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**NEW ZEALAND'S ATTORNEY-GENERAL: THE ROLE,
THE RESPONSIBILITY AND THE REVIEW**

**LAWS522: Public Law: State, Power and Accountability
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Contents

I	Introduction.....	1
II	The History of the Attorney-General.....	3
III	Accountability	4
IV	Law Officer Role	7
	A Introduction.....	7
	B Legal Advice	7
	C Royal Assent	8
	D Section 7 Report	9
	1 Introduction	9
	2 The section 7 requirements.....	10
	3 The courts.....	11
	4 Political accountability	13
	5 Options to improve accountability	14
V	Legal Proceedings Involving the Crown	17
	A Introduction.....	17
	B Defining the Role.....	17
	C Accountability by the Solicitor-General and Crown Law	20
	D Media Accountability.....	21
	E Political Accountability.....	22
VI	Link between the Executive and the Judiciary.....	23
	A Introduction.....	23
	B Protecting the Judiciary from Criticism	24
	C Judicial Appointment	25
	1 Conventions.....	26
	2 Political accountability	28
	3 A Judicial Appointments Commission.....	28
VII	Mechanisms outside Formal Accountability	29
	A Introduction.....	29
	B Lawyer Requirement.....	30
	C New Zealand Law Society	32

D	A Sense of Duty	33
VIII	Options for Reform.....	34
A	Cabinet Membership	34
B	A Select Committee and Codification	35
IX	Conclusion	36
X	Appendix One: Judicial Appointment Process.....	39
XI	Appendix Two: Pike River Mine (Question Time 5 March 2014).....	40
XII	Bibliography	42

Abstract

Accountability and transparency are essential to the proper functioning of democracy in New Zealand. The Attorney-General is critical to constitutional arrangements by which he upholds both legal and political functions. This paper serves to describe, analyse and critique each of the Attorney-General's specific roles and assess their relative frameworks for accountability using Bovens framework. As the Law Officer of government, named representative in Crown proceedings and the link between the Executive and the Judiciary, the Attorney-General permeates all three branches of government. Ultimately, this paper aims to expose the lack of forums available that can question the Attorney-General's decisions and initiate consequences. It serves to diagnose, but not resolve, the accountability flaws. Some options for greater transparency and review are suggested, which derive from a comparative analysis with the United Kingdom. Finally, this paper looks at options outside formal accountability that assist with keeping the Attorney-General in check. Conventions, a sense of duty and the need for a lawyer to occupy the position contribute to the overall control of the role.

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I Introduction

New Zealand's constitutional arrangements are unwritten, flexible and, in some respects, ambiguous. The Attorney-General stands out amongst the top office holders as having extensive and important influence. Office-holders "are responsible for making decisions or providing authoritative advice, and thereby contributing significantly to the interpretation of New Zealand's constitution."¹ Due to its constitutional significance, it is important to fully understand their appointment and dismissal procedures and the appropriateness of their accountability frameworks.² This paper provides guidance on these questions through the analysis of the Attorney-General's accountability. A useful accountability lens to adopt is the framework set out by Mark Bovens. Throughout this paper, accountability will adopt the meaning that it is "a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences."³ In some parts of this paper the Attorney-General will therefore be referred to as 'the actor'.

Currently, there is no definitive answer to the transparency and accountability role of the Attorney-General. The Cabinet Manual 2008 provides some guidance on the role but in itself it is simply an authoritative account of conventions; it is not a legal document. Essentially, it states that the Attorney-General is the principal legal adviser, a Minister and almost always a member of Cabinet thereby providing legal advice in the course of government decision-making.⁴

Unlike other Ministers, the Attorney-General has an overriding responsibility to act in the public interest.⁵ The actor has an obligation "to act on some matters independently, free of political considerations, with...the political partisanship that is otherwise properly associated with other ministerial offices."⁶ This has provided inspiration for this paper - who is ensuring a political figure is using an apolitical mind?

¹ Matthew Palmer "What is New Zealand's constitution and who interprets it? Constitutional realism and the importance of public office-holders?" (2006) 17 Public Law Review 133 at 153.

² At 153.

³ Mark Bovens "Analysing and Assessing Accountability: A Conceptual Framework" 13 European Law Journal 447 at 450.

⁴ Cabinet Office *Cabinet Manual 2008* at [4.2].

⁵ L J King "The Attorney-General, Politics and the Judiciary" (Fourth Annual Colloquium of the Judicial Conference of Australia, University of Sydney, November 1999).

⁶ King, above n 5.

The main responsibilities of the Attorney-General are discussed, followed by their relative accountability. First, the Attorney-General is a law officer. In this capacity, he or she provides legal advice, advises the Governor-General on the Royal assent and has a duty to report on any bills that are inconsistent with the New Zealand Bill of Rights Act 1990. The lack of legal accountability surrounding the section 7 role was highlighted in the case of *Boscawen v Attorney-General* which held that the function was not judicially reviewable. Therefore, the Courts do not provide a forum to hold the Attorney-General to account. Alternatively, the report is discussed in Parliament and published online. Secondly, the Attorney-General is the named representative in Crown proceedings. By convention, however, prosecutions are delegated to the Solicitor-General in order to prevent any political interference in the Court processes. Conventions, the media and Parliamentary debate contribute to the control of this role, though they do not necessarily meet the threshold of accountability. Finally, the Attorney-General protects the judiciary from criticism in the House of Representatives and is responsible for appointing judges. The actor is described as the bridge and gatekeeper between the Executive, Parliament and Judiciary.⁷ In order for the Attorney-General to continue in this role, a medium for questioning his or her judicial appointments is crucial to open government. Many individuals and groups have argued in favour of a Judicial Appointments Commission as a result of being unsatisfied with this current position.

Accountability aside, the Attorney-General is not free to do as he or she pleases. Preventing an Attorney-General from misusing his or her powers can be controlled through other means that are outside formal accountability. For example, their own sense of duty, expectations and skills instilled by a legal education or abiding by conventions and culture. It is therefore imperative that the selection process is robust and transparent to ensure that an appropriate candidate is chosen.

In summary, the role of the Attorney-General entails being the protector of the rule of law. It is therefore imperative that the individual appointed to this role is answerable and responsible for his or her choices. Whilst a water-tight, wonder solution is not provided in the length of this paper, it serves to identify the flaws in the current accountability mechanisms; a diagnosis of the problem as such.

⁷ Ben Heraghty “Defender of the Faith? The Role of the Attorney-General in Defending the High Court” (2002) 28 Monash University LR 206 at 208.

II The History of the Attorney-General

The history of the Attorney-General is important because it shows the dramatic evolution of the role from an apolitical to political nature, and independence of Cabinet to being a Cabinet minister. Its origins are founded in the United Kingdom, where the Attorney-General's Office stemmed from the thirteenth-century. The King was unable to personally present in the Courts for pleadings and so subsequently, appointed an Attorney to carry out that role.⁸ The Attorney was “the only legal representative of the Crown recognised in this Court”.⁹ Under the reign of King Edward IV (1461-1483), an Attorney-General of England was appointed with the title of the senior law officer.¹⁰ To assist the Attorney-General and to act as Deputy, the first “King’s Solicitor” was appointed the same year, establishing the foundation to the modern office of the Solicitor-General.¹¹ The defining features of the law officers in the United Kingdom were described as “the legal advisers of the Crown, the Ministry, and the departments of government; they are members of the Ministry, *though never of the Cabinet* and come and go with the change of party majorities”.¹² This was inherited in New Zealand with the other English laws through the English Laws Act 1858.¹³

In 1866, New Zealand legislation made the Attorney-General ineligible for membership of either House in the General Assembly or of the Executive Council. Like the United Kingdom, the Law Officer's role at the time was non-political. Meanwhile, the Solicitor-General of 1867 was a member of the Legislative Council. During this time, “it can be said that New Zealand had a political Solicitor-General and a politically independent Attorney-General.”¹⁴ However, the arrangements were only temporary. The next Solicitor-General to be appointed was an independent law officer. This appointment was linked with the change in the Attorney-General's Act of 1876 which “permitted, but did not require, the Attorney-General to be a member of the Executive Council or a member of either House of the General Assembly.”¹⁵ It was thought that even if a political Attorney-General would venture to imperil his reputation as a professional, by giving a biased and misleading opinion for political purposes, there would always be an officer as backup who would be

⁸ King, above n 5.

⁹ *The King v Austen* 9 Price 142, 147 ER 48 (Exch).

¹⁰ King, above n 5.

¹¹ *Wilkes v The King* (1768) Wilm 322, 97 ER 123 (HL).

¹² William Anson *The law and custom of the Constitution* (Clarendon Press, Oxford, 1907) at 207-208.

¹³ English Laws Act 1858.

¹⁴ John McGrath “Principles for Sharing Law Officer Power: the Role of the New Zealand Solicitor-General” (1998) 18 NZULR 197 at 200.

¹⁵ At 200.

beyond the suspicion of party bias.¹⁶ This implies that the Solicitor-General is capable of being a safety net for any political suspicions on the Attorney-General's behalf; an assumption that is doubted in part V(C) of this paper.

III Accountability

The personal accountability of an individual to Parliament for the way he conducts public office is an important principle of our constitutional law and to undervalue it would be a great mistake and likely to undermine the integrity of our system in the longer term. The Attorney-General must be accountable to Parliament if there is to be maximum trust or at least minimum skepticism.¹⁷

Bovens provides a conceptual framework to analyse and assess public accountability. It is for this reason that I am using it as the standard for accountability in this paper. Accountability is important because it is essential to a well-functioning liberal democracy; it keeps the power of government checked and the public informed.¹⁸ There is increased demand by citizens to hold the government to account.¹⁹ The concept holds “strong promises of fair and equitable governance”.²⁰ It is important that accountability be retrospective as opposed to *ex ante* control.

In order to satisfy Bovens' definition of accountability, three elements must be met. First, the actor should be obliged to inform the forum about his conduct. This is achieved “by providing various sorts of data about the performance of tasks, about outcomes or about procedures.”²¹ It will also often involve providing explanations and justifications in the event of failure or accident. Secondly, there should be an opportunity for the forum to debate with the actor about his conduct; the actor must then have the opportunity to explain and justify his conduct in the course of the debate.²² The forum must be able to *question* the adequacy of the information or the legitimacy of the conduct. Thirdly, both parties

¹⁶ (1876) 23 NZPD 254 (Legislative Council).

¹⁷ House of Commons *The constitutional role of the Attorney General: fifth report of session 2006-07, report, together with formal minutes, oral and written evidence* (Constitutional Affairs Committee, 17 July 2007) at 36.

¹⁸ Tom Willems “Public Accountability and PPP's - How to obtain good public accountability in complex settings?” (PhD, University of Antwerp, 2000) at 2.

¹⁹ Bovens, above n 3, at 449.

²⁰ At 449.

²¹ At 451.

²² At 451.

should know that the forum may pass judgement on the actor's conduct.²³ It may approve of the behaviour or in the case of a negative judgement, the forum may present the actor with certain consequences.²⁴ Consequences may range from fines or evoking disciplinary measures to calling for a minister's resignation or rendering account in front of television cameras.²⁵

Public accountability requires that institutions account for their conduct in "various forums in a variety of ways".²⁶ One important type of accountability is political accountability; voters delegate their sovereignty to popular representatives who then delegate to a cabinet of Ministers.²⁷ The media are also increasing their capacity as informal forums for political accountability. Legal accountability is another type of accountability and is demonstrated in the courts. Here, legal scrutiny is based on legal standards.²⁸ Alongside the Courts exists administrative accountability where the focus is on quasi-legal forums that exercise independent and external administrative and financial supervision and control.²⁹ Another type of accountability is through professional responsibility where an individual must adhere to acceptable practices such as those set by the New Zealand Law Society for lawyers.³⁰ Finally, social accountability depicts that actors should feel obliged to account for their performance to the public at large.³¹ This is facilitated through public reporting and establishing public panels.

