform package are not included in this Regulatory Impact Statement as they are exempt from regulatory impact analysis. The relevant exemptions are that they either are technical "revisions" or consolidations that substantially re-enact the current law in order to improve legislative clarity or navigability, repeal or remove redundant legislative provisions, provide solely for the commencement of existing legislation or legislative provisions, or have no or only minor impacts on businesses, individuals or not-for-profit entities.

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Introduction

1. In 2010, the Minister of Justice asked the Law Commission to review the Judicature Act 1908, and other legislation governing the operation of New Zealand's main courts. The Commission's final report, *Review of the Judicature Act 1908: Towards a consolidated Courts Act* was tabled in Parliament on 27 November 2012.

2. The main proposals in the government response are technical; they consolidate and relocate different legislative provisions. The proposed reorganisation would have only minor impacts on businesses or individuals (there would be a one-off compliance cost of court users familiarising themselves with the new arrangements), and would make the legislation more accessible. As part of the reorganisation, six more substantive policy issues arise.

3. In developing the government response to the review, the Ministry has considered whether the Commission's recommendations maintain fundamental constitutional principles, enhance public confidence in the justice system, and create a more efficient justice system. The government response also presents an opportunity for the Government to address the management of court information and the indicator interest rate for interest on court-ordered debt repayments.

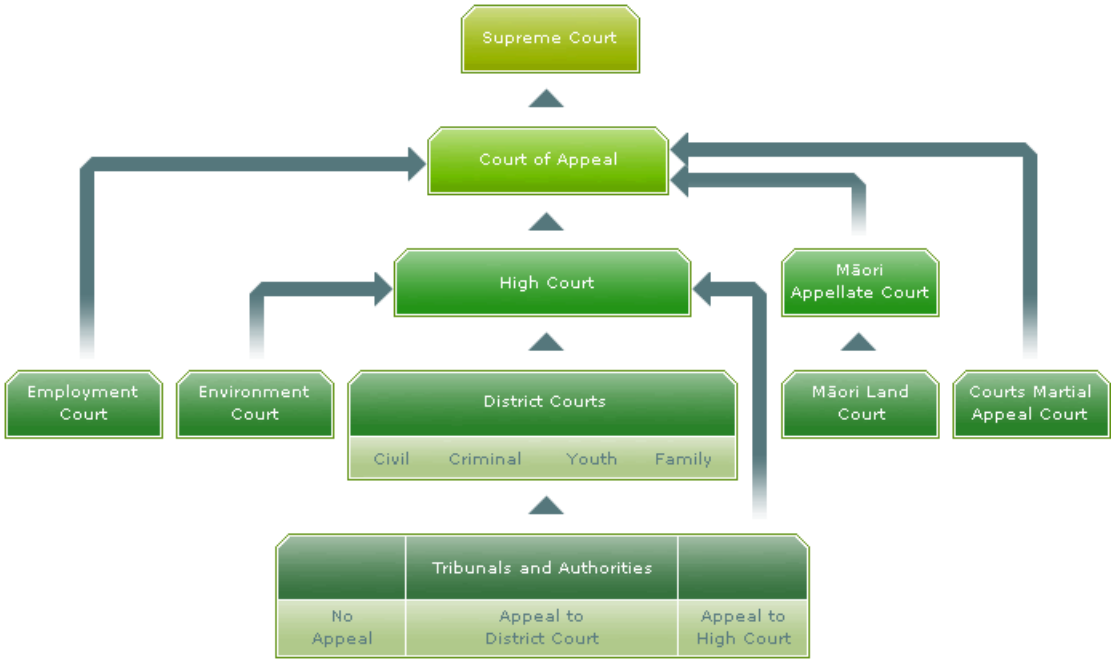
4. The overall package contains six key topics:

    1) matters relating to judges (how they are appointed, ensuring impartial decision-making, and appointment of part-time and acting judges)
    2) management of court information
    3) judicial specialisation in the High Court
    4) vexatious litigants (parties who take legal action to harass or subdue)
    5) the upper limit of the District Court's civil jurisdiction, and
    6) the indicator interest rate for interest on court-ordered debt repayments.

5. The status quo, problem and analysis are set out for each of these topics, after a general overview and overarching objectives.

General overview – status quo

6. The New Zealand court system is represented in the diagram below:



7. The structure and procedure of New Zealand courts is established by a mixture of principles, different types of legislation, common law (law developed by judges), and practice notes and guidelines:

- The Judicature Act 1908 establishes the Court of Appeal and codifies provisions about the High Court.
- The Supreme Court Act 2003 establishes the Supreme Court.
- The District Courts Act 1947 establishes the District Courts.
- Inherent jurisdiction of the High Court: Each court can hear and make decisions about matters if the power to do so is within its jurisdiction. Jurisdiction is established in an Act of Parliament, except for the High Court, which has inherent jurisdiction.
- Court practice and procedure: developed in common law; issued in practice notes and guidelines; sometimes codified into court rules (a type of legislation).
- Constitutional conventions.

8. Constitutional conventions include:

- **The rule of law:** a set of principles which, operating together, create a legal and constitutional environment which is seen by people as creating certainty, transparency, predictability, fairness and legitimacy. The content of the principles is open to debate, but common aspects are:

  1) the government and its officials and agents are accountable under the law
  2) the laws are clear, publicised, stable and fair, and protect fundamental rights, including the security of persons and property
  3) the process by which the laws are enacted, administered and enforced is accessible, fair and efficient, and

4) justice is delivered by competent, ethical, and independent representatives who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve.

