

CHRISTOPHER JAMES WILSON

THE APPOINTMENT OF JUDGES: TIME FOR  
A CHANGE?

LLM RESEARCH PAPER

PUBLIC LAW: EXPLORING THE EDGE (LAWS 505)

FACULTY OF LAW

VICTORIA UNIVERSITY OF WELLINGTON

2005

W747 WILSON, C.J. The appointment of judges.

AW

8741  
UW  
56  
747  
05



Victoria

UNIVERSITY OF WELLINGTON

*Te Whare Wānanga  
o te Ūpoko o te Ika a Māui*



LIBRARY

## CONTENTS PAGE

### ABSTRACT

Content	Page
Abstract	1
Introduction	2
PART ONE:	
The Existing Process	3
The Key Requirements of any Judicial Appointment System	5
PART TWO:	
Potential Politicisation of the Current System	6
Quality of Appointments	13
Public Confidence in Appointments	15
PART THREE:	
Membership	18
The Appointment Process	19
Judicial Commissions and the Power of Appointment	20
PART FOUR:	
Political Neutrality	23
Quality of Appointments	27
Public Confidence in the Judiciary	33
Conclusion	38



## **ABSTRACT**

The following paper is concerned with the appointment of the judiciary in New Zealand.

This paper is intended to give an overview of the current appointment process and identify the key criteria of any appointment system. It then compares the current appointment process with those key criteria in order to establish whether or not the current process is in need of reform. The necessary conclusion is that some level of reform is required.

The second objective of this paper is to decide whether the establishment of a Judicial Appointments Commission is a justifiable response to the current need for reform. This question is assessed by considering whether the introduction of a Commission would result in an appointment system that better satisfies the key criteria identified in this paper. Ultimately, this paper concludes that a Judicial Appointments Commission is not justifiable in the New Zealand context.

## **STATEMENT ON WORD LENGTH**

The text of this paper (excluding abstract, table of contents and footnotes) comprises approximately 12,447 words.

Public Law – Appointment of Judges.

## INTRODUCTION

As the chief expositors, applicators and developers of the law it can hardly be disputed that judges are important constitutional actors. Therefore, it is important to ensure that the process by which they are appointed will produce a judiciary that is of the highest possible quality and able to act with absolute integrity.

This paper discusses the problems associated with our current appointment process and asks whether the creation of an independent Judicial Appointments Commission would be a better means of appointing the custodians of the rule of law.

The first part of this paper describes the existing appointment process in New Zealand and sets out the key criteria for a successful appointment regime.

Our process has been criticised for failures in relation to each of these key criteria. Part two discusses those criticisms and concludes that the current system has a number of inherent short-comings, and that some level of reform is justified.

A Judicial Appointments Commission has often been suggested as a potential alternative to the current process. The third part of this paper identifies and discusses the various models that have been suggested for such a Commission.

Finally, part four considers whether the establishment of a Judicial Appointments Commission would constitute an improvement over the current appointment process. To that end the various models are assessed in terms of their likely impact on the key aspects of any appointment system if they were to replace the present system.

Ultimately, this paper concludes that, while an Appointments Commission would address some of the current concerns, it would also create a number of new

problems and would not result in an appointment process that better conforms with the key criteria identified in this paper. Therefore, this paper is of the opinion that while the present system is in need of reform, its replacement by a Judicial Appointments Commission is not a viable alternative.

## **PART 1: PORTRAIT OF AN APPOINTMENT SYSTEM**

Part one of this paper describes the existing appointment process in New Zealand. It also identifies the key criteria for a successful appointment regime.

### **I THE EXISTING PROCESS**

The current procedures for judicial appointment came into effect in 1999, following revision of the process by successive Attorney-Generals.<sup>1</sup> The changes were designed to standardise the appointment process, with administrative matters managed by the Judicial Appointments Unit in the Department of Justice.

Section 4(2) of the Judicature Act 1908 provides the rather bare statement that judges are to be appointed by the Governor-General. In practice, appointment is made by the Governor-General acting upon the advice of the Attorney-General after a relatively informal process of consultation and discussion has taken place. The current process of appointment has evolved over time and is largely a matter of convention.<sup>2</sup>

#### **A Criteria for Appointment**

Currently section 6 of the Judicature Act specifies that no person shall be appointed a High Court judge unless they have held a practicing certificate as a barrister or solicitor for at least seven years. This is the limit of legislative qualifications.<sup>3</sup> However, as part of the formalisation process a set of specific

<sup>1</sup> Philip Joseph *Constitutional and Administrative Law in New Zealand* (2nd edition, Brooker's, Wellington, 2001) 255.