It is then important to assess the adequacy of accountability arrangements regimes to which an actor is subject.³² Bovens describes three different perspectives: a democratic, a constitutional and a learning perspective. A democratic perspective means that public accountability is held by citizens who control public office. Citizens sit at the end of the accountability chain and pass judgement on the conduct of the government and indicate their displeasure by voting for other popular representatives.³³ Accountability supports democracy by providing the voters with "the information needed for judging the propriety

²³ Bovens, above n 3, at 451.

²⁴ At 451.

²⁵ At 452.

²⁶ At 454.

²⁷ At 455.

²⁸ At 456.

²⁹ At 456.

³⁰ At 456.

³¹ At 457.

³² At 462.

³³ At 463.

and effectiveness of the conduct of the government”.³⁴ A phenomenon commonly referred to as the court of public opinion. Secondly, a constitutional perspective prevents “an overbearing, improper or corrupt government” through checks and balances of countervailing powers.³⁵ This exists in New Zealand through the separation of powers doctrine. Lastly, accountability may be assessed through a learning perspective where accountability is “a tool to make and keep governments, agencies and individual officials effective in delivering on their promises.”³⁶ The public nature of accountability “teaches others in similar positions what is expected of them, what works and what does not.”³⁷ It forces them to reflect on the successes and failures of their past policy.³⁸

By contrast, transparency, in Bovens’ opinion, is not enough to constitute accountability.³⁹ Organisational transparency and freedom of information provides forums with the necessary information but it lacks an opportunity for questioning and judgement.⁴⁰ Transparency alone sees solely “to the element of publicness in public accountability, to the disclosure of information, the accessibility of the debates to the general public or the disclosure of the judgement”.⁴¹ Public reporting supports transparency but does not on its own qualify as public accountability. The public information must then be *challenged*: questions posed and judgement passed. A public debate about the reported information will arise “only if caught by the watchful eye of a journalist, an interest group or a lonely Internet activist, who in turn may stimulate a forum, such as a parliamentary standing committee, to hold the agency to account.”⁴²

In this paper the following potential accountability forums are discussed: the courts, Parliament, Crown Law, the media, the New Zealand Law Society and the public via elections. Irrespective of the forums, there is a degree of transparency in the role and it, at times, is quite high profile. The aim of this paper, however, is to prove that this is not enough.

³⁴ Bovens, above n 3, at 463.

³⁵ At 463.

³⁶ At 463.

³⁷ At 463.

³⁸ At 464.

³⁹ At 453.

⁴⁰ At 453.

⁴¹ At 453.

⁴² At 453.

IV Law Officer Role

A Introduction

As senior law officer, the Attorney-General has responsibility for the government's administration of the law. There are three roles which I have categorised under the law officer capacity and each will be dealt with in turn. First, the Attorney-General provides legal advice to the government and encourages Cabinet ministers to seek legal advice. Secondly, the Attorney-General certifies that there are no reasons why Royal assent should be withheld. Thirdly, the Attorney-General protects and promotes the rule of law and in doing so, he or she reports on the consistency of bills with the New Zealand Bill of Rights Act 1990.

B Legal Advice

The Cabinet Manual requires that the law officer notifies Cabinet of any proposals or government action that does not comply with existing law. All legal advice that is provided to Ministers or government agencies (whether it is internal advice from departmental legal advisers, advice from the Crown Law Office, or advice from outside legal firms to either Ministers or government agencies) will attract solicitor/client privilege.⁴³ If legal advice is protected by legal professional privilege, it may be protected from disclosure under the Official Information Act 1982 and the Privacy Act 1993, and will not be required to be produced for inspection during discovery in legal proceedings.⁴⁴ The Attorney-General may waive legal privilege.

Accountability is therefore heavily circumscribed by legal professional privilege. To enhance accountability and public confidence it is favourable that the government publishes all or most legal advice in political situations, but this is at the full discretion of the Attorney-General. Interest parties in government may apply to the Attorney-General to waive privilege. The legal advice must then be proven to be helpful to their discourse. Obviously, there are also clear circumstances where legal advice cannot be made public. For example, where proceedings are contemplated, it is not appropriate to release legal advice in relation to those circumstances. On the other hand, where the Government relies on legal advice to support a politically-focused argument, then publication of that advice is in favour to maintain public confidence in the role of the Attorney-General.⁴⁵

⁴³ Cabinet Office, above n 4, at [4.61].

⁴⁴ At [4.59].

⁴⁵ House of Commons *Draft Constitutional Renewal Bill (provisions Relating to the Attorney-General)*: *Fourth Report of Session 2007-08* (Constitutional Affairs Committee, 24 June 2008) at 22.

Legal advice, protected by privilege, also limits the role's transparent ambitions. Whilst it may be disclosed in some situations to government officials, the public at large are not able to request the advice under the Official Information Act pursuant to s 9(2)(h).⁴⁶ There is that risk of an Attorney-General 'hiding behind' his privilege to avoid confrontation by different forums. Therefore, in order to best achieve transparency, it is necessary to divide the political issues from the legal functions of the Attorney-General. Making clear where the responsibility lies, albeit not always possible, might be in the interests of maintaining public confidence.⁴⁷

Whilst other Ministers are accountable to their electorate, the Attorney-General does not have that same accountability in terms of being answerable to a community. The Attorney-General is appointed, on merit, by the Prime Minister.⁴⁸ Arguably, therefore, the Attorney-General under a Bovens analysis can be accountable to the Prime Minister, who can subsequently pose questions and make judgement on the Attorney-General's decisions. However, this is limited by the fact that the Attorney-General is expected to be apolitical and not consult Cabinet in his law officer duties.

C Royal Assent

A bill does not become law until it has received royal assent. Granting of the royal assent signifies that it has been approved by the Head of State,⁴⁹ and is given by the Governor-General in New Zealand, who is the Sovereign's representative. Constitutional convention ensures that the Governor-General signs the Bill only in accordance with the advice of the government. This advice is given in the form of an advice sheet signed by three prominent figures. The Clerk of the House signs to ensure there are no errors in the Bill, then the Attorney-General signs advising that there are no reasons why Royal assent should not be granted and, finally, the Prime Minister signs, advising that the Royal assent be granted.⁵⁰ This means that the Attorney-General has the final substantive comment on whether or not a Bill should be made into law.

⁴⁶ Section 9(2)(h) states "withholding of the information is necessary to maintain legal professional privilege".

⁴⁷ House of Commons *Draft Constitutional Renewal Bill (provisions Relating to the Attorney-General): Fourth Report of Session 2007-08*, above n 45, at 14.

⁴⁸ Cabinet Office, above n 4, at [2.7].

⁴⁹ "The Royal Assent" New Zealand Parliament <<http://www.parliament.nz/en-nz/features/00NZPHomeNews031220091/the-royal-assent>>.

⁵⁰ "The Royal Assent", above n 49.

Hypothetically, if the Attorney-General advised the Governor-General against signing the rights-infringing Bill, what would be the result? Is there an expectation that the Attorney-General *should* speak up at the Royal assent stage if the Bill contains right-infringing provisions? The situation is almost impossible. The Attorney-General signs off on the bill *after* thorough checks have been completed by the Clerk's Office and Parliamentary Counsel Office. There is no ability to challenge the Bill and advise the Governor-General not to sign because it is simply a pro forma signature; there is no substantive checking involved in Royal assent. Moreover, no bill presented to a Governor-General has ever been refused the Royal assent in New Zealand.⁵¹ In the United Kingdom, which has a comparable requirement for the Royal assent in the House of Lords and the House of Commons, Royal assent has not been refused since 1707.⁵² The constitutional principle that the Governor-General acts only on the advice of Ministers requires the Governor-General to accept that advice except in the most extraordinary circumstances.⁵³ Circumstances that meet that extraordinary threshold have never arisen.

Justice McGrath has made a number of commentaries about conventions relating to public officials. Specifically, he has said that "if Ministers take decisions outside the scope of convention, they will not on that account be restrained by the courts. They will, however, need to satisfy the electorate that the circumstances warranted the exercise of their power or suffer the political consequences."⁵⁴ This speaks to Bovens' political dimension of accountability. Convention aside, there is no accountability mechanisms in place to cover a situation where the power to advise against assent is used.

D Section 7 Report

1 Introduction

The section 7 reporting duty is very important in the law-making process. Legislative proposals are sometimes modified as a result of the section 7 process before they achieve their final form.⁵⁵ An adverse report is beneficial in the legislative process because it conveys a clear message that the bill in question is consistent with rights and freedoms before it is introduced. This means that it is critical for the Attorney-General to be held to

⁵¹ Kenneth John Scott, *The New Zealand Constitution* (Clarendon Press, Oxford 1962) at 85.

⁵² Geoffrey Marshall *Constitutional Conventions* (Clarendon Press, Oxford, 1984) at 22.

⁵³ New Zealand Bill of Rights Act, s 7(a); "Parliamentary Practice in New Zealand" New Zealand Parliament <http://www.parliament.nz/en-nz/about-parliament/how-parliament-works/ppnz/00HOOOCPNZ_271/chapter-27-the-legislative-process>.

⁵⁴ John McGrath "The Crown, the Parliament and the Government" 7 *Waikato Law Review* 1 at 6.

⁵⁵(10 October 1989) NZPD 13039.

account to ensure he or she performs the duty well. This section discusses the Court as an accountability forum, followed by the attention the section 7 report receives during debate in Parliament. A number of other institutions are suggested as an alternate section 7 report writer, with a standing committee proving to be the most effective. Ultimately, if the responsibility remains with the Attorney-General, the decision could be judicially reviewable. This will be addressed below.

2 The section 7 requirements

Specifically in the capacity as law officer, section 7 of the Bill of Rights Act 1990 requires the Attorney-General to “bring to the attention of the House of Representatives any provision in the Bill that appears to be inconsistent with any of the rights and freedoms contained in this Bill of Rights.”⁵⁶ For all government Bills, that report must be made on the introduction of that Bill, prior to the first reading.⁵⁷ In any other case, such as a private member’s bill, the report must be made as soon as is practicable after the introduction of the Bill.⁵⁸ It was resolved in the parliamentary debate of the Bill of Rights bill that, prima facie, infringements did not require a report by the Attorney-General if the limitation was a reasonable one; it must be “justified in a free and democratic society” as per section 5.⁵⁹

The Attorney-General has no ongoing responsibility to report on a bill as it moves through the various stages of Parliamentary review.⁶⁰ This means that amendments, whether it be at the select committee level or committee of the whole House stages, are not subject to a formal Attorney-General’s report.⁶¹ Whilst a wider interpretation of a continuous obligation might be preferred, section 7 is clear and unambiguous in its terms.⁶²

Ultimately, there is no remedy available if the Attorney-General does not certify the legislation, or if he certifies the legislation as complying with the Bill of Rights when it blatantly should not comply. If the Attorney-General does not make an effort to certify a bill and is therefore not strongly focused on his responsibility as a protector of rights, there are no reviews or sanctions in place by either Parliament, the courts or an independent body

⁵⁶ New Zealand Bill of Rights Act 1990, s 7.

⁵⁷ “Parliamentary Practice in New Zealand”, above n 53.

⁵⁸ New Zealand Bill of Rights Act, s 7(b).

⁵⁹ Philip A Joseph “Constitutional and Administrative Law in New Zealand” (4th ed, Brookers Ltd, Wellington, 2014) at 1279; New Zealand Bill of Rights Act, s 5.

⁶⁰ “Parliamentary Practice in New Zealand” New Zealand Parliament, above n 53.

⁶¹ *R v Poumako* [2000] 2 NZLR 695 at [25], [66] and [96].

⁶² Claudia Geiringer “Declarations of inconsistency dodged again” (2009) NZLJ 232 at 233.

to rectify this.⁶³ Devoid of any legal accountability, as will be discussed in the next section, the Courts mention there would some “constitutional crisis” on an inadequate performance by the Attorney-General.⁶⁴

3 *The courts*

Legally, the Attorney-General has not yet been held to account by the courts. This was decided in *Boscawen v Attorney-General* where the plaintiffs sought a judicial review of section 7. The *Boscawen* case was brought in July 2007 when the Electoral Finance Bill was introduced for the purposes of regulating a number of aspects of election financing. This included political party and candidate donations, election expenses and the involvement of third parties.⁶⁵ The plaintiffs argued that by placing limits on expenditure to promote electoral outcomes, the Bill restricted the right to freedom of expression as protected by section 14 of the Bill of Rights. Meanwhile, the Crown Law Office advised the then Attorney-General, Sir Michael Cullen, that despite the inconsistencies of the Bill against the right to freedom of expression, these inconsistencies were “demonstrably justified” under section 5.⁶⁶ They were deemed to be reasonable and allowed for the legislation’s objectives of greater transparency, accountability and fairness in the democratic process.⁶⁷ Subsequently, no section 7 report was issued to the House on the Electoral Finance Bill.

The High Court and Court of Appeal both concluded that the Attorney-General’s duty to report was not judicially reviewable because it “imposed on him a parliamentary function and not one in his capacity as a member of the Executive”.⁶⁸ It was deemed to be an intra-parliamentary procedure which does not affect the rights of other persons.⁶⁹ Intervention by judicial review into the legislative process “manifestly risks creating significant tensions between Parliament and the Courts”.⁷⁰ The Justices in the Court of Appeal added that the Attorney-General did not exhibit any wilful refusal to comply with section 7 or to perform the function in bad faith. In effect, this means that there are two exceptions where the Attorney-General may be legally accountable for a refusal to issue a section 7 report, namely bad faith or wilful refusal, though the situation has not occurred to date. Parliament

⁶³ (14 August 1990) 510 NZPD 3762.

⁶⁴ *Boscawen v Attorney-General* [2009] 2 NZLR 299 (CA) at [41].

⁶⁵ Electoral Finance Bill 2007 (130-3).

⁶⁶ Claudia Geiringer “Declarations of inconsistency dodged again”, above n 62, at 232.

⁶⁷ Electoral Finance Bill 2007 (130-3).

⁶⁸ *Boscawen v Attorney-General* [2008] NZAR 468 (HC) at [36].

⁶⁹ At [41].

⁷⁰ At [45]; also see *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40.

is to be provided with the Attorney-General's genuinely held view, despite whether others consider that view to be right or wrong.⁷¹ The Court points out that "it is hard to see how it could require the Attorney-General to make a report to Parliament which the Attorney-General considered to be incorrect".⁷² In conclusion, section 7 was not judicially reviewable as "it would effectively force a confrontation between the Attorney-General and the Courts."⁷³ The relevant Bovens' perspective here is constitutional; the courts focus their interaction on the conformity of the Executive's actions with the law. On the other hand, introducing judicial review may reflect an appropriate constitutional dialogue between the courts and Parliament, akin to a "chat over the fence".⁷⁴

Despite ruling against the plaintiffs, there was an indication by the court that in some situations where the Attorney-General would cause atrocity, it may be appropriate for the Court to interfere;⁷⁵ a small window of accountability was provided here. Counsel submitted a hypothetical possibility of an Attorney-General "who steadfastly refused to make a report to Parliament in the face of legislation clearly interfering with rights contained in the New Zealand Bill of Rights Act despite advice to the contrary and in plain dereliction of duty."⁷⁶ The Court of Appeal sidestepped the question stating such a situation was not helpful to the analysis of the case. Nevertheless, they added "it would be likely that there would be a constitutional crisis of some magnitude and that may well be one of the less significant aspects of it."⁷⁷ It may be argued that Margaret Wilson's refusal to accept Crown Law advice to make a section 7 report on the Foreshore and Seabed was, in the Court's words, a "plain dereliction of duty".⁷⁸ Ultimately, the court of public opinion made judgement and crucified Wilson. Finlayson, current Attorney-General, concurred that there is a learning perspective gained from this situation. He stated "I do not see how an Attorney-General acting impartially as senior law officer could not have produced a section 7 report on those two bills [Electoral Finance Bill and Foreshore and Seabed Bill], both thankfully now repealed."⁷⁹ This learning perspective is not particularly strong because it is likely to be politically loaded. Wilson represented the Labour government

⁷¹ *Boscawen v Attorney-General* (CA), above n 64, at [20].

⁷² At [36].

⁷³ At [36].

⁷⁴ *Boscawen v Attorney-General* (HC), above n 68 at [54].

⁷⁵ *Boscawen v Attorney-General* (CA), above n 64, at [41].

⁷⁶ At [40].

⁷⁷ At [41].

⁷⁸ At [40].

⁷⁹ Christopher Finlayson "Section 7 of the Bill of Rights: an Attorney General's perspective" (NZ Centre for Human Rights Law, Policy and Practice, University of Auckland, 13 March 2014) at 2.

while Finlayson is the Attorney-General for the National government. Regardless of political sway or not, looking to the past can provide some guidance for the future.

Whilst the Attorney-General has not been held to account by the courts before, that does not rule out any future circumstances of court intervention in inappropriate behaviour. If a situation was presented to the Supreme Court where the appellants sought to overrule the decision in *Boscawen*, the Chief Justice may reconsider its stance and require that a more robust reporting mechanism be adopted by the Attorney-General. The Supreme Court could redefine the section 7 reporting duty so that it fell under his executive role, and therefore was judicially reviewable. I believe that the number of claims could be monitored by the judiciary to ensure that the Attorney-General is not consumed in Court time. Introducing judicial review would heighten the responsibility of the Attorney-General because the Courts would then become the forum to which the Attorney-General can be held to account. During the court process, specifically in cross-examination, he or she could be questioned about a refusal to report or justify the reasoning behind the process. This is a direct challenge to a failure to report. However, in terms of accountability, the examining process will always be limited because the section 7 report is subjective; each Attorney-General will provide differing views on consistencies with the Bill of Rights. The remedies available to the court are also not that well placed to provide consequences for a failed duty by the Attorney-General. The court may impose a fine or an order for that individual to be suspended from the position for a period of time. However, to impose the most serious consequence, namely calling for his resignation, that must stem from political pressure. This is discussed in the next part.

4 Political accountability

In essence, Parliament examines, criticises and debates. Parliament acts as an important intermediary between the government and the public, and can engage in accountability dialogue with the executive.⁸⁰ It loosely meets Bovens' definition of an accountability relationship, with extra discussion occurring in the select committee stage. There is Parliament's question time, in which opposition and other backbench MPs can ask question of ministers and receive responses.

In application of the Electoral Finance Act situation, opponents of the Act maintained, even after its enactment, that their freedom of expression was unjustifiably limited. Consequently, following its election to office in November 2008, the new government

⁸⁰ Auditor-General *Third report for 1999: The accountability of Executive Government to Parliament* (1999) at 16.

quickly repealed the Act. This was a favourable political result at the end of the day though, admittedly, only after an election had already been held under the offending regime.⁸¹ This gave effect to Bovens' democratic perspective. This obvious dissatisfaction reflects poorly on the Attorney-General who had the opportunity to centralise this rights debate in the legislative process through issuing a section 7 report.

When they are issued, section 7 reports are often criticised in Parliament. This means that the Attorney-General is often held to account in regard to his personal performance; Ministers of Parliament are in a position to interrogate the Attorney-General on the report. At the end of the day, however, the report is purely subjective and therefore it is the personal judgement of the Attorney-General that is being brought to criticism. A consistent poor performance in regard to section 7 reports may lead to a real lack of confidence in the law officer and, subsequently, his or her resignation being called for by the Prime Minister. Parliament has no involvement in the appointment process of the Attorney-General and therefore has no removal powers like legislatures in some countries, for example the United States, have. This is an obvious weakness from a constitutional perspective that Parliament does not have the power to remove a minister from office. Another weakness is that the focus of Parliamentary interaction can often be aimed at making political gain, rather than focusing on conformity of actions with laws and norms.

Finally, the section 7 reports are published online on the Ministry of Justice website. This means that regular flagrant breaches have the potential to upset the public. Elections on their own are not an adequate accountability forum because they do not offer legal (or other) sanctions and provide no opportunity to criticise, but in saying that, they are a means to impose political consequences to vote in the opposition party.

5 Options to improve accountability

The weaknesses in political and legal accountability can amount to the idea that the duty would be better performed by another institution that is less subjective and less political. The three options that are discussed in the next part are the courts, a standing committee and a supreme Bill of Rights.

By way of comparison to New Zealand, in the United Kingdom the sponsor minister makes the reports. In Canada, the Attorney-General is also the Minister of Justice so it is unlikely that he or she will ever make a report criticising compatibility with their equivalent Bill of Rights, as he or she cannot be seen to be part of a House that is party to an unconstitutional

⁸¹ Claudia Geiringer "Declarations of inconsistency dodged again", above n 62, at 232.

Bill.⁸² The “down-stream” consequences of section 7 reports are “less meaningful” in New Zealand than in the United Kingdom or Canada, who both assert a strong judicial review function.⁸³ Section 7 reports, despite their frequency, form only a very minor part of the discussion in the House. This has the effect of having section 7 reports that are technically public but that are not widely put in the public eye.⁸⁴

First, there is the option that the judiciary address inconsistent legislation through declarations of inconsistency. In *Moonen v Film and Literature Board of Review*, the judgment offered that the courts can and should inquire into the justifiability of legislative breaches of the Bill of Rights.⁸⁵ The courts use their jurisdiction to make declarations of inconsistency as was requested in *Boscawen*. One academic reasoned that “formal declaratory relief would almost certainly make it more likely that the media would report a case as a victory against the Government, thus increasing the political pressure on the Government to respond to the breach.”⁸⁶ In the case of *Taylor v Attorney-General*, the declaration of inconsistency received widespread media attention with a media release made by the Courts of New Zealand. Subsequent newspaper articles like “Prisoners should be allowed to vote: High Court” headlined the news.⁸⁷ Additionally, Russell McVeagh noted that “whatever the response on a substantive level, it is hoped that Parliament publicly demonstrates serious engagement with the judgment.”⁸⁸ The most significant weakness to the courts as a review of rights inconsistencies is that it is reactive (i.e. post-legislation) rather than proactive (i.e. pre-legislation).

Alternatively, if a supreme Bill of Rights was introduced, the judiciary could strike down legislation which is inconsistent with any rights and freedoms. Under a supreme law regime “the ability of political arms to directly challenge an unfavourable court decision is

⁸² Andrew Geddis “Human Rights Compatibility Reports” (NZ Centre for Human Rights Law, Policy and Practice, University of Auckland, 13 March 2014) at 1.

⁸³ At 1.

⁸⁴ At 1.

⁸⁵ Claudia Geiringer “On a road to nowhere: implied declarations of inconsistency and the New Zealand Bill of Rights Act” (2009) 40 VUWLR 613 at 618.

⁸⁶ At 642.

⁸⁷ Aimee Gulliver “Prisoners should be allowed to vote: High Court” *Stuff.co.nz* (online ed, 24 July 2015).

⁸⁸ Andrew Butler, Tim Clarke and Chris Curran “Bill of Rights Remedies: Declarations of Inconsistency” Russell McVeagh < <http://www.russellmcveagh.com/Publications/ViewPublication/tabid/176/Title/bill-of-rights-remedies-declarations-of-inconsistency/pid/407/Default.aspx>>.

difficult”.⁸⁹ A supreme Bill of Rights would empower the judiciary and essentially place the court as assessors of section 7. In short, this would mean judges are now taking part in the legislative process, without having been legitimately and democratically elected. It is also noted that “if Parliament were required to await the Court’s decision, it would be a major impediment to the process”.⁹⁰ This has its limitations as only cases that are litigated can be struck down. In terms of legal accountability, any bills containing inconsistencies with the Bill of Rights has the potential to be invalidated by the judiciary. This would create a very high standard of legal accountability, thereby making the section 7 report more critical to the parliamentary process than it is now, in order to ensure all inconsistencies are thoroughly addressed at an early stage.

Finally, in the parliamentary debate of 1990 regarding the Bill of Rights Bill, it was argued that requiring the Attorney-General to report on every justifiable limit would swamp the House.⁹¹ However, it is feasible that the responsibility be reassigned to a Bill of Rights Standing Committee (to examine and report on all Bills), a recommendation that the House did not act upon.⁹² The House’s refusal to create such a committee was justified by claiming “the Standing Orders were sufficiently wide to allow select committees to undertake this role (should they wish) within their respective subject areas”.⁹³ Introducing a standing committee, in terms of accountability, would enhance the consultation process, add to critical discussions (like those held in select committees) and therefore be more objective and independent from politics.

In conclusion, I believe that a permanent standing committee is an option to enhance the effect section 7 report has on the legislative process. However, in the current situation, where the Attorney-General remains as the author of a section 7 report, there needs to be more robust accountability mechanisms in place. This may be achieved by redefining the role and it becoming judicially reviewable, as is the case in the United Kingdom and Canada.

⁸⁹ Petra Butler "15 Years of the Bill of Rights: Time to Celebrate, Time to Reflect, Time to Work Harder?" (2006) *Victoria University Human Rights Research* at 22.

⁹⁰ *Moonen v Film and Literature Review Board* 2 NZLR 9 (CA); *Boscawen v Attorney-General* [2009] 2 NZLR 299 (CA) at [35].

⁹¹ Joseph, above n 59, at 1279.

⁹² At 1279.

⁹³ At 1277-1278.

V Legal Proceedings Involving the Crown

A Introduction

There are two dimensions to legal proceedings involving the Crown. Firstly, under our current constitutional arrangements, the Attorney-General is responsible through Parliament to the citizens of New Zealand for prosecutions carried out by or on behalf of the Crown. The second dimension is that in practice, this role is delegated. The prosecution process is superintended by the Solicitor-General, who, pursuant to section 9A of the Constitution Act 1986, shares all the relevant powers vested in the office of the Attorney-General.⁹⁴ The rationale for this relationship is to remove any risks of political influence from legal proceedings. However, in cases of high public interest, the Attorney-General will become involved and assume proceedings. In these circumstances, there must be a degree of accountability. The following forums will be assessed in this part: the Solicitor-General and Crown Law, the media and Parliament.

B Defining the Role

Provisions pertaining to the Attorney-General and legal proceedings have evolved slowly. In the Interpretation Act 1924, section 4 stated that the ‘Attorney-General’ is interpreted “in respect of any power, duty, authority, or function imposed upon or vested in him in virtue of his office as Attorney-General, includes the Solicitor-General”.⁹⁵ The Finance Act 1952 stated in section 27 that “functions of Attorney-General may be performed by Solicitor-General”.⁹⁶ Finally, the Constitution Amendment Act 1999 inserted Section 9A into the Constitution Act 1986 stating that “the Solicitor-General may perform a function or duty imposed, or exercise a power conferred, on the Attorney-General.”⁹⁷ Constitutional convention governs the non-political appointment of the Solicitor-General. Independence from government is essential to the proper exercise of those duties. The convention seeks to prevent the performance of criminal law being subject to any kind of political decision-making.⁹⁸

Published guidelines titled *Solicitor-General’s Prosecution Guidelines* are important to “reinforce the expectation of the Law Officers and the Courts that a prosecutor will act in

⁹⁴ *Solicitor General’s Prosecution Guidelines* (Crown Law, July 2013) at 1.

⁹⁵ Interpretation Act 1924, s 4.

⁹⁶ Finance Act 1952, s 27.

⁹⁷ Constitution Amendment Act 1999, s 3.

⁹⁸ Letter from the Solicitor-General to the Attorney-General, 16 December 1996.

a manner that is fundamentally fair, detached and objective.”⁹⁹ Even though the Solicitor-General is empowered to perform the Attorney-General’s role through the Constitution Act, this should not be interpreted as meaning the Solicitor-General is or can be the de facto Attorney-General. The Solicitor General only assists or supports the Attorney-General but that itself has “its working limitations since he or she also has no right of audience in Cabinet or Parliament”.¹⁰⁰ The Solicitor-General must also willingly accept that his opinion as junior law officer can be overridden by the Attorney-General and his advice to government.¹⁰¹ It is the Attorney-General that has the final say. This reinforces the need for accountability.

Occasionally, there are instances where the Attorney-General, rather than the Solicitor-General, becomes directly involved in the decision-making process of individual cases.¹⁰² The circumstances are very rare; convention holds strong that the Attorney-General does not interfere. However, it would be appropriate when the public interest in a prosecution is very high. For example, in regard to the bombing of the Rainbow Warrior in 1991, the accused was arrested in Switzerland.¹⁰³ Due to the level of national and international interest, the then Attorney-General, Honourable Paul East, decided to make the decision personally.¹⁰⁴ It was also deemed appropriate for the Attorney-General Michael Cullen to step in when he overruled a District Court judge's decision to issue an arrest warrant against a visiting former Israeli general the judge believed was answerable for Middle East war crimes.¹⁰⁵ These situations are reliant on the Attorney-General’s judgement as to when it would be appropriate or not to intervene. There is no independent review of their interference. In terms of accountability in these circumstances, again, no forum exists to debate with the Attorney-General and allow him to justify his conduct. The House, pursuant to Standing Orders, may not comment on the duration of the prosecution.¹⁰⁶ Interference is ad hoc and therefore we rely solely on convention as the restraint.

⁹⁹ *Solicitor General’s Prosecution Guidelines*, above n 94, at 4.

¹⁰⁰ Nilay Patel “A layman as Attorney-General” (2005) NZLJ 259 at 260.

¹⁰¹ McGrath “Principles of Sharing Law Officer Power: the Role of the New Zealand Solicitor-General”, above n 14, at 217.

¹⁰² “Control and accountability” New Zealand Law Commission <http://www.nzlii.org/nz/other/nzlc/report/R66/R66-3_.html>.

¹⁰³ “Control and accountability”, above n 102.

¹⁰⁴ “Control and accountability”, above n 102.

¹⁰⁵ David Eames and Ruth Berry “Government overrules war-crimes arrest order” *The New Zealand Herald* (online ed, 1 December 2006)

¹⁰⁶ Standing Orders of the House of Representatives 2014, SO 115(1).

Nevertheless, in the Law Commission's view, it is entirely proper for the Attorney-General to direct prosecution policies, "so long as that is done in the public interest and free from improper political influence".¹⁰⁷ But this paper is questioning what the consequences are for a failure to perform apolitically are. In order to be confident that politics are absent from the role, the alternative option is that the Attorney-General removes himself or herself from Cabinet. It is noted that David Lange sat outside Cabinet in his short time as Attorney-General before Labour's defeat in election in 1990.¹⁰⁸ The argument is that the Attorney-General should not be involved in questions of government policy or too closely in policy debates within government; he or she "should not engage in robust political debate except in relation to his own portfolio and should be generally reticent and non-confrontational with respect to party politics."¹⁰⁹ This notion, often described as "independent aloofness",¹¹⁰ has largely been upheld in the United Kingdom where the Attorney-General has not been a member of Cabinet since 1928.¹¹¹ By contrast, the Attorney-General of the United States is appointed by the President, is a member of Cabinet and therefore forms part of the executive government, much like New Zealand.

The interaction between the Attorney-General and the Solicitor-General can be helpfully demonstrated by the prosecution of John Banks. The situation arose where Banks was accused of filing a false electoral return. Although he was acquitted in the Court of Appeal, Banks sought an investigation when the Crown had withheld some information relating to the memorandum of Banks' lawyer. The Court of Appeal disagreed with the Crown's submissions that the memorandum should not have been disclosed and Banks claimed "the Solicitor-General has a lot to answer for".¹¹² In July of this year, the Attorney-General confirmed he was satisfied with the way Crown Law conducted itself in the prosecution against Banks.¹¹³ It was, in his opinion, in line with the Prosecution Guidelines 2013.¹¹⁴ Finlayson, as the Attorney-General, stated he would avoid any involvement in the criminal

¹⁰⁷ "Control and accountability", above n 102.

¹⁰⁸ Michael Cullen, New Zealand Attorney-General "Address to Legal Research Foundation" (Northern Club, Auckland, 25 May 2005).

¹⁰⁹ King, above n 5.

¹¹⁰ King, above n 5.

¹¹¹ King, above n 5.

¹¹² Jared Savage "Attorney-Gen to 'look into' Banks' prosecution" *The New Zealand Herald* (online ed, 20 May 2015).

¹¹³ Stacey Kirk "Crown Law acted appropriately in prosecution of John Banks - Chris Finlayson" *Stuff.co.nz* (online ed, Wellington, 14 July 2015).

¹¹⁴ Kirk, above n 113.

proceedings but “he was responsible for ensuring the Crown Law office had a good reputation”.¹¹⁵ This example serves to show the defined relationship between the Solicitor-General and the Attorney-General. Evidently, the Solicitor-General is accountable to the Attorney-General because he or she must answer to Parliament on the conduct of all litigation on behalf of the government.¹¹⁶ But that accountability is not necessarily applicable for vice versa, especially since the Solicitor-General is junior law officer. This will be addressed in the following section.

C Accountability by the Solicitor-General and Crown Law

In situations where the Attorney-General is misusing his power, the Solicitor-General may feel an obligation to step in. This must solely be a personal obligation or a sense of duty held by the Solicitor-General. The most prominent weakness of this is that the Solicitor-General’s role is the junior legal officer and therefore inferior to the Attorney-General. If the Solicitor-General was required or felt obliged to keep the Attorney-General in check, this could in fact give birth to a conflict of interest between his employment and whistle blowing on the Attorney-General’s wrongful actions. There is currently no accountability framework appropriate for the Solicitor-General to occupy.

Crown Law as an accountability forum is also not strong. Crown Law Office is a department of the public service with specialist responsibilities for providing legal advice and representation to the Government (in particular, departments and Ministers) in matters affecting the Crown.¹¹⁷ It is led by the Solicitor-General and therefore, indirectly, by the Attorney-General who oversees the Solicitor-General. Part of the Crown Law Office is the Attorney-General’s group. Therefore it is weak from a constitutional perspective, because it is under the Minister’s direction, it does not have inquisitorial powers and cannot issue sanctions against the Minister or government. It would be difficult to redefine the scope of the Office because its functions lie in legal advice to government. By restructuring it so it does operate independently, like a commission, it could require the Attorney-General to annually report on his or her actions of the previous year. In this way, the Attorney-General could reflect on their progress as well as receiving review, criticisms and compliments from the Solicitor-General and his team without fear of disfavour. This would be particularly beneficial in the rare situations that the Attorney-General involves themselves in litigation involving the public interest.

¹¹⁵ Kirk, above n 113.

¹¹⁶ McGrath “Principles of Sharing Law Officer Power: the Role of the New Zealand Solicitor-General”, above n 14, at 204.

¹¹⁷ *Briefing to the incoming Attorney-General* (Crown Law, 2014) at pt 4.

D Media Accountability

The media is “by far the most important” source of information about officials’ activities and decisions,¹¹⁸ thereby representing a necessary condition for the existence of democratic government and a pre-condition for accountability.¹¹⁹ The media can play a key role in enabling citizens, “who have imperfect information about government activities”,¹²⁰ to monitor the individual actions of ministers. This ultimately results in a government that is “more accountable and responsive to its citizens and rendering elected politicians more accountable.”¹²¹

Bovens himself considers that the media can be a form of political accountability.¹²² From a democratic perspective, the media can be very effective, especially since the Attorney-General has a high profile and often reports on or in relation to high profile cases. Newspaper articles add to the transparency of the role but there are no real inquisitorial powers available to journalists. To a small extent, challenging journalists can ask questions of the Attorney-General’s activity but the Attorney-General has no obligation to respond to the questions. However, failure to do so may result in a judgement by the newspaper, accusing the Attorney-General of doing a poor job. Therefore although the media cannot impose formal sanctions, its actions can indirectly result in political consequences for the Minister and government.

One example of the Attorney-General’s interaction with the media was in relation to the Banks prosecution, as discussed earlier in this part. He was subsequently answerable to the media for Crown Law, stating he was “satisfied” it had been dealt with properly.¹²³ However, the position is in its very nature is a legal one. It is not necessarily appropriate for the media to deal with and ‘pose questions’ to the Attorney-General in regards to complex legal matters. Another main weakness of the media are the risks of sensationalised reporting, where journalists simply want to ‘frame’ the persecutor for dramatic effect; a situation is sensationalised in a scandalous light for commercial motivations. In regard to these issues and in my view, the Attorney-General has little accountability to the media.

¹¹⁸ R Douglas Arnold *Congress, the Press, and Political Accountability* (Princeton University Press, Princeton, 2004) at 1.

¹¹⁹ Martino Maggetti “The Media Accountability of Independent Regulatory Agencies” (2012) 4 *European Political Science Review* 385 at 387.

¹²⁰ At 387.

¹²¹ At 387.

¹²² Bovens, above n 3, at 455.

¹²³ Isaac Davison “Attorney-General satisfied with conduct of Crown Law” *The New Zealand Herald* (online ed, 14 July 2015).

An appropriate forum must have proper understanding of the law and be able to pose the right kind of questions in order for the Attorney-General to respond and justify.

E Political Accountability

As a Minister, the Attorney-General must answer to Parliament for the actions of himself, the Solicitor-General and the Crown Law Office, as well as for those other agencies under the Attorney's ministerial control such as the Parliamentary Counsel Office.¹²⁴ This is prescribed as individual ministerial responsibility in the Cabinet Manual.¹²⁵ The Attorney-General has overall responsibility for the conduct of all legal proceedings involving the Crown, and can be expected to keep his or her fellow ministers generally informed of the initiation, progress and outcome of such proceedings against or by the Government.¹²⁶ On occasion, a Minister may be required to account for the actions of a department when errors are made, even when the Minister had no personal knowledge of, or involvement in, those actions.¹²⁷ In serious situations of departmental error, it is an expectation that that the Minister will resign. This has not occurred to date in the role of the Attorney-General. Moreover, in recent times, the convention has been less strictly followed where Ministers are not resigning and therefore the convention has somewhat flouted.

Political accountability is also heavily circumscribed by the unwillingness of the Attorney-General to engage in discussion regarding his portfolio. Essentially, "how effective parliamentary questioning is depends on the questioner and, I suppose, it depends on the willingness of the Minister to give information."¹²⁸ Quite recently, the Attorney-General chose not to inform the House about the Pike River Mine prosecution. In 2014, he refused to answer questions in Question Time in relation to the disaster by stating the responsibility falls solely on the Solicitor-General (see Appendix Two). Trevor Mallard questioned, "Mr Speaker. Can I invite you to go back and look at that answer, look at the Cabinet Manual, and look at the Standing Orders, and inform us who is answerable in Parliament for those [prosecution] decisions if it is not the Attorney-General?"¹²⁹ The Speaker did not rule on the matters raised by Mallard in the House. It is, on one hand, difficult for the Attorney-General to answer questions that he has no knowledge of. On the other hand, it is important for Crown Law to be questioned on their action in order to ensure the process is accountable

¹²⁴ Cullen, above n 108.

¹²⁵ The Cabinet Manual at [3.21] states "ministers are accountable to the House for ensuring that the departments for which they are responsible carry out their functions properly and efficiently"

¹²⁶ Cullen, above n 108.

¹²⁷ Cabinet Office, above n 4, at [3.21].

¹²⁸ Elwyn Jones "Office of the Attorney-General" (1969) 27 Cambridge Law Journal 43 at 50-51.

¹²⁹ (5 March 2014) 696 NZPD 16323.

and progressing fairly. The Attorney-General could request the information in order to answer on it. The issue rests on the fact that parliamentary questions relating to legal advice may not be answered on the basis of privilege - unless the government (via the Attorney-General) decides otherwise. Finally, the *sub judice* rule restricts debate in relation to cases proceeding through the courts and also severely limits the extent to which the work of the Law Officers are subject to scrutiny.¹³⁰

VI Link between the Executive and the Judiciary

A Introduction

The Attorney-General is a member of both the Executive and a Member of Parliament that appoints the judiciary. In New Zealand there is a separation of powers between the legislature, executive and the judiciary. This separation ensures there are checks and balances within the system and that accountability and impartiality are maintained.¹³¹ This aligns with Bovens' constitutional perspective; a fundamental principle of democracy. Each branch of government has a role in balancing and reviewing the power of the two other branches. For example, through the process of judicial review, the judiciary examines the actions of the Executive. Meanwhile, the Executive is principally involved in the selection of Judges. Both the Executive and Parliament would be involved in the dismissal of Judges in the event of misconduct.¹³²

Fundamental to the separation of powers is the independence of the judiciary. The public must be confident that their disputes will be resolved according to the law and without "fear or favour, affection or ill will".¹³³ Judges' salaries must not to be reduced in their commission;¹³⁴ judges are protected against removal from office.¹³⁵ This ensures the judiciary are not improperly influenced by the executive or legislature branches. The Attorney-General has two important duties in maintenance of the rule of law and their independence. First, the Attorney-General protects the judiciary from criticism in the House. Secondly, he or she appoints and dismisses judges. It is a strong convention that in the judicial appointment process, the Attorney-General must act independently of politics

¹³⁰ House of Commons *The constitutional role of the Attorney General: fifth report of session 2006-07, report, together with formal minutes, oral and written evidence*, above n 17, at 137.

¹³¹ "The Judiciary" Ministry of Justice <<http://www.justice.govt.nz/courts/the-judiciary>>.

¹³² Crown Law Office *Judicial Appointments Protocol* (21 May 2014) at 2.

¹³³ Oaths and Declarations Act 1957, s 18.

¹³⁴ Constitution Act 1986, s 24.

¹³⁵ Section 23.

and therefore improper influence. This decision has been largely criticised with suggestions that a Judicial Appointments Unit be created. In my opinion, convention, consultation and transparency is enough to hold the Attorney-General to account. A failure to act properly, given the constitutional importance of judicial independence will result, in political consequences.

B Protecting the Judiciary from Criticism

The Attorney-General also has a particular responsibility as a Minister for protecting the judiciary from improper and unfair public criticism, for example, by addressing attacks on their decisions and by discouraging other Ministers from engaging in improper attacks or criticism.¹³⁶ This is a strong convention. It is also upheld in the Standing Orders which state “a member may not use offensive words against the House or against any member of the judiciary.”¹³⁷ Criticising judges is discouraged in order to maintain judicial independence, as discussed earlier.

Whether the Attorney-General is the right person to carry out this role of protection from political criticism has been a fierce debate in Australia. On one hand, it is not the Attorney-General’s role to defend the judiciary and the judiciary should not presume that the political office of Attorney-General can or should represent judicial interests.¹³⁸ On the other hand, it ensures that political attacks are responded to by a prominent, influential figure in the political arena and ensures that judges are not forced into that arena themselves.¹³⁹ On occasion, when political and media criticism of the courts or a court decision reaches a point where it threatens to undermine public confidence in the courts, it is at that point the Attorney-General should assert himself to protect the courts from irresponsible criticism.¹⁴⁰ In terms of accountability, this is important from a constitutional perspective. By linking the Attorney-General with the judiciary, it ensures there is not overbearing and intrusive legislature let into the judicial arena. Bovens reminds us that “good governance arises from a dynamic equilibrium between the various powers of the state” and this is achieved by the Attorney-General also standing up for the judiciary in situations of criticism. Ultimately,

¹³⁶ McGrath, “Principles for sharing law officer power: the role of the New Zealand Solicitor-General”, above n 14, at 203.

¹³⁷ SO 117.

¹³⁸ Alana McCarthy “The Evolution of the Role of the Attorney-General” (paper presented at the 23rd Annual Australia and New Zealand Law and History Society Conference, Murdoch University, Western Australia, 2-4 July 2004) at [1].

¹³⁹ At [28].

¹⁴⁰ Anthony Mason and Geoffrey Lindell “The Mason Papers: Selected Articles and Speeches” (Federation Press, 2007) at 98.

the Attorney-General is in a unique position as both “a bridge and a gatekeeper” between the Executive, Parliament and the Judiciary.¹⁴¹

C Judicial Appointment

In terms of the appointment of judges, new procedures were introduced in 1999, which made the Attorney-General responsible for the process. In *Judicial Protocol* it states that “making recommendations to the Governor-General for the appointment of Judges is a most important responsibility in a democracy such as New Zealand, operating under the rule of law.” Some of the guiding principles for the procedures and processes have been formalised to:¹⁴²

Clear and publicly identified processes for selection and appointment;
 Clear and publicly identified criteria against which persons considered are assessed;
 Clear and publicly identified opportunities for expressing an interest in appointment;
 A commitment to actively promoting diversity in the judiciary without compromising the principle of merit selection.

Appointments are made on the basis of merit.¹⁴³ The criteria for appointment include legal ability, qualities of character, personal and technical skills and reflection of society.¹⁴⁴ The Attorney-General’s Judicial Appointments Unit was set up to specifically handle expressions of interest in judicial appointments with the highest degree of confidentiality and security. The Appointments Unit is attached to the Ministry of Justice, but its records are held separately from those of the Ministry.¹⁴⁵ Judicial appointments are made by the Governor-General on the recommendation of the Attorney-General. By convention, the Attorney-General receives advice from the Chief Justice and the Solicitor-General for Supreme Court, Court of Appeal and High Court appointments.¹⁴⁶ District Court appointments involve advice from the Chief District Court Judge and the Secretary for Justice.¹⁴⁷ See Appendix One for the specific process from consultations to appointment.

¹⁴¹ Heraghty, above n 7, at 208.

¹⁴² Crown Law Office *Judicial Appointments Protocol*, above n 132, at 2.

¹⁴³ At 3.

¹⁴⁴ At 3.

¹⁴⁵ “Judicial Appointments” Courts of New Zealand
 <<https://www.courtsofnz.govt.nz/about/judges/appointments>>.

¹⁴⁶ “Judicial Appointments”, above n 145.

¹⁴⁷ “Judicial Appointments”, above n 145.

Although appointments are made by the Executive, it is a strong constitutional convention that the Attorney-General acts independently of party political considerations. It is imperative that appointments are made “in his or her capacity as First Law Officer of the Crown, rather than as cabinet minister dispatching government business.”¹⁴⁸ Convention means the Attorney-General mentions appointments at Cabinet after they have been determined, thereby ensuring that they are not subject to Cabinet discussion. The strength of conventions and subsequent political accountability are discussed next.

In terms of dismissal, the Attorney-General’s office is also concerned with initiating the removal of judges.¹⁴⁹ If the Judicial Conduct Panel concludes that the removal of a judge is justified, the Attorney-General retains absolute discretion as to whether to initiate the removal of the judge.¹⁵⁰ If the Attorney-General agrees that a superior court judge should be removed from the bench then they must address Parliament to propose that it recommend to the Governor-General that the judge be removed.¹⁵¹ If Parliament makes that recommendation then the Governor-General will dismiss the judge.¹⁵² For judges from the lower courts, the Attorney-General advises the Governor-General who can then formally remove the judge from office.¹⁵³ Responsibility for both appointment and dismissal enhances the need for accountability.

1 Conventions

Conventions hold that the Attorney-General has widespread consultation powers and that appointments are made based on merit. Finlayson confirms that he “consults widely on judicial appointments and, as a matter of course, this involves discussions with the New Zealand Law Society and the New Zealand Bar Association, as well as the Chief Justice and other heads of bench about the suitability of candidates.”¹⁵⁴ Justice McGrath contends that the strength of this convention is often under-estimated and that holders of offices

¹⁴⁸ Joseph, above n 59, at 822.

¹⁴⁹ Rosemary Judd “Symposium Paper on Judicial Accountability” (Equal Justice Project, University of Auckland, 22 August 2013) at 11.

¹⁵⁰ Philip A Joseph and Thomas Joseph “Judicial system – Judges” Te Ara – the Encyclopedia of New Zealand (13 July 2012) <<http://www.teara.govt.nz/en/judicial-system/page-7>>.

¹⁵¹ Judicial Conduct Commissioner *Complaints about Judicial Conduct* (Office of the Judicial Conduct Commissioner, July 2005) at 7.

¹⁵² At 7.

¹⁵³ At 7.

¹⁵⁴ “Attorney-General disagrees with independent judicial commissioner” (2012) New Zealand Law Society <<http://www.lawsociety.org.nz/news-and-communications/latest-news/2012/attorney-general-disagrees-with-independent-judicial-commissioner>>.

governed by conventional duties have a strong sense of obligation not to fail in those responsibilities.¹⁵⁵ Previous Solicitor-General Terrence Arnold expressed similar opinions, stating “these conventions are robust, essentially as a result of the scrupulous way in which they have been understood and observed by the relevant actors over many years.”¹⁵⁶ Thus although an Attorney-General could conceivably breach convention by making judicial appointments based on political motives,¹⁵⁷ it is important to keep in mind that “this can be said of many of our offices that are restrained by constitutional conventions”.¹⁵⁸

The operation and strength of some conventions can be verified by the public.¹⁵⁹ But while some may question an appointment, whether the appointment was actually based on improper influences and political factors can only be determined by the Attorney-General himself. This means that “the public must rely on the integrity and assurances of ‘insiders’ to know whether the convention is strong. Unsurprisingly, this provides a lesser sense of certainty about the reliability of the process.”¹⁶⁰ In Canada they have a very similar appointments process whereby judicial appointment is largely governed by convention. Peter McCormick summarised the problem as:¹⁶¹

It may well be that the right people are involved, that they are making their decisions on defensible criteria, and that their advice is strictly followed by the politicians, with purely professional considerations always being preemptive – but since we do not know that this is the case, we have to take it on faith, and this phrase is the very antithesis of transparency.

The fact that Law Officers have confirmed appointments occur independently of political considerations increases public confidence in the selection process. However, doubts are always likely to arise in any system that gives wide discretion to a government minister. This is especially so in a society who is increasingly willing to question authority figures and demand greater transparency.¹⁶² There will always be perceptions of bias, regardless

¹⁵⁵ John McGrath “Appointing the judiciary” [1998] NZLJ 314 at 317.

¹⁵⁶ Terrence Arnold “Judicial Appointments” (Speech to the New Zealand Bar Association Conference, Wellington, August 2003) at 7.

¹⁵⁷ Juliet Bull “The Implications of a Supreme Bill of Rights for Judicial Appointments in New Zealand” (LLB (Hons) Dissertation, Victoria University of Wellington, 2014) at 18.

¹⁵⁸ McGrath “Appointing the judiciary”, above n 151, at 317.

¹⁵⁹ Bull, above n 157, at 19.

¹⁶⁰ At 19.

¹⁶¹ Peter McCormick “Selecting the Supremes: The Appointment of Judges to the Supreme Court of Canada” (2005) J App Prac & Process 1 at 24-25.

¹⁶² Bull, above n 157, at 19.

of how impartial appointments are on paper and in practice, simply because of the fact that appointments are made by a government minister without any public oversight.¹⁶³ In terms of Bovens accountability this means that the democratic perspective is failing.

2 *Political accountability*

Two previous Attorneys-General in New Zealand state that ultimately the decision to appoint judges should rest with the Executive because they are then politically accountable for the choices they make in this area.¹⁶⁴ This indicates that failure to act apolitically would come under scrutiny in the House of Representatives. Although comments and criticisms on the judiciary are generally not allowed in Parliament, they are sometimes heard. It is difficult to suspect whether an appointment was made, or a candidate was rejected, on inappropriate grounds. Diversion from the *Judicial Protocol* may give some indication and therefore allow political opposition to mobilise. Former Chief Justice Sir Thomas Eichelbaum reminds us that “what remain unknown and unseen are the cases where for politically influenced reasons, particular persons are not appointed”.¹⁶⁵ Thus the protection afforded by political accountability is fairly weak given that appointments are announced only after they have been decided.

In a situation where the Attorney-General appointed his or her ‘buddy’ as a judge, there are *no* accountability mechanisms in place. In my opinion, it would be appropriate in Parliament to scrutinise the actions of the Attorney-General and question the process. If this were to happen, it is likely that a Judicial Appointments Commission would be formed.

3 *A Judicial Appointments Commission*

For fear of political manipulation, academics have suggested that there should be an independent Judicial Appointments Commission. Since April 2006, judicial appointments in the United Kingdom came under the responsibility of an independent Judicial Appointments Commission. Previously, appointments were made on the recommendation of the Lord Chancellor, who, like the Attorney-General, was a government minister and member of cabinet. This process was strongly criticised for allowing a member of the government to have the sole responsibility for appointing judges. The creation of the Judicial Appointments Commission therefore strives “to maintain and strengthen judicial

¹⁶³ Bull, above n 157, at 19.

¹⁶⁴ Rt Hon Paul East QC “A Judicial Commission?” (1995) NZLJ 189 and Rt Hon Sir Geoffrey Palmer SC “Judicial Selection and Accountability: Can the New Zealand System Survive?” in Gray and McLintock (eds) *Courts and Policy* (Brookers, Wellington, 1995) 11 at 84.

¹⁶⁵ Thomas Eichelbaum “The Inaugural Neil Williamson Memorial Lecture: Judicial Independence Revisited” (1997) 6 *Canterbury Law Rev* 421 at 427.

independence by taking responsibility for selecting candidates for judicial office out of the hands of the Lord Chancellor and making the appointments process clearer and more accountable”.¹⁶⁶ In terms of accountability, a Judicial Appointments Commission would improve the appointment process because it would promote wider consultation, remove mystique surrounding the appointments process and avoid risk of political influence. The Commission subsequently recommends candidates to the Lord Chancellor, or to the Attorney-General in New Zealand’s situation, who has a very limited power of veto.

New Zealand has resisted calls for a Judicial Appointments Commission. Opponents question the need for an independent commission and point to the risk of political appointments to the commission itself and therefore compromising its independence. No questions have been raised about the independence and professionalism of judges appointed under the present system.¹⁶⁷ I therefore conclude there is no pressing need for a commission to be created. The system is relatively transparent through its online reporting, with clear guidelines as to process and consultation, which is ensured by convention. It is important, however, to improve accountability in the situation of poor decision-making on the Attorney-General’s behalf. It may be appropriate in these circumstances that the Standing Orders are relaxed and therefore allow Parliament to question the Attorney-General’s process.

VII Mechanisms outside Formal Accountability

A Introduction

Accountability and transparency are essential to the functioning of our open government. New Zealand ranks consistently highly by international standards for an open government.¹⁶⁸ In 2014, the World Justice Project ranked the country number two in the world for “Open Government”.¹⁶⁹ However, the increasing expectation of accountability and transparency from the public sector must be appropriately balanced with allowing and supporting the ability of the government to govern effectively and efficiently as they are elected to do.¹⁷⁰ Accountability overloads are circumstances in which, “the relevant actor

¹⁶⁶ “About us” Judicial Appointments Commission <<https://jac.judiciary.gov.uk/about-us>>.

¹⁶⁷ “Story: Judicial system” Te Ara The Encyclopedia of New Zealand <<http://www.teara.govt.nz/en/judicial-system/page-7>>.

¹⁶⁸ Mai Chen *Public Law Toolbox: Solving Problems with Government* (2nd Ed, Lexis Nexis, Wellington 2014) at 27.

¹⁶⁹ “Country Profiles” WJP Rule of Law Index 2014 <http://worldjusticeproject.org/sites/default/files/files/country_profiles.pdf>.

¹⁷⁰ Mai Chen, above n 168, at 27.

is so occupied giving account within various, possibly competing accountability frameworks, that he or she has no time to do his or her job”.¹⁷¹ As analysed above, the Courts, Parliament, Crown Law and Solicitor-General are not appropriate accountability forums by Bovens definition. However, this does not mean the role is free for the actor to use power as he or she wishes. In some respects, transparency and culture are equally important. In the next part, I discuss the culture that surrounds the Attorney-General. First, it is necessary that the actor is a lawyer. A legal education is important for the legal advisor role and introduces another accountability forum that is the New Zealand Law Society. Secondly, the actor’s own sense of duty makes the selection process a crucial one.

B Lawyer Requirement

Currently there is no legal requirement concerning the qualifications of the Attorney-General. However, it has been tradition in New Zealand to appoint a lawyer.¹⁷² This adds to the *control* of the role.

There have been two administrations in which the Attorney-General has not been a lawyer. Firstly, on the resignation of Downie Stewart, the Prime Minister at the time, also became Attorney-General in 1933, because, it seems, he was of the view there was no lawyer suitable for the office in the ranks of the parliamentary party supporting the government. While there is no constitutional impediment, there would be concern among the legal profession if the holder were not qualified as a lawyer. That is because the Attorney-General’s responsibilities are essentially those of the senior legal adviser and legal decision-maker within government.¹⁷³

Secondly, in 2005, Honourable Michael Cullen, namely Deputy Prime Minister and Leader of the House, was appointed the Attorney-General under Helen Clark’s Labour government until the General Election in September 2005.¹⁷⁴ It stirred much controversy among the legal profession to the point that the New Zealand Law Society passed a resolution

¹⁷¹ Rayner Thwaites and Dean Knight “Administrative Law Through a Regulatory Lens: Situating Judicial Adjudication within a Wider Accountability Framework” in Susy Frankel and Deborah Ryder (eds) *Recalibrating Behaviour: Smarter Regulation in a Global World* (Wellington, LexisNexis, 2013) at 529-558.

¹⁷² Cullen, above n 108.

¹⁷³ McGrath, “Principles for sharing law officer power: the role of the New Zealand Solicitor-General”, above n 14, at 205.

¹⁷⁴ “Former MPs - Hon Dr Michael Cullen” (30 April 2009) New Zealand Parliament <<http://www.parliament.nz/en-nz/mpp/mps/former/49PlibMPsFormerMichaelCullen1/cullen-hon-dr-michael>>

deprecating the appointment.¹⁷⁵ Controversy was muted, perhaps, by the power of the office and the obvious competence of its holder. Cullen was subsequently reappointed as Attorney-General in March 2006 on the resignation of the Honourable David Parker.¹⁷⁶ In a speech to the Legal Research Foundation, Cullen justified his lack of legal qualifications. Cullen said that “the Attorney-General is the senior law officer of the Crown but, apart from a ten-year experiment with a non-political Attorney-General (James Prendergast from 1865-1875, later Chief Justice) the Attorney-General is also a politician and Minister and is not necessarily a lawyer.”¹⁷⁷ He claimed that he “cannot accept that admission to the Bar confers some kind of sacred knowledge that cannot be acquired any other way”.¹⁷⁸ That may be so, but Cullen still required a Parliamentary Private Secretary for assistance, Russell Fairbrother, who was a registered lawyer.

Opposing this view, one academic noted that the skills required for Attorney-Generalship cannot be acquired in any other way other than through a legal education.¹⁷⁹ The Attorney-General’s role is the *principal legal adviser* for the government and, therefore, is responsible for ensuring that the government conducts itself in accordance with the law.¹⁸⁰ The Attorney-General may appear personally in cases of exceptional gravity or great public importance either nationally or internationally.¹⁸¹ Moreover, the Attorney-General provides legal advice to Cabinet – a function involving the practice of law. The Attorney-General’s role is also to encourage ministers to seek legal advice in the course of government decision-making. A lawyer is able to identify issues of potential legal controversy where legal advice is important. If Cabinet issues are delayed due to delayed legal insight, “then the machinery of government may become very inefficient”.¹⁸²

The Attorney-General is considered leader of the legal profession, especially given its titular significance. The decision of Helen Clark to appoint Cullen may have been a result of a lack of other lawyers in Cabinet at the time of his appointment. Nevertheless, it is imperative that future Prime Ministers “recognise these raw realities and, in their wisdom,

¹⁷⁵ Richard Worth “Cullen appointment degrades office of Attorney-General” *The New Zealand Herald* (online ed, 5 Jan 2005).

¹⁷⁶ “Former MPs - Hon Dr Michael Cullen”, above n 174.

¹⁷⁷ Matthew Palmer “What is New Zealand’s constitution and who interprets it? Constitutional realism and the importance of public office-holders?”, above n 1, at 150.

¹⁷⁸ Cullen, above n 108.

¹⁷⁹ Patel, above n 100, at 259.

¹⁸⁰ At 259.

¹⁸¹ At 259.

¹⁸² At 259.

desist from such controversial appointments”.¹⁸³ Richard Worth, National Party spokesman on justice at the time, added that “if New Zealand is to pursue a lonely course with the appointment of an Attorney-General without legal skills, then the tasks associated with the office will be compromised.”¹⁸⁴ Therefore in my opinion, it is necessary for the position to be occupied by a lawyer and thereby maintain a good relationship with the administrators of the law: the judiciary. A strong legal background also provides the possibility of added control through the New Zealand Law Society. This will be dealt with next.

C New Zealand Law Society

If convention holds that the Attorney-General be a lawyer, then he or she is subject to the Lawyers and Conveyancers Act 2006 and the regulations and rules made under that Act.¹⁸⁵ The regulatory functions of the Law Society include controlling and regulating the practice of the profession of law in New Zealand, and assisting and promoting the reform of the law (for the purpose of upholding the rule of law and the administration of justice).¹⁸⁶ The Law Society issues annual practicing certificates for lawyers to be able to provide legal services. This means that the Attorney-General is also subject to the rules of Client Conduct and Care and failure to do so will result in scrutiny by the Law Society. This is one means of accountability: a learning perspective as described by Bovens to ensure that any major departures from accepted practice are managed accordingly.

The New Zealand Law Society supports that the Attorney-General (in practice with the Solicitor-General/Crown Law) should assume the role of central authority in relation to extradition on criminal processes.¹⁸⁷ “Such decisions can be left to an official such as the Solicitor-General to certify that processes have been properly followed.”¹⁸⁸ The Law Society believes that the Solicitor-General may ensure that the Attorney-General’s job is done properly; as previously discussed, however, in my opinion the Solicitor-General is not in a position to do this. Overall, the Law Society does not act as a proper check on the actions of the Attorney-General. Failure to abide by the rules and regulations as a lawyer,

¹⁸³ Patel, above n 100, at 259.

¹⁸⁴ Worth, above n 175.

¹⁸⁵ See Lawyer and Conveyancers Act 2006, s 4.

¹⁸⁶ “Governance” New Zealand Law Society <<https://www.lawsociety.org.nz/about-nzls/governance>>.

¹⁸⁷ “Attorney-General preferred extradition central authority” New Zealand Law Society <<https://www.lawsociety.org.nz/news-and-communications/news/march-2015/attorney-general-preferred-extradition-central-authority>>.

¹⁸⁸ “Attorney-General preferred extradition central authority”, above n 186.

may mean that the Attorney-General, if serious enough, could have his practising certificate removed. At the end of the day, the Law Society are not in a particularly strong position to regularly pose questions about each of the roles the Attorney-General occupies or make a judgement with sanctions. The accountability does not meet the standard held by Bovens. In saying that it helps to guide and contribute to the overall control of the role.

D A Sense of Duty

The Prime Minister determines portfolio allocations and ministerial rankings, taking into account practical and political considerations.¹⁸⁹ The Attorney-General, therefore is appointed, on merit, by the Prime Minister. The way the Attorney-General interprets their role is really a matter of their personal understanding of the role. Some, like David Lange, thought the Attorney-General should be outside Cabinet to try and de-politicise it.¹⁹⁰ Being in Cabinet, however, has the advantage of the Attorney-General having a better understanding of the potential issues that may raise rule of law issues. It means that section 7 reports enabled the Attorney-General to interact with other Ministries to make their policies New Zealand Bill of Rights compliant. In essence, the role is full of ambiguity and therefore depends on the personal integrity of who holds the office.

Selection process may therefore be the best form of control – a rigorous process that ensures the best candidate for the job is appointed and will uphold the democratic values of New Zealand’s constitution. However, no information is publicly available regarding the selection process for the Attorney-General. It is predicted that an individual with a legal background and litigation experience will be selected, based on that merit. For example, Finlayson, prior to entering Parliament in 2005, practised law in Wellington for over 25 years.¹⁹¹ He had nine appearances in the Privy Council and is a member of the Rules Committee of the High Court which regulates court procedures in New Zealand. Finlayson was appointed to the role of Attorney-General in 2008 along with other separate ministerial portfolios. After the 2011 and 2014 elections, Chris was reappointed Attorney-General.¹⁹²

Matthew Palmer speaks of a constitutional culture where actors can frame their roles as they see fit.¹⁹³ They do this by either looking to past traditions, using conventions as

¹⁸⁹ Cabinet Office, above n 4, at [2.7].

¹⁹⁰ Interview with Margaret Wilson.

¹⁹¹ “About Chris” Chris Finlayson Member of Parliament <<http://www.chrisfinlayson.co.nz/>>.

¹⁹² “About Chris”, above n 191.

¹⁹³ Matthew Palmer “What is New Zealand’s constitution and who interprets it? Constitutional realism and the importance of public office-holders?”, above n 1.

guidance or using their own sense of rightness to make the best actions in the role. It is through the appointment process that an actor with a sense of duty will be appointed and this is the controlling factor of the role. Bovens' learning perspective is applicable here because Attorneys-General can look to previous actors and search for improvements and successes in the role. Bovens articulates that the "public nature of the accountability process teaches others in similar positions what is expected of them, what works and what does not."¹⁹⁴ Conventions are inherently a source of scepticism because they lack any legal enforcement. But it must be reminded that:¹⁹⁵

Within the conventions of Parliament the Attorney-General is accepted as having an individual, independent judicial responsibility to act in a judicial way, and to report on matters even when there may be political pressures not to notice that particular matter. Most of the people who have been appointed in the past to the position of Attorney-General are of such a calibre that they would rather resign than fail to carry out their legislative responsibilities in a particular way.

VIII Options for Reform

A Cabinet Membership

New Zealand supports the Attorney-General sitting in Cabinet in order for the public interest to be properly ascertained. The public interest "cannot be determined in isolation from practical realities, and that may require that political factors be considered along with others".¹⁹⁶ However, if there is growing concern around the Attorney-General's extensive power with no accountability, one alternative is for the Attorney-General to sit outside of Cabinet and adopt the English model.

In the United Kingdom, the Attorney-General is a Minister, directs prosecutions (in conjunction with the Director of Public Prosecutions) but does not regularly attend meetings of Cabinet.¹⁹⁷ In 1924, under Ramsay Macdonald's government, the then Attorney-General was Sir Patrick Hastings who allegedly dropped a sensitive prosecution as a result of political pressure from the Prime Minister.¹⁹⁸ The truth of the accusation

¹⁹⁴ Bovens, above n 3, at 464.

¹⁹⁵ (14 August 1990) 510 NZPD 3463.

¹⁹⁶ Cullen, above n 108.

¹⁹⁷ "Duties of the Attorney-General" UK Parliament
<<http://www.publications.parliament.uk/pa/cm200708/cmselect/cmjust/698/69805.htm>>.

¹⁹⁸ Cornell W Clayton *The Politics of Justice: Attorney General and the Making of Government Legal Policy: Attorney General and the Making of Government Legal Policy* (Routledge, Britain, 1992) at ch 2.

remains a matter of debate; Hastings vowed throughout that he made the decision without interference. In any event, the episode precipitated the downfall of the Macdonald government and appears to have established as a constitutional rule the office's independent status.¹⁹⁹ Subsequently, since 1928, the British Attorney-General has not been a member of Cabinet.²⁰⁰

The Constitutional Affairs Committee has recommended that the Attorney-General should attend Cabinet by invitation, and then only for the consideration of specific and relevant agenda items. The arrangements for the Attorney-General to attend Cabinet should be clear and specific to giving legal advice. This is because it is important to make clear, when the Attorney-General is giving advice to Cabinet, that he is *not* part of that group but is a person advising that group.²⁰¹ By not being part of that group, the advice can be said to be objective.²⁰² The danger of the Attorney-General participating generally in Cabinet policy-making is that it blurs the distinction which should be clearly maintained between the function of legal adviser and a member of the ministerial and political leadership.²⁰³ Separating the political functions of the Attorney-General from the legal functions is best achieved through transparency.

My view on membership of Cabinet in New Zealand is that it is appropriate for the Attorney-General to sit in Cabinet. Although a number of the advisory roles must be discharged free of partisan factors, political considerations in the wider sense can never be ignored. Concerns of political involvement can be resolved through more robust accountability mechanisms.

B A Select Committee and Codification

It has been also suggested in England that a parliamentary select committee be established to specifically scrutinise the Attorney-General.²⁰⁴ At present, however, there is no such committee. Lord Goldsmith sees value in such scrutiny by a suitably well-informed select

¹⁹⁹ Clayton, above n 198, at ch 2.

²⁰⁰ See Sir Elwyn Jones "The Office of the Attorney-General" (1969) Cambridge Law Journal 43.

²⁰¹ House of Commons *Draft Constitutional Renewal Bill* (Joint Committee on Draft Constitutional Renewal Bill, 21 May 2008) at 111.

²⁰² At 111.

²⁰³ House of Commons *Draft Constitutional Renewal Bill (provisions Relating to the Attorney-General): Fourth Report of Session 2007-08*, above n 45, at 12.

²⁰⁴ House of Commons *The constitutional role of the Attorney General: fifth report of session 2006-07* (Constitutional Affairs Committee, 17 July 2007), above n 17, at 62.

committee.²⁰⁵ There would need to be some limitations, for example in relation to current criminal cases and national security issues. In Lord Goldsmith's opinion, such an arrangement could significantly enhance accountability for, and understanding of, the Attorney-General's role.²⁰⁶ The British Attorney-General suggests two possible ways of clarifying the Attorney-General's role. One is the imposition of a statutory duty (comparable to that imposed on the Lord Chancellor by the Constitutional Reform Act) to promote the Rule of Law.²⁰⁷ This might be coupled with further provisions as to the qualifications for appointment as a Law Officer and the nature of the role.²⁰⁸ These proposals would simply codify the role in a way which might give greater clarity and transparency.

As surfaced in the Draft Constitutional Renewal Bill of United Kingdom analysis, "the accountability of the Attorney-General remains limited".²⁰⁹ The Bill proposed that the Attorney-General improve on current annual reports as well as making reports on situations where the decision made was not to prosecute. The reform Bill stated that "the Attorney-General must lay before Parliament a Report on the exercise of his or her functions during the previous year".²¹⁰ Mandated transparency would, at least, contribute to more transparency and responsiveness from the role. However, issues remained unsolved; critics argue that it is "unlikely to create greater accountability, given the limits on the information which they will contain".²¹¹

IX Conclusion

The Attorney-General holds strong legal and political influence in New Zealand's constitutional arrangements. The role's influence on lawyers, politicians, Crown Law, Cabinet, the Prime Minister and the Governor-General stimulated my accountability evaluation. This paper has aimed to analyse the relative strength of accountability forums for the Attorney-General in relation to each of the actor's roles. First, the Attorney-General is the senior law officer. In this capacity he or she provides legal advice which is protected

²⁰⁵ House of Commons *The constitutional role of the Attorney General: fifth report of session 2006-07* (Constitutional Affairs Committee, 17 July 2007), above n 17, at 62.

²⁰⁶ At 62.

²⁰⁷ At 62.

²⁰⁸ At 62.

²⁰⁹ At 62.

²¹⁰ House of Commons *Draft Constitutional Renewal Bill (provisions Relating to the Attorney-General): Fourth Report of Session 2007-08*, above n 45, at 21.

²¹¹ At 3.

by legal professional privilege. The Attorney-General also advises the Governor-General on the Royal assent and is required to report to the House on bills inconsistent with the New Zealand Bill of Rights. For the latter, there is no legal accountability in place as decided in *Boscawen v Attorney-General*. It is suggested in this paper that judicial review could be introduced in relation to this report. There was some mention by the courts that if the Attorney-General were to cause atrocity, consequences would result. Ultimately, it is a political function and therefore must be accounted for politically in the House of Representatives. The Courts, a standing Committee and a supreme Bill of Rights were presented as alternatives to section 7 reporters.

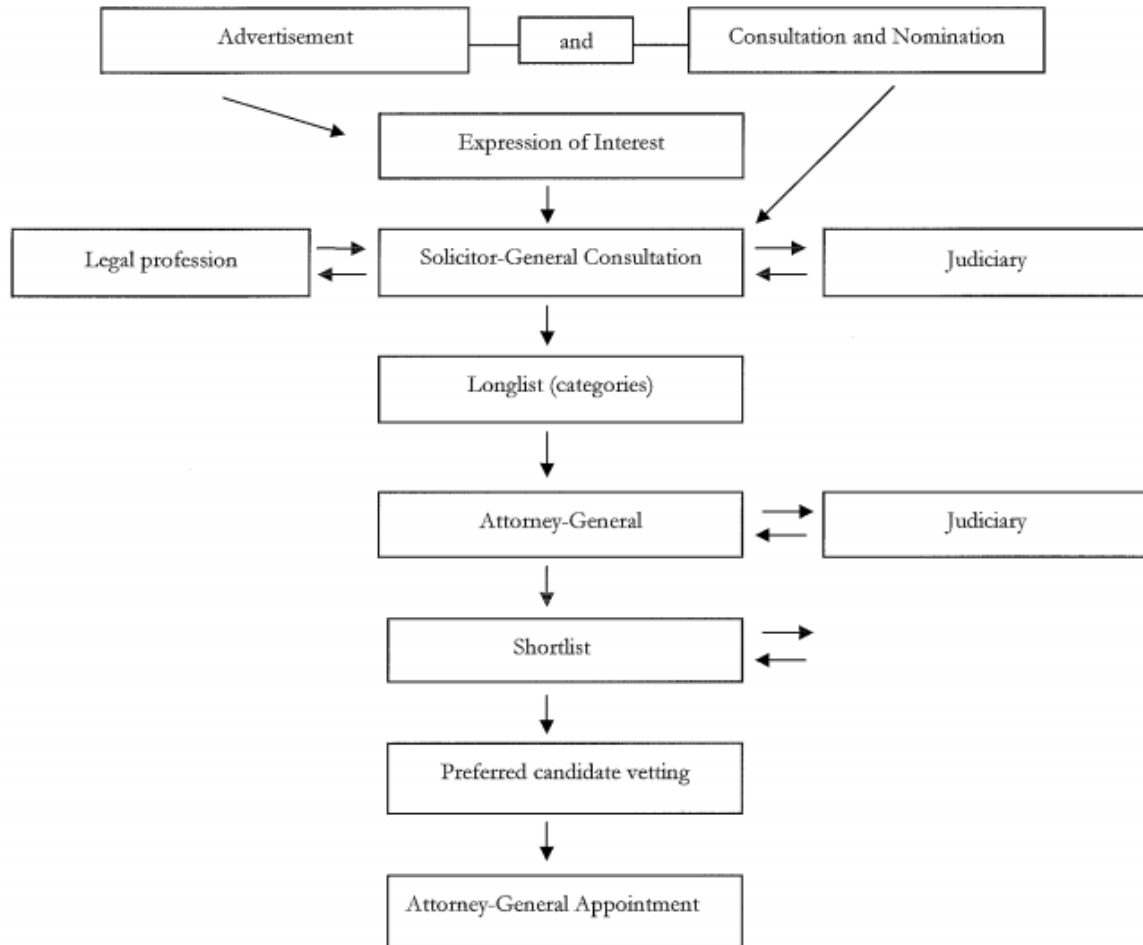
Delegating the role of legal proceedings to the Solicitor-General was discussed next. This responsibility is predominantly controlled by convention. Possible accountability forums included the Solicitor-General and Crown Law Office, the media and Parliament. Through my analysis I concluded that the relative forums did not adequately meet Bovens' definition. Most problematically was that they lacked the ability to make a judgement and provide consequences.

The Attorney-General is the link between the executive and the judiciary. The actor is responsible for appointing and dismissing judges and for protecting them from criticism. This role is particularly important in terms of being accountable in order to ensure the rule of law is maintained. Conventions, political accountability and a judicial appointment commission were discussed in relation to this.

It is suggested that the need for control of the role is just as important as accountability. This does not necessarily need to be achieved through forums that scrutinise, judge and provide consequences for the Attorney-General, but shape the role so that its power is not abused. Mechanisms outside of formal accountability include requiring the actor to be a lawyer, with subsequent responsibilities to the Law Society, and their own sense of duty. For the latter, this means that the Attorney-General selection process is crucial to adequate performance of the duties.

Finally, this paper provided a comparative analysis, predominantly with the United Kingdom. Their Attorney-General sits outside of Cabinet in order to remove politics from the legal process. Though it has its merits, in my opinion, it is best that New Zealand's Attorney-General remains in Cabinet in order to be informed with our current political situation and to fully engage in questioning in the House. There are merits for a select

committee to scrutinise the actions of the Attorney-General in order to improve regular reporting and therefore enhance transparency.

X Appendix One: Judicial Appointment Process

XI Appendix Two: Pike River Mine (Question Time 5 March 2014)

ANDREW LITTLE (Labour) to the **Attorney-General**: Will he release all correspondence between the Christchurch Crown Solicitor or any other solicitor acting for the Ministry of Business, Innovation and Employment, and counsel for Peter Whittall on the decision not to proceed with the prosecution of Mr Whittall under the Health and Safety in Employment Act 1992 relating to conditions at the Pike River Mine that lead to the deaths of 29 miners; if not, why not?

Hon CHRISTOPHER FINLAYSON (Attorney-General): No, because that is not a decision for me to make.

Andrew Little: In light of that answer and in light of the public statement made by counsel for Peter Whittall on Friday, 28 February at 4.23 p.m. that “Neither Mr Whittall nor Mr Grieve have any issue with any of their letters on this matter being made public.”, and thereby waiving their legal professional privilege, why will he not now ensure that that correspondence is released?

Hon CHRISTOPHER FINLAYSON: The member did not listen, or did not listen carefully, to my answer to his first question. That is not a decision for me to make. Perhaps I can help the honourable member by referring him to the Solicitor-General’s *Prosecution Guidelines* and the introduction to it by me, which says “Under our constitutional arrangements, the Attorney-General is responsible through Parliament”—

Grant Robertson: This is humble.

Hon CHRISTOPHER FINLAYSON: Well, instead of making unpleasant comments, Mr Robertson should listen, because, I am sure Mr Little would agree, this is a very serious matter.

Mr SPEAKER: Order! If the Minister could just give his answer, it would be helpful.

Hon CHRISTOPHER FINLAYSON: I will go back for a minute, because Mr Little at least is taking this seriously. Under our constitutional arrangements, the Attorney-General is responsible through Parliament to the citizens of New Zealand for prosecutions carried out by or on behalf of the Crown. In practice, however, the prosecution process is superintended by the Solicitor-General who, pursuant to section 9A of the Constitution Act 1986, shares all the relevant powers vested in the Office of the Attorney-General.

Andrew Little: What information about the state or progress of the prosecution did Cabinet have before it when deciding not to take action to ask the shareholders in Pike

River, including Crown entities, to make good the reparation orders made by the District Court on 5 July 2013?

Hon CHRISTOPHER FINLAYSON: Regrettably, the member did not listen to the first answer to the question. Cabinet did not make a decision, and the implication in his question is deeply constitutionally offensive. These are decisions that are made by the Solicitor-General. Cabinet has no place in deciding on the initiation, the continuance, or the bringing to an end of a prosecution.

Andrew Little: Was the offer on behalf of Mr Whittall, to pay \$3.41 million to the families of the dead miners, taken into account in the decision not to proceed with the prosecution and in the subsequent decision to offer no evidence and seek a discharge, the equivalent of an acquittal?

Hon CHRISTOPHER FINLAYSON: As I said, these are matters for the Solicitor-General. To the best of my knowledge, when the Solicitor-General and, through him, the Crown prosecutor in Christchurch were determining the matter, that was a factor that was taken into account. But there were a number of matters that meant that the Crown decided not to proceed with the prosecution.

Andrew Little: How was the public interest test, required under paragraph 5.1.2 of the Solicitor-General's prosecution guidelines of 1 July 2013, met in this case, in light of the clear findings of the royal commission of inquiry of the level of negligence by the mine owner's officers, leading up to the fatal explosion on 19 November 2010 and the fact that 29 men died at work in one fell swoop, causing widespread public alarm?

Hon CHRISTOPHER FINLAYSON: Once again, I have to bring the member back to the prosecution guidelines and to the person who makes the decision, and the factors that are taken into account in making the decision. These matters are free from political interference, or at least in a National Government they are.

Hon Trevor Mallard: I raise a point of order, Mr Speaker. Can I invite you to go back and look at that answer, look at the *Cabinet Manual*, and look at the Standing Orders, and inform us who is answerable in Parliament for those decisions if it is not the Attorney-General.

Mr SPEAKER: I will accept the invitation from the member, and I will certainly have another look at it.

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