- **Independence of the judiciary:** the principle that the courts are operationally independent and impartial – this ensures that the individual judge, when sitting, is subject only to the law.
- **Separation of powers:** the principle that the three separate arms of government should be functionally independent of each other: the Legislature (Parliament), Executive (Cabinet and Ministers outside Cabinet plus government departments) and the Judiciary.

9. The Employment Relations Act 2000 establishes the Employment Court, and the Resource Management Act 1991 establishes the Environment Court. Other statutes establish the Youth Courts, Family Courts and Disputes Tribunals as divisions of the District Courts.

10. The Family Court, Youth Court, Māori Land Court, Māori Appellate Court, Courts Martial Appeal Court, and Tribunals and Authorities fall outside the scope of this package, because they are being addressed in separate government reviews. The Employment Court and Environment Court are being considered as part of this package, but on a separate time track.

Objectives

11. The Ministry is focussed on developing a modern, accessible and people-centred justice system. We want the most robust justice system possible, because of the importance of maintaining the rule of law. We also want to ensure the civil justice system promotes a more competitive and productive economy. To contribute to these overarching goals, the primary objectives of this package are to:

- Maintain fundamental constitutional principles.
- Enhance public confidence in the justice system, including:
  - providing better information
  - enhancing transparency
  - ensuring impartial decision-making, and
  - encouraging accurate and fair decision-making.
- Create a more efficient justice system, including:
  - faster and less expensive dispute resolution in court, and
  - future-proofing legislation so that it does not create barriers to improving courts and justice services for the public.

12. Some objectives are more important than others for particular areas of the package of work.

13. Separate objectives apply to determining the indicator interest rate for interest on court-ordered debt repayments.

1 Judges

Status quo and problem

14. Better transparency about judicial arrangements may improve public confidence in the justice system over time. High public confidence in the justice system ensures public acceptance of judges' decisions; therefore it is fundamentally linked to maintenance of the rule of law. High public confidence in the justice system is so important that we consider there is always a case for improvement.

15. New Zealand compares well in the World Justice Project's Rule of Law Index. However, New Zealand's lowest ranking is in civil justice, and second-lowest ranking is in criminal justice. New Zealand ranks ninth in civil justice, and seventh in criminal justice, of 29 high income countries.

16. In order to improve public confidence in the justice system, this package addresses the following areas:

- **Judicial appointment processes:** the procedures for how judges are appointed are generally unclear and inadequately publicised, especially in the higher courts.
- **Ensuring impartial judicial decision-making:** information about how judges should approach real or potential situations of bias (unfair prejudice) in a particular case, such as if they have a conflict of interest, is currently provided in common law or judicial codes of practice.

17. Some changes to create consistency between, and clarify the law about, part-time, acting and temporary judges also form part of this package. The regulatory impacts of these changes have not been assessed, because they relate to the machinery of the courts.

Judicial appointment processes

18. Legislation provides that judicial appointments are made by the Governor-General. The Chief Justice (leader of the Judiciary) is appointed on the Prime Minister's recommendation. Generally, all other judges are appointed after a recommendation by the Attorney-General (the senior law officer of the Crown, with principal responsibility for the government's administration of the law).

19. Before being eligible for appointment as a District Court or High Court judge, a person is required by legislation to have held a practising certificate as a barrister or solicitor for at least seven years. A candidate for appointment as a Supreme Court or Court of Appeal judge must also be a High Court judge. Legislation does not specify anything further about the initial appointment of judges.

REGULATORY IMPACT ANALYSIS

20. We considered the following options relating to judicial appointment processes:

A. Status quo: some limited aspects are in legislation; no comprehensive publication of processes.
B. Primary legislation requires processes to be produced publicly by the Attorney-General (preferred).
C. Processes set out in primary or secondary legislation.
D. After approval from the Attorney-General, processes voluntarily published.

		Judicial appointment processes options			
		A **Status quo**	**B** **Primary legislation requires Attorney-General to publish (preferred)**	**C** **Set out in full in primary or secondary legislation**	**D** **Voluntary publication after Attorney-General approval**
Objectives	**Enhance public confidence in justice system**	In part. • The public do not have adequate access to information about how judges are appointed, or on what basis. • Transparency could be better. • Potential applicants may be unwilling to enter into an unclear process.	✓✓✓ • The public and applicants clearly understand process. • Legislative requirement places onus on Attorney-General to produce information.	✓✓ • The public and applicants clearly understand process. • Parliamentary authority strengthens process.	✓ • The public and applicants clearly understand process. • May take time for the Attorney-General to publish the information. • Risk that Attorney may not choose not to disseminate information.
	Maintain fundamental constitutional principles	✓✓✓	✓✓✓	✓✓ Arguable if Parliament, rather than Attorney, needs to decide what the best way is to select a judge.	✓✓✓
	Create a more efficient justice system	✓✓ • Provides flexibility.	✓✓✓ • Attorney-General has flexibility to release updates.	✓ • If changes needed, less flexible (must have agreement by Parliament).	✓✓ • Attorney-General has flexibility to release updates.
Conclusion		Flexible, but transparency could be improved and may discourage potential applicants.	Best meets objectives.	Does not anticipate future changes to the process and may not be suitable for Parliament to determine.	Dependent on the Attorney-General.

Ensuring impartial decision-making

21. There may be situations where it is inappropriate for judges to sit on a case because of apparent bias or conflict of interest. In these instances the judge may disqualify themselves from that particular case (recusal).

22. Guidelines for Judicial Conduct are published on the *Courts of New Zealand* website, and further clarification has been provided by common law, for example, in the *Saxmere* cases. The Judicature Act states that High Court judges may not hold other offices or undertake other paid employment without permission of the Chief High Court Judge. However, there are no comprehensive legislative provisions covering all judges.

23. If a person is unhappy with the outcome of their case, they may be able to appeal the decision. If a person is concerned that a judge is not impartial, they may make a complaint to the Judicial Conduct Commissioner.

REGULATORY IMPACT ANALYSIS

24. We have considered the following options to ensure impartial decision-making:

A. Status quo: a mixture of guidelines, legislative provisions, and common law set out recusal processes.
B. Set out recusal processes in primary legislation.
C. Require in legislation that the judiciary develop publicly available recusal processes (preferred).

		Ensuring impartial decision-making: options		
		A **Status quo**	**B** **Set out recusal processes in primary legislation**	**C** **Require in legislation that the judiciary develop publicly available recusal processes** **(preferred)**
Objectives	**Enhance public confidence in justice system**	✓✓ • New Zealand courts rank well internationally and are transparent (see World Justice Project Rule of Law Index). • Standards which are applied to disqualify judges from cases are unclear. • Over time, public confidence in the justice system may be eroded – particularly if a conflict arose and was not properly addressed.	✓✓✓ • Would improve public understanding by setting out clear statement of what is appropriate.	✓✓✓ • Would improve public understanding by setting out clear statement of what is appropriate. • May be difficult to enforce.
	Maintain fundamental constitutional principles	✓✓✓	May be constitutionally inappropriate for Parliament to direct the judiciary to this extent.	✓✓✓

		Ensuring impartial decision-making: options		
		A **Status quo**	**B** **Set out recusal processes in primary legislation**	**C** **Require in legislation that the judiciary develop publicly available recusal processes** **(preferred)**
	Create a more efficient justice system	N/A	N/A	N/A
Conclusion		Only partially achieves objectives. Some risks.	May not meet an important objective.	Meets objectives. Some risks.

2 Management of court information

Status quo and problem

25. Statistical information from the courts is used for a variety of purposes:

- by Heads of Bench (the judges in charge of each court) and the Ministry of Justice to monitor and improve the performance of the courts
- by the Ministry of Justice and other government departments to help formulate good policies and improve access to public services, and
- to meet the public's expectations about the performance of the justice system.

26. Public confidence in the justice system is essential to building a productive and competitive economy.

27. Some information is available about the performance of the courts, including statistics about court workloads and case waiting times broken down by court, on the *Courts of New Zealand* website.

28. The judiciary is not required to publish annual reports. However, the Chief High Court Judge publishes one, and the Chief Justice's predecessor published an annual report between 1995 and 2000. The Chief District Court Judge is planning to publish an annual report.

29. In some cases, it takes a long time for the judgment to be delivered to the parties after a civil hearing, which creates uncertainty for people, and may erode confidence in the justice system. The Supreme Court tries to deliver all reserved judgments within six months. The Chief High Court Judge has recently set a standard that 90 percent of all judgments be delivered within three months. District Court judicial standards require rigorous adherence to a time frame, and standard procedures are followed to ensure the timely delivery of reserved judgments.

30. The Ministry of Justice is unique in the public sector as it holds the court record as custodians on various data bases, such as the Case Management System. Court rules provide that the court file is a collection of documents in the custody or control of the court. Documents that relate to a proceeding cannot be used for any purpose without the judiciary's consent, or a clear legislative requirement. The court record is not subject to the Official Information Act 1982 or the Privacy Act 1993.

31. There are a number of mechanisms which enable the Ministry of Justice to extract and disclose to other agencies information from the court record and judicial information, for example, under Schedule 5 of the Privacy Act, which enables the Ministry to share information for law enforcement purposes.

32. The situation relating to access to individual court files is clear – requests from individuals to access individual court files are governed by specific court rules.

33. As the judiciary controls court records, there are problems with the Ministry of Justice's ability to extract and use court record information, and disclose court record information to others. In particular, it is unclear:

- what information is actually included in 'court records', and whether that changes according to how and where the information is held by the Ministry of Justice
- whether there is information outside of court records which is also owned by the judiciary, and whether it is subject to the Official Information Act and the Privacy Act
- when and how the Ministry of Justice can extract and use the court record for planning, performance management and policy development purposes – this has led to inconsistent approaches within the Ministry, and
- when and how the Ministry can extract, use and disclose the court record in response to requests from other government departments – there is no consistent and transparent approach to the increasing number of requests the Ministry is receiving for 'bulk' access to court record and judicial information.

Regulatory Impact Analysis

34. We considered the following options about court performance and management of court information, some of which could be implemented together:

A. Status quo.
B. Require the Chief Justice to publish an annual report.
C. Preferred option 1: Clarify that court information is divided into (1) the court record, (2) judicial information, and (3) Ministry of Justice information that does not meet the definition of the first two categories. The appropriate division of information would be agreed in consultation with the judiciary. Ministry of Justice information would be subject to the Privacy and Official Information Acts. Also, an appropriate mechanism would be provided for the Ministry to disclose the court record held on its databases to government departments in response to 'bulk' requests. This option would also enable the Ministry of Justice to report annually, at an aggregate level, on the time taken to resolve disputes through the courts and deliver judgments.
D. Preferred option 2: Improve timeliness of delivery of judges' decisions after the hearing (reserved judgments).

		Options			
		A **Status quo**	**B** **Require the Chief Justice to publish an annual report**	**C** **Statutory clarification of court information and aggregate annual reporting** **(preferred)**	**D** **Improve timeliness of delivery of reserved judgments** **(preferred)**
Objectives	**Enhance public confidence in justice system**	✓✓ • Access to court information by members of the public and government departments lacks certainty, clarity, transparency and consistency. • Some risk that over time, public confidence in the justice system will decline.	✓✓✓ • Increase confidence in justice system through greater information provision and greater transparency. • Regular timeframe for reporting and general sense of content provided.	✓✓✓ • More public knowledge of the system as a whole. • More information enables people to make better decisions about what type of dispute resolution will best suit their case.	✓✓✓ • Increased transparency and accountability without sacrificing quality or efficiency. • Less uncertainty for litigants waiting for the outcome of their case.
	Maintain fundamental constitutional principles	✓✓✓	✗ Unusual to have statutory requirement in absence of judicial control over court operating costs.	✓✓✓	✓✓✓
	Create a more efficient justice system	✓✓ • Information is available about the operation of the courts, in annual reports, and in statistics published on the Courts of New Zealand website. • However, reporting practices within the judiciary are inconsistent. • Government departments are not always easily able to access	✓✓ • Does not address access issues. • Content depends on the judiciary.	✓✓✓ • Ministry of Justice would have information about court performance, so could make better policy decisions and allocate resources more efficiently. • Government agencies would have better access to information to help facilitate public services.	✓✓✓ • Better processes will improve the delivery of judgments, which is more efficient.

		Options			
		A **Status quo**	**B** **Require the Chief Justice to publish an annual report**	**C** **Statutory clarification of court information and aggregate annual reporting** **(preferred)**	**D** **Improve timeliness of delivery of reserved judgments** **(preferred)**
		court information to help formulate good policies and improve access to public services.		• Low risk that Ministry and judiciary may not be able to agree on the appropriate division of information.	
Conclusion		Does not meet objectives.	May not meet an important objective.	Meets objectives.	Meets objectives.

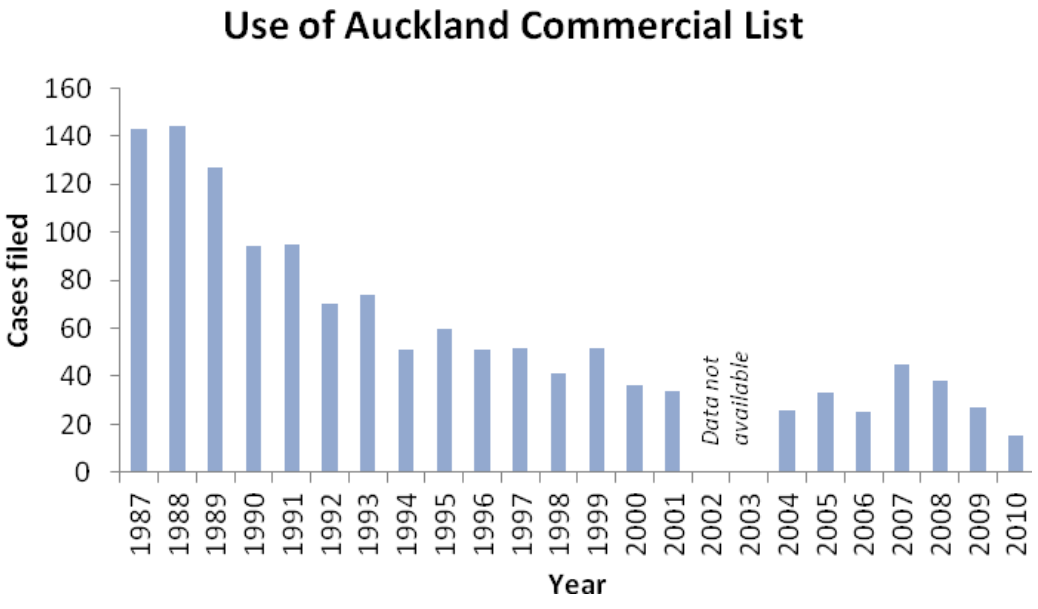
3 Judicial specialisation in the High Court

Status quo

35. Criminal and civil cases are managed separately in the High Court, but judges can hear either type of case.

36. The Judicature Act provides for a commercial list to be established by the Governor-General (acting on the advice of responsible ministers) and notified in the *New Zealand Gazette*. Auckland has had a commercial list since 1987. This commercial list provides a process for speeding up the pre-trial stages of selected commercial cases brought in the High Court.

37. The number of cases on the Auckland commercial list varies from year to year, but numbers have declined significantly and steadily since its creation, as shown below.



38. Detailed data about the nature of commercial cases in the High Court is not available, but better information will be available soon. The Ministry of Justice, in conjunction with the Chief High Court Judge, implemented a system on 1 January 2013 to systematically capture information on natures of cases. Results will be regularly published on the *Courts of New Zealand* website.

Problem

39. An annual report of the Auckland commercial list has reported signs that the commercial list was losing its purpose, as many of the techniques used in it were integrated into the way all High Court cases (not just commercial cases) were managed by judges before a hearing.

40. There is also a growing unmet demand from some sectors for more specialised judicial decision-making in relation to civil matters, particularly in relation to matters that impact on businesses. Resolving commercial disputes is a particularly valuable function of the High Court. Any lack of specialist court dispute resolution processes in relation to commercial civil disputes affects New Zealand's ability to build a more competitive and productive economy, because it may discourage people from doing business in New Zealand.

41. A University of Otago Legal Issues Centre study has identified that anecdotally, litigants may increasingly be choosing alternative dispute resolution [such as commercial arbitration] over using the court.[1] Too much alternative dispute resolution use means less opportunity for the courts to establish binding and persuasive common law decisions, and means justice is not as frequently seen to be done in open court.

Regulatory Impact Analysis

42. We have considered the status quo (option A) or enabling greater specialisation by establishing a specialist panel or panels (option B). Option B would also disestablish existing commercial lists. The relevant objective is creating a more efficient justice system.

43. Option B may lead to better quality decision-making and faster dispute resolution than the status quo. However, assessing the impact on quality of judgments and timeliness is difficult, given the qualitative challenges related to comparing generalist and specialist judicial work. Few areas of law are likely to offer the volume of cases to justify this option.

44. A relatively small cohort of judges being responsible for certain case types may cause capture problems or harm more diverse development of the common law. This could be mitigated by establishing a pilot commercial panel, and requiring a report-back on its performance after two years. The pilot would allow the judiciary to develop practices (such as the appropriate division of time between panel and general work) to mitigate this risk.

45. If the upper limit of the District Court's civil jurisdiction is increased resulting in a decline in High Court general civil proceedings, this may make judicial specialisation less viable. This could be mitigated by increasing the level to $350,000 (rather than a higher level) with a review in two years (see topic 5: upper limit of the District Court's civil jurisdiction below).

4 Vexatious civil litigants

Status quo

46. Section 88B of the Judicature Act provides that the Attorney-General may apply to the High Court to prevent a person from bringing civil proceedings. The judge will make an order if the Attorney-General can prove that the person persistently and without reasonable ground instituted vexatious proceedings in the District Courts or High Court. Before making an

[1] Laing, Righarts and Henaghan *A Preliminary Study on Civil Case Progression Times in New Zealand* (University of Otago Legal Issues Centre, 15 April 2011).

order, the judge must give the person an opportunity to be heard. Only the High Court can make an order. There is no provision for the order to expire after a period of time.

47. In practice, the Solicitor-General makes applications on behalf of the Attorney-General. Since the provision was introduced in 1965, less than ten orders have been made.

Problem

48. Vexatious litigants undermine public confidence in the justice system by placing unwarranted pressure on the limited resources of courts and parties. It is difficult to quantify the magnitude of the problem because information about potential vexatious litigants is not gathered. However, anecdotally we know that repeat and unfounded civil applications do occur, and these are not always addressed because the current remedy is used rarely (because the statutory threshold for intervention is high) and only in extreme cases (because the consequence is great – it curtails civil rights). There is also no clear or obvious deterrent to vexatious litigation.

49. The current provision is inflexible – only the Attorney-General (or, as is the case in practice, the Solicitor-General) can prevent a vexatious litigant from continuing vexatious litigation, and the only way of preventing further litigation is to obtain an order from the High Court. Therefore, parties subject to vexatious litigation have no accessible way to prevent it as the remedy is so difficult to obtain.

Regulatory Impact Analysis

50. The following options about vexatious litigants have been considered:

A. Status quo: the Attorney-General can apply for an order to prevent a person from bringing further civil proceedings if the person persistently and without reasonable ground instituted vexatious proceedings in the District Courts or High Court.

B. Preferred option: A system of graduated civil restraint orders to prevent vexatious civil cases from being initiated:

- A limited order regarding particular proceedings (parties and the Attorney-General can apply).
- An extended order regarding particular and related proceedings (parties and the Attorney-General can apply).
- A general civil restraint order regarding all proceedings (only Attorney-General can bring an application).

C. Enable the court to make civil restraint orders without an application.

D. Enable, via protocol, courts to refer potential vexatious litigants for investigation and possible action by the Solicitor-General.

		Options			
		A **Status quo**	**B** **Graduated orders (preferred)**	**C** **Courts make orders**	**D** **Protocol for courts to refer vexatious litigants for investigation**
Objectives	**Enhance public confidence in justice system**	✖ • Remedy of last resort, high threshold for intervention. • Attorney-General represents wider public interest. However, only the Attorney may apply for an order, the remedy is less publicly acceptable.	✓✓✓ • Enables parties subject to vexatious litigation, first aware of the behaviour of the opposing party, to take action. Parties more incentivised to take action than Attorney-General. Balances access to the courts with adequate controls. • Consistent with Family Court Review mechanisms to address vexatious litigation.	✓✓ • Medium risk of perception of bias, which may decrease public confidence in the justice system.	✓✓ • Enables parties subject to vexatious litigation, who are first aware of the behaviour of the opposing party, to do something. Parties are more incentivised to take action than Attorney-General, as they are directly affected. However, onus is still on the state to take final action.
	Maintain fundamental constitutional principles	✓✓✓ Low impact on access to courts – less than 10 orders since 1965.	✓✓ May affect the fundamental common law principle of access to the courts.	✓✓ May affect the fundamental common law principle of access to the courts.	✓✓ May affect the fundamental common law principle of access to the courts.
	Create a more efficient justice system	✖ • Unwarranted pressure on limited resources of courts and parties. • Low resource implications for courts and government (except for the impact of vexatious applications themselves).	✓✓✓ • Provides flexible remedies, and early & proportionate responses. • Small risk that parties subject to order cannot access civil justice if they truly need it later. However, response proportionate to problem. • Small risk that parties maliciously or tactically make ill-conceived / inappropriate applications. However, mitigated by limiting ability for parties to apply for more extensive orders. • Ministry of Justice will need to maintain records of parties subject to orders.	✓ • Judges (and court officials) often best placed to identify persons making unmeritorious claims, and to assess the appropriate order. • Small risk that parties subject to civil restraint order cannot access civil justice if they truly need it later.	✓✓ • Allows judges (and court officials) to identify potential vexatious litigants. • Small risk that parties subject to civil restraint order cannot access civil justice if they truly need it later.
Conclusion		Does not meet objectives.	Best meets objectives.	Meets objectives, but some risks.	Meets objectives.

5 Upper limit of the District Court's civil jurisdiction

Status Quo

51. Generally, parties with civil disputes (disputes between individuals, businesses and sometimes local or central government, such as breached contract or insurance claims) may use the District Court if the amount in dispute is less than $200,000 (a limit set in 1992). Otherwise, the High Court is used.

52. Because of the inherent jurisdiction of the High Court, applicants may choose to commence their claim in the High Court, even if their claim is for any amount below $200,000. Respondents can also request that their claim be transferred to the High Court if the claim is for over $50,000.

53. We estimate that just over one percent of civil litigants who could use either the High Court or the District Court choose the High Court (about 260 cases a year). In 2012, 31 civil cases were transferred from the District Court to the High Court.

54. Some litigants also reduce the amount claimed to $200,000 in order to use the District Court (and forego a legal remedy for the amount in dispute above $200,000).

DISTRICT COURT

55. Before June 2009, new civil cases entering the District Court were increasing. The trend has since reversed, because of changes to civil procedure in 2009 which encourage parties to settle their cases without court involvement.

56. About two percent of District Courts civil cases go to trial; the rest are resolved before that point.

HIGH COURT

57. There are about 6300 new High Court civil cases per year. Around 2000 of these new civil cases are general proceedings, which are most representative of a standard civil dispute (other types of cases include insolvency, civil appeals and judicial review cases).

58. About six percent of High Court civil general proceedings reach trial.

DIFFERENCES BETWEEN THE DISTRICT AND HIGH COURTS

59. The District Courts and the High Court operate under different rules of procedure. Litigants in the District Court are encouraged, to a greater extent than in the High Court, to resolve disputes before involvement by a judge. Some litigants may prefer the District Court processes if they are more suited to their case. In addition, court fees are lower in the District Court than the High Court and time to resolve the dispute is generally shorter in the District Court. The type of case will also influence litigants' decisions to file in the District Court or High Court. Some litigants may prefer to access the procedures and judicial expertise of the High Court.

60. District Court cases generally are less expensive for the taxpayer than High Court cases, because of less judicial involvement.

Problem

61. People with civil disputes of more than $200,000 are missing out on the choice to use to the District Court, and the benefits of using the District Court (dispute resolution before judicial

involvement, faster dispute resolution in some cases, and cheaper dispute resolution in some cases).

62. The upper limit of the District Court's civil jurisdiction has not been adjusted for inflation for 21 years, and the present limit of $200,000 would be worth over $315,000 in today's money.[2] Therefore, some litigants do not have access to the District Court because the value of their claim is too high. They have to reduce the amount claimed if they want to access the District Court.

Regulatory Impact Analysis

63. The amount set in 1992 ($200,000) adjusted based on CPI change to the third quarter of 2012 is $315,859. Using Treasury's forecast annual change in CPI for 2013 (1.5%), if legislation commenced at the end of 2013 the updated amount would be $320,600. $350,000 is based on Treasury's forecast annual percentage changes in CPI to 2017.

64. A major limitation on the analysis is that future litigant behaviour is difficult to predict. The values of claims are not always recorded. We assume that the same types of litigants will continue to choose to commence some claims in the High Court because they prefer the High Court processes to District Court processes, and between ten and 21 or 62 percent of litigants (depending on the value claimed, reflecting current and projected party behaviour) who have claims between $200,000 and the new level will continue to choose to lodge their claim in the High Court.

65. We have chosen some possible levels which seem reasonable (based on the current level, inflation-adjusted level, and suggested levels from the Law Commission and District Courts Civil Judges). We have therefore analysed the status quo ($200,000), $350,000, $500,000, a gradual increase by Order in Council, or an increase coupled with a government review. These options are assessed against the relevant objectives below.

66. Similarly, the amounts could be increased or reviewed over different time periods – for example, every six months, yearly, or five-yearly. Shorter periods of increase would 'tinker' too much with the legislation so would make it less accessible.

67. We also considered providing the District Court with exclusive jurisdiction up to a certain monetary limit, for example, $100,000. This would be a fundamental constitutional change (so would not maintain constitutional principles) as it would limit the High Court's inherent jurisdiction.

[2] Based on the Reserve Bank's Inflation Calculator at www.rbnz.govt.nz, using the Consumer Price Index (CPI) movement between the first quarter of 1992 and the third quarter of 2012.