<sup>2</sup> Ministry of Justice *Appointing Judges: a Judicial Appointments Commission for New Zealand?* (Ministry of Justice, Wellington, 2004) 18.

<sup>3</sup> David Williams QC "The Judicial Appointment Process" [2004] NZ Law Rev 39, 43.

criteria for appointment has been established by the Attorney-General to aid the objective assessment of the most suitable candidates. These are a list of "clearly defined, transparent and publicly announced criteria" that are currently used in assessing candidates for judicial office.<sup>4</sup> The listed criteria are legal ability, qualities of character, personal technical skills and reflection of society.

## II THE KEY REQUIREMENTS OF ANY JUDICIAL APPOINTMENT

### *B The Consultation Process*

Consultation as to potential candidates is fairly widespread. The Judicial Appointments Unit advertises for nominations or expressions of interest, consulting with organisations such as the New Zealand Law Society, New Zealand Bar Association, Maori Law Society, the President of the Law Commission and others. All names that meet the criteria are pooled and held by the Judicial Appointments Unit on a confidential database.<sup>5</sup> For appointments to the High Court the candidates undergo a short-listing process managed by the Chief Justice and the President of the Court of Appeal, with assistance from the Solicitor-General if necessary.<sup>6</sup> When a vacancy occurs further consultation is undertaken and several names are submitted to the Attorney-General, from which he or she chooses the preferred candidate.

A similar process is undertaken for appointments to the District Court, except that the process is managed by the Department of Justice and not the Solicitor-General. Also, a series of interviews are conducted in relation to particular District Court vacancies.<sup>7</sup>

Unlike the High Court and District Court, advertising is not undertaken for appointments to the Court of Appeal. This is because appointments to the Court of Appeal are generally made through the elevation of existing High Court Judges.<sup>8</sup>

<sup>4</sup> "Judicial Appointments: Office of High Court Judge" available on-line at <http://www.justice.govt.nz/pubs/other/pamphlets/2003/>.

<sup>5</sup> David Williams QC, above n 3, 45.

<sup>6</sup> Ministry of Justice, above n 2, 19.

<sup>7</sup> Ministry of Justice, above n 2, 20.

<sup>8</sup> Ministry of Justice, above n 2, 21.



The Supreme Court is a recent addition to New Zealand's legal framework, however, it is expected that most appointments to the Supreme Court will come from the Court of Appeal or the High Court.<sup>9</sup>

## **II THE KEY REQUIREMENTS OF ANY JUDICIAL APPOINTMENT SYSTEM**

A recent Ministry of Justice discussion paper on the appointment of judges identified the following criteria as the key hallmarks of any judicial appointment system.

- 1) The appointments must be made on the basis of merit;
- 2) Public confidence must be maintained in the process, the courts and the judiciary;
- 3) The result should be a judiciary which is both capable of independent, impartial and competent decision-making, and reflective of the society it serves; and
- 4) The process should avoid inappropriate politicisation.<sup>10</sup>

In essence there are three essential elements of a sound appointment system. It should result in the best available candidates being appointed in a manner that is free from political interference or bias and which maintains public confidence in the judiciary.<sup>11</sup>

<sup>9</sup> Ministry of Justice, above n 2, 21.

<sup>10</sup> Ministry of Justice, above n 2, 11.

<sup>11</sup> David Williams QC, above n 3, 47.

## **PART 2: CRITICISMS OF THE CURRENT SYSTEM**

Our current appointment system has been widely criticised in recent years. This part describes and details those criticisms.

Criticism of the current process may be split into three broad categories. These categories reflect the three key hallmarks of a good appointment system identified by this paper.

### **I POTENTIAL POLITICISATION OF THE CURRENT SYSTEM**

One of the underlying objectives of the any appointment system is to preserve judicial independence and avoid a politicised judiciary. Critics of the current system argue that it lacks the necessary constitutional safeguards to ensure that the appointment of judges are not, and will not, be politically motivated.

#### **A Protection from Political Interference in the Current System**

Under the current appointment system judicial independence is intended to be preserved by the

“cardinal convention” that judicial appointments are never based on political influences. This is notwithstanding the fact that the Attorney-General is a member of Parliament, usually a member of Cabinet, as well as holding other ministerial portfolios.

In addition, as judicial appointments are not to be politically motivated they are not subject to discussion by the Cabinet. Instead, the Attorney-General merely announces the appointment to Cabinet, followed by formal advice to the Governor-General. As such, the Attorney-General is acting in their capacity as first law officer of the Crown, and not as a Cabinet Minister. Indeed, the fact that the Attorney-General is politically appointed is intended to provide a means of

accountability for his or her actions and act as a democratic check against political appointments.

### **B Criticism of This Protection**

The obvious disadvantage of this system, identified by the 1978 Royal Commission on the Courts, is the lack of any constitutional safeguards that might prevent the influence of political favouritism in the appointment process. As the Commission noted, it is<sup>12</sup>

only when a judge is appointed [that] the provisions in respect of tenure of office, removal and fixing of salaries give statutory recognition to the principle of independence so that there is, at least in theoretical terms, scope for political influence in the making of judicial appointments.

More recently such criticism has been echoed by Sir Thomas Eichelbaum who noted that it is important to recognise that the current system is merely resting on convention. He highlights the fact that "Like it or not - like them or not - in a democracy the judges are a bulwark between individual rights and the power of the Executive."<sup>13</sup>

However, a strong argument against such criticism is that New Zealand does not have a history of political appointments and that this is evidence that the risk of a politicised judiciary is more theoretical than a genuine concern. Sir Thomas Eichelbaum has noted that he is unaware of any example in New Zealand history where an appointment has been criticised as politically motivated,<sup>14</sup> and Paul East has stated that the current system has provided us with "a judiciary that is respected throughout the world for its absolute integrity".<sup>15</sup>

<sup>12</sup> *Report of the Royal Commission on the Courts* (1978) 200.

<sup>13</sup> Sir Thomas Eichelbaum "Judicial Independence - Fact or Fiction?" [1993] NZLJ 90, 90.

<sup>14</sup> Sir Thomas Eichelbaum, above n 13, 92.

<sup>15</sup> Hon Paul East, Attorney-General, "The Role of the Attorney-General" in Philip Joseph (ed) *Essays on the Constitution* (Brooker's, Wellington, 1995) 184, 202.

## 1 *Politically motivated appointments*

While the statements of Sir Thomas Eichelbaum and Paul East are generally true, judicial appointments in New Zealand are not without examples of historical abuse.

The appointment of Sir Robert Stout as Chief Justice in 1899 was regarded as a means of removing him from the political arena.<sup>16</sup> There is also the example of the Atkinson Administration appointing WB Edwards as a High Court judge apparently in return for his agreement to chair a commission on Maori Land issues. The next Administration attacked his appointment as invalid. The New Zealand Court of Appeal upheld his appointment but the Privy Council reversed that decision.<sup>17</sup> Edwards J was forced to return to practice, although he was subsequently reappointed to the High Court bench.<sup>18</sup> In modern times both his return to practice and reappointment would be controversial.

Although isolated (and rather old) these examples demonstrate that political appointments are a very real danger in the absence of proper constitutional safeguards. In addition, recent changes in both the political and social environment have increased the risk of politically motivated judicial appointments.

### C *Recent Developments*

In a 1995 article the then Attorney-General Paul East noted that recent changes in the practice of law had lead to an increased concern about the role of the judiciary in an increasingly complex and stressed society.<sup>19</sup>

<sup>16</sup> Robin Cooke *Portrait of a Profession; the Centennial Book of the New Zealand Law Society* (Reed, Auckland, 1969) 55.

<sup>17</sup> *Buckley v Edwards* (1892) NZPCC 204.

<sup>18</sup> Lord Cooke, above n 16, 55-56.

<sup>19</sup> Hon Paul East, Attorney-General "A Judicial Commission" [1995] NZLJ 189, 189.

1      *The growth of judicial review.*

The Attorney-General felt that

perhaps the biggest change is the growth of judicial review. ... decisions in relation to administrative review have increasingly placed Judges ever closer to making decisions about administrative decision making itself.

In recent years courts have shown an increasing willingness to substitute their own decisions for those of the executive. Such an approach can be seen in the case of *Waikato Regional Airport v Attorney-General*.<sup>20</sup> The case was concerned with the Ministry of Agriculture and Fisheries' border control services. Regional airports were being charged for the services while Crown funding was used exclusively to fund the services for metropolitan airports. Waikato Airport brought an action in judicial review in relation to this charging system.

In the High Court Wild J held that the charging decisions were invalid as they had taken into account irrelevant considerations.<sup>21</sup> Wild J instructed both parties to decide on an equitable refund between themselves. If they could not do so his Honour held that he would determine an appropriate refund, and that his approach would be along the following lines.<sup>22</sup>

In each financial year, to allocate the available Parliamentary appropriation to each international airport pro rata to the number of incoming international passengers and tonnage of incoming international freight requiