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Dear Ms Seales

Law Commission Issues Paper No 21 - ***A Register of Judges' Pecuniary Interests?***

The New Zealand Law Society (Law Society) welcomes the opportunity to comment on the first issues paper in the Law Commission's review of the Judicature Act 1908, *Towards a New Courts Act: A Register of Judges' Pecuniary Interests?*

Q1 Is the present law on recusal for financial interests deficient?

No. The present substantive law, as summarised at paragraph 2.17 of the Commission's paper, is adequate.

A register of judges' pecuniary interests is unnecessary for the reasons developed in answer to question 2, below.

Improvements to the procedure for disclosure by judges of information relevant to disqualification in particular cases are discussed in response to question 3, below.

Q2 What precisely is sought to be caught and addressed by legislation relating to a register of judges' pecuniary interests?

To answer this question it is necessary first to categorise the judicial role in relation to its potential for conflicts of interest, by contrast with the position and roles of members of the Legislature and members of the Executive. This line of inquiry is necessary, if proposals to legislate in respect of judges' pecuniary interests are put forward on the basis that they are necessary to achieve "transparency", on an equal footing as between the legislative, judicial and executive branches of government. That appears to be the premise on which the Register of Pecuniary Interests of Judges Bill (the Member's Bill) is being promoted. The explanatory note to the Member's Bill begins by referring to a "time-honoured principle" that "public servants of every kind must be beyond reproach, and suspicion". Proceeding on the mistaken premise that all members of the Executive (rather than just Cabinet Ministers, as noted in paragraph 8.18 of the Commission's paper) and all members of the Legislature are required publicly to disclose their respective pecuniary interests, the explanatory note argues:

> *Recent developments within New Zealand's judicial conduct processes suggest that application of the same practice observed by the other two branches of government might assist in the protection of the judiciary in future.*
>
> *Being obliged under law to declare pecuniary interests that might be relevant to the conduct of a future case in which one is involved would relieve a judge from a repetitive weight of responsibility to make discretionary judgments about his or her personal affairs as each case arises. ...*
>
> *The purpose of the Bill, as stated, is to promote the due administration of justice by requiring judges to make returns of pecuniary interests to provide greater transparency within the judicial system, and to avoid any conflict of interest in the judicial role.*

There are serious misconceptions inherent in this approach, and it is appropriate to identify and correct them at the outset:

- The reference to "recent developments within New Zealand's judicial conduct processes" can only be to the failure of now-retired Supreme Court Justice Wilson to recuse himself in the Court of Appeal case of *Saxmere Company Limited v Wool Board Disestablishment Company Limited*.[1] Yet that was as much a case involving a close personal relationship – there, between Justice Wilson and counsel for one of the parties to the appeal – as one involving the judge's relevant "pecuniary interests". And, as the Law Commission paper points out (paragraph 8.13), the particular matters ultimately found to have required Justice Wilson's recusal would not have required disclosure in terms of the Member's Bill.

- As already noted, the Member's Bill as it stands will not, if enacted, have the effect of applying to the judiciary "the same practice observed by the other two branches of Government". That point aside, the apparent assumption that equal treatment in terms of disclosure obligations of each of the three branches is desirable in and of itself is mistaken. The three branches have significantly different roles to perform. The judicial role requires independence and impartiality in relation to the individual case which the judge is tasked with deciding. In that context, the potential for conflict of interest and/or (apparent) bias extends well beyond pecuniary interests alone. And (as the *Saxmere* litigation shows) the judge's duty of disclosure may be more far-reaching than a bare listing of particular pecuniary interests identified by legislation as warranting disclosure. A judge's disclosure duties will extend to material relationships with former clients, business associates, friends and family, and relevant associations such as clubs or political party memberships. Cases involving judicial "pecuniary interests" as such are likely to constitute a relatively small portion of cases giving rise to conflict of interest/recusal arguments.

- In terms of the present (substantive) law relating to recusal, it is wrong to think that imposing on judges a legal obligation to declare pecuniary interests for the purposes of a public register would "relieve a judge from a repetitive weight of responsibility to make discretionary judgments about his or her personal affairs as each case arises". As already mentioned, judicial conflicts of interest based on a judge's pecuniary interests will not arise frequently. But when they do, the existence of an entry on a judicial register of pecuniary interests will in no way relieve the judge concerned from his or her obligations to make full disclosure and to reach a principled decision whether recusal is warranted.

- It follows that the Member's Bill if enacted would make little contribution towards achieving its stated purposes, set out above. Judicial returns of overall pecuniary interests do not, in and of themselves, "provide greater transparency within the judicial system". Complete disclosures

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[1] *Saxmere Company Limited v Wool Board Disestablishment Company Limited* [2009] NZCS 72; [2010] 1 NZLR 35.

of specific pecuniary (and other) interests, tailored to the needs of the individual case, are required to achieve that goal. Nor, given that material pecuniary interests constitute only one category of matters giving rise to potential judicial conflict of interest, can any general register of pecuniary interests possibly have the effect of "avoid[ing] any conflict of interest in the judicial role".

The explanatory note to the Member's Bill indicates that its purpose is to enhance public confidence in and protect the impartiality and integrity of the judicial system. There is existing legislation directed to the New Zealand judiciary, with precisely that statutory purpose: the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004. No comparable legislation has been enacted to scrutinise and regulate the conduct of members of either the legislative branch or the executive branch. Nor does the Member's Bill's stated goal of upholding public confidence in the standard of behaviour and conduct observed by all public servants justify similar legislation applying to the conduct of members of the legislative and executive branches.