		Upper limit of District Court Civil Jurisdiction: Options				
		A **$200,000 (Status quo)**	**B** **$350,000**	**C** **$500,000**	**D** **$350,000 in secondary legislation and CPI adjusted every 5 years (rounded) by Order in Council**	**E** **$350,000 & review by the Ministry of Justice in 2 years (preferred)**
Objectives	**Enhance public confidence in justice system**	✓ • By late 2013 the equivalent level in today's dollars would be $320,600 (based on actual CPI movement and Treasury forecast annual percentage CPI change).	✓✓ • Inflation-adjusts and future-proofs to 2017. • Low risk that actual CPI change will be different to Treasury forecast.	✓✓ • Inflation-adjusted and future-proofs – however, difficult to predict inflation or deflation further out.	✓✓ • Inflation-adjusted and future-proofs indefinitely however may create uncertainty if the level changes in small increments.	✓✓✓ • Inflation adjusted and future-proofs. • Low risk that actual CPI change will be different to Treasury forecast. Mitigated by built in monitoring and review mechanisms to identify unintended consequences.
	Maintain fundamental constitutional principles	✓✓✓	✓✓✓	✓✓✓	✓✓ However, limit is significant enough that it should not be up to the Executive to determine	✓✓✓
	Create a more efficient justice system	✓	✓✓ • 23 to 26% decrease in High Court civil cases (general proceedings statements of claim filed) freeing up a minimal amount of High Court judicial resource. Minimal impact on disposal times. • 2 to 3% increase in District Court cases (however greater proportion of cases likely to reach a hearing). Small increase (11 to 12%) in District Courts judges' hours spent on civil cases (which can be managed through rostering and scheduling). Minimal impact on case disposal times and costs incurred by litigants. • Small risk that District Court judges less skilled at considering more complex civil cases, although higher value cases not necessarily more complex. Mitigated by existence of specialist civil judges. • District Court fees lower, so decreased costs to litigants with claims between $200,000 and $350,000 who choose District Court. More dispute resolution options.	Uncertain • 28 to 38% decrease in High Court civil cases (general proceedings statements of claim filed). More amplified effect than option B on High Court judicial resources and disposal times. • 3 to 4% increase in District Court cases. Significant increase (14 to 21%) in District Courts judges' hours spent on civil cases. Moderate impact on case disposal times and costs incurred by litigants. • Small risk that District Court judges less skilled at considering more complex civil cases, although higher value cases not necessarily more complex. Mitigated by existence of specialist civil judges. • District Court fees lower, so decreased costs to litigants with claims between $200,000 and $500,000 who choose District Court. More dispute resolution options.	✓✓ • Small changes to the level (or even deflation) every 5 years may create some uncertainty. • Small risk that District Court judges less skilled at considering more complex civil cases, although higher value cases not necessarily more complex. Mitigated by existence of specialist civil judges. • District Court fees lower, so decreased costs to litigants with claims between $200,000 and $350,000 who choose District Court. More dispute resolution options.	✓✓✓ • 23 to 26% decrease in High Court civil cases (general proceedings statements of claim filed) freeing up a minimal amount of High Court judicial resource. Minimal impact on disposal times. • 2 to 3% increase in District Court cases (however greater proportion of cases likely to reach a hearing). Small increase (11 to 12%) in District Courts judges' hours spent on civil cases (which can be managed through rostering and scheduling). Minimal impact on case disposal times and costs incurred by litigants. • Small risk that District Court judges less skilled at considering more complex civil cases, although higher value cases not necessarily more complex. Mitigated by existence of specialist civil judges. • District Court fees lower, so decreased costs to litigants with claims between $200,000 and $350,000 who choose District Court. More dispute resolution options.
Conclusion		Does not address problem.	Meets objectives.	Uncertain if will create efficiencies.	Meets objectives, but some risks.	Best meets objectives.

6 Indicator interest rate for interest on court-ordered debt repayments

Status Quo and Problem

68. The Judicature Act 1908 provides an interest rate that can be ordered by the High Court in some situations where a debtor owes money. The rate is a fixed simple interest rate, but there is judicial discretion to reduce the rate. The prescribed rate lacks flexibility, particularly at times of change in market rates. In other situations, it is up to the judge to determine the interest rate. This can mean inadequate compensation for creditors. The uncertainty and complexity of the law can lead to excessive litigation and unnecessary costs in judicial and court time, as it is not possible for practitioners to predict outcomes of claims.

69. In 2007, the Government agreed to provide in the Judicature Act 1908 that the Official Cash Rate (OCR) be used as an indicator rate for the High Court to determine what interest should be paid by debtors in civil cases where over $5000 is owed (interest would also include a slight premium of 0.15% and would be payable on a compound basis). The Interest on Money Claims Act, which would implement this policy, has not yet been introduced but is now included in this package (as the package will repeal the Judicature Act).

70. Since the Ministry undertook regulatory impact analysis for the Interest on Money Claims Act, the 2007-2008 global financial crisis (GFC) and the associated regulatory responses have changed market conditions. Published wholesale indicator interest rates – like the OCR – are now significantly lower than published retail indicator interest rates, and this situation is likely to remain that way.

Objectives

71. The objectives of this topic are to achieve:

- simple, accessible and predictable law
- adequate, commercially realistic and fair compensation for creditors, and
- a method of calculating interest owed, using a published interest multiplier that is updated regularly and administratively, and is easy to use.

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72. The two principal published retail indicator interest rates are the Six Month Retail Term Deposit Rate and the Floating First Mortgage New Customer Housing Rate. The following options for an indicator interest rate to calculate the indicator interest rate for interest on court-ordered debt repayments have been considered:

A. Status quo – current policy setting: OCR
B. Six Month Retail Term Deposit Rate (preferred)
C. Floating First Mortgage New Customer Housing Rate.

	Options		
Objectives	**A** **OCR** **(status quo – current policy setting)**	**B** **Six Month Retail Term Deposit Rate** **(preferred)**	**C** **Floating First Mortgage New Customer Housing Rate**
Simple, accessible and predictable law	✓✓✓ • Rate published online.	✓✓✓ • Rate published online.	✓✓✓ • Rate published online.

Objectives	Options		
	A **OCR** **(status quo – current policy setting)**	**B** **Six Month Retail Term Deposit Rate** **(preferred)**	**C** **Floating First Mortgage New Customer Housing Rate**
Adequate, commercially realistic and fair compensation for creditors	✖ • 2.5% (current) • Does not take into consideration that as a consequence of the GFC (and resulting changed market perceptions and regulatory settings), the OCR is now lower than other rates and is likely to remain that way. • Banks perceived to be significantly more risky than previously recognised. • Does not balance standard borrowing and lending rates. • Low risk of litigation.	✓✓✓ • 3.95% (latest current figure: January 2013) • Fair compensation for creditors. • Encourages early debt settlement for debtors. • Medium risk of litigation. • Takes into consideration change in market conditions due to the GFC. • Balances standard borrowing and lending rates. • Small risk that rate could become lower than OCR, which could be mitigated by allowing the rate to be changed by Order in Council.	✓✓ • 5.80% (latest current figure: December 2012) • Encourages early debt settlement for debtors. • High risk of litigation. • Takes into consideration change in market conditions due to the GFC. • Balances standard borrowing and lending rates. • Small risk that rate could become lower than OCR, which could be mitigated by allowing the rate to be changed by Order in Council.
A method of calculating interest owed, using a published interest multiplier that is updated regularly and administratively, and is easy to use	✓✓✓ • Regularly reviewed by the Reserve Bank Governor. • Reasonably accessible to individuals.	✓✓✓ • Reasonably accessible to individuals. • In New Zealand, considered a more stable source of funding than the status quo.	✓✓✓ • Reasonably accessible to individuals.
CONCLUSION	Does not meet an important objective.	Best meets objectives.	Meets objectives.

Consultation

73. The Law Commission released two issues papers in the course of its review, and its final report was informed by public submissions on those papers. Submitters included the judiciary, New Zealand Law Society and New Zealand Bar Association.

74. During development of the package of work the Minister of Justice met with the Chief Justice, Chief High Court Judge, Chief District Court Judge and Attorney-General; and the Ministry of Justice consulted the Chair of the Rules Committee.

75. Stakeholder and judicial views have been taken into consideration in the development of our analysis.

76. The Treasury, Crown Law Office, Parliamentary Counsel Office, Ministry of Business, Innovation and Employment, Department of Corrections, Ministry of Social Development, Ministry of Education, Inland Revenue Department, New Zealand Police, Office of the Privacy Commissioner, and Office of the Ombudsmen has also been consulted on topics 1 to 5.

77. The Ministry of Justice commissioned advice from an economic consultant who reviewed the indicator interest rate options for calculating interest on court-ordered debt repayments in light of the global financial crisis. The economic consultant consulted the Reserve Bank. The Treasury has also been consulted.

Conclusion

78. The assessed options are summarised in the table below, with preferred options indicated where applicable.

Topic	Options	Conclusion
1. Judges		
• **Judicial appointment processes**	A. Some limited aspects of judicial appointment processes in legislation; no comprehensive publication of processes (status quo).	
	B. Require in primary legislation requires processes to be produced publicly by the Attorney-General.	Preferred.
	C. Processes set out in primary or secondary legislation.	
	D. After approval from the Attorney-General, processes voluntarily published.	
• **Ensuring impartial judicial decision-making**	A. Recusal processes set out in a mixture of guidelines, legislative provisions, and common law (status quo).	
	B. Require recusal processes to be set out in primary legislation.	
	C. Require in legislation that the judiciary develop publicly available recusal processes.	Preferred.
2. Court performance and management of court information	A. Status quo.	
	B. Require the Chief Justice to publish an annual report.	
	C. Clarify court information in primary legislation; provide an appropriate mechanism for the Ministry to disclose bulk information to other government departments; and Ministry of Justice annual reports on timeliness.	Preferred.
	D. Improve delivery of reserved judgments.	Preferred.
3. Judicial specialisation in the High Court	A. Enable commercial lists to be established by gazette notice (status quo).	*No preferred option.*
	B. Enable in primary legislation the establishment of a specialist panel or panels, and abolish provision for commercial lists.	
4. Vexatious litigants	A. Provide in primary legislation that the Attorney-General may apply for order to prevent a person from bringing further civil proceedings if proceedings instigated persistently and without reasonable grounds (status quo)	
	B. Provide in primary legislation for graduated civil restraint orders: limited for particular proceedings, extended for particular and related proceedings, and general for all proceedings.	Preferred.
	C. Enable the court to make civil restraint orders without an application.	
	D. Enable, via protocol, courts to refer potential vexatious litigants for investigation by the Solicitor-General.	

Topic	Options	Conclusion
5. Upper limit of District Court civil jurisdiction	A. $200,000 in primary legislation (status quo)	
	B. $350,000 in primary legislation	
	C. $500,000 in primary legislation	
	D. $350,000 in secondary legislation and CPI adjusted every 5 years (rounded) by Order in Council.	
	E. $350,000 in primary legislation & review by the Ministry of Justice in 2 years.	Preferred.
6. Indicator interest on court-ordered debt repayments	A. OCR	
	B. Six Month Retail Term Deposit Rate	Preferred.
	C. Floating First Mortgage New Customer Housing Rate	

Implementation

79. The proposed changes will not be overly significant to implement. The proposals in this paper require repealing, consolidating and re-enacting legislation. Consequential amendments to other legislation (including some newly enacted legislation) would be required. Implementation dates will depend on the Government's legislative programme and allocation of legislative priorities.

80. The pilot commercial panel will need to be established, run and monitored by the Ministry of Justice in conjunction with the judiciary.

81. The Ministry will need to create a system to record vexatious litigants who have orders against them, so they can be prevented from filing further claims.

82. Determining the categories of court information will require more analysis and liaison with the judiciary. More resources and support may need to be provided to the judiciary to assist with publishing more information.

83. The Ministry of Justice will publish online the rate used to calculate interest on court-ordered debt repayments.

84. Once Cabinet makes policy decisions, Ministers are likely to issue a press release to publicise the proposals. If Bills are enacted, the Ministry of Justice will update Ministry of Justice websites, and published informational material for the public, to reflect the changes. The Ministry will also write to the judiciary and stakeholders to inform them of proposed changes.

Monitoring, evaluation and review

85. The Ministry of Justice will continue to monitor and evaluate courts legislation, and is working on improving data collection to better evaluate policy options. The Ministry will review the upper limit of the District Court's civil jurisdiction in two years' time. The commercial panel will be piloted for two years, after which there will be a report-back on the effectiveness of the pilot.