The fact that, in addition to appeal rights, there is dedicated legislation capable of addressing – as indeed it did in relation to the conduct of Justice Wilson – complaints and concerns about failure to avoid conflicts of interests in the judicial role, removes the need for legislation requiring a register of judges' pecuniary interests.

Q3 Is there a practical need for a register of judges' pecuniary interests?

As explained in the answers to the preceding two questions, there is no practical need for a register of judges' pecuniary interests.

Instead of such a register, what is needed is a better-understood and publicly available set of procedures that operate where a judge or litigant considers that recusal may be necessary or there is a likelihood of complaint about his or her suitability to hear a case. Current practices are not well understood by litigants and counsel, and they are inconsistently applied.[2] Disclosure by judges sometimes occurs too close to the hearing, or at the hearing itself, when it is usually too late to do anything without causing major disruption such as loss of a fixture.

Enhanced procedures would:

- refer to the desirability of the judge discussing the matter with his or her colleagues;
- outline the manner in which relevant material would be disclosed;
- provide processes for the hearing of submissions on that material and the making of a reasoned decision; and
- stress the importance of judges making any necessary disclosure as early as possible to give the parties adequate time to respond without jeopardising the fixture.

Implementing procedures to encourage timely disclosure by judges may require cases to be allocated to particular judges sooner than occurs currently, and for disqualification issues to be considered in a preliminary way at the first opportunity (for example, at the first case management conference). If any matters relevant to disqualification are dealt with in accordance with such

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[2] The Law Commission's paper refers, at paragraph 2.8, to the higher courts' Judges' Benchbook, but indicates that this document does not appear to have been made available to the public. A slightly lengthier set of guidelines for disqualification of judges has been available on the Courts of New Zealand website at least since *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 122; [2010] 1 NZLR 76 as section F of the "Guidelines of Judicial Conduct": http://www.courtsofnz.govt.nz/business/guidelines/guidelines-for-judicial-conduct accessed 11 May 2011.

procedures, then any need for a pecuniary interests register would fall away. The Law Commission's suggestion in paragraph 2.30, that each court should evolve a distinct recusal process, seems appropriate. Each Head of Bench could gazette that process or it could be issued as a practice note.

Q4 To whom should the legislation apply?

As discussed above, the proposed legislation is not required.

Q5 What must be disclosed?

This question relates to disclosure as part of a register of judges' pecuniary interests. In light of the answers to previous questions, this question does not need to be addressed.

Q6 What should be the ambit of usage of disclosures?

In light of the answers to previous questions, this question does not need to be addressed.

Q7 What of the security of judges?

Based on the Commission's discussion of security issues, it appears that question 7 is aimed at personal security, in the sense of physical safety of judges, their families and property. However, the concerns underlying this question need to be more widely assessed, by extending them to a consideration of judges' privacy and freedom from harassment by aggressive media or hostile individuals, including but not limited to dissatisfied litigants.

The kind of register information which the Member's Bill contemplates being made publicly available would no doubt be available for its intended legitimate use, by litigants seeking to ascertain in advance of a court hearing whether the designated judge held any potentially disqualifying pecuniary interests. But equally, the information could be used, indeed abused, for other purposes: drawing prurient attention to the judge's personal wealth (or lack thereof); using the extent of disclosure to pursue investigations aimed at revealing additional information about listed assets or to build a case upon which to accuse the judge of a failure fully to disclose; possibly even attempting to intimidate individual judges in the performance of their duties, by making or threatening public disclosure of their and their family's financial affairs.

There already exist websites run by disaffected litigants which specialise in reproducing purported personal information about New Zealand judges. The contents of a pecuniary interests register are likely to be seized upon by those individuals who seek regularly to attack individual members of the judiciary, for whatever reason.

In assessing the significance of these concerns, a feature unique to members of the judiciary needs to be borne in mind. If publicly criticised or attacked, the individual member of the judiciary cannot defend himself or herself. A politician whose pecuniary interests or financial conduct come under scrutiny can mount a public defence by recourse to the media. A judge faced with that situation has no right of reply. (Of course, the alternative, were a disclosure regime to be enacted, might be for that important and valuable convention to be ignored). These presumably unintended consequences of imposing disclosure obligations and establishing a public register in relation to judges' pecuniary interests are both predicable, and (if they eventuate) likely seriously to erode public confidence in the judiciary, far more than allowing the status quo to continue.

Q8 Who is to administer and monitor disclosure by the judges?

Under the “enhanced status quo” approach recommended above, judges themselves would continue to be primarily responsible for administering and monitoring their own disclosure, under procedures set by the Heads of Bench. Heads of Bench would be involved in administering and monitoring the operation of such procedures and conferring with individual judges who have concerns or questions about whether to disqualify themselves in a particular case. Litigants and their lawyers would also be involved in monitoring disclosure by judges in particular cases, and would have recourse to rights of appeal and complaint to the Judicial Conduct Commissioner if necessary.

Q9 Would the enactment of legislation of this character have an adverse impact on the recruitment and retention of judges?

It is difficult to predict whether such legislation would have an adverse impact on the recruitment and retention of judges, but it is unlikely to have a positive impact. For the reasons outlined in response to question 7 above, judges would undoubtedly be concerned that such broad financial disclosure would be unduly intrusive.

Q10 Is this subject area one which presently calls for legislation?

As explained in detail in responses to previous questions, legislation is not required.

The Law Society hopes that the above comments are of assistance to the Law Commission.

This submission has been prepared with assistance from the Law Society’s Public and Administrative Law Committee. If you have any queries regarding this submission please contact Vicky Stanbridge, the Committee Secretary, by telephone (04) 463 2912 or email (vicky.stanbridge@lawsociety.org.nz).

Yours sincerely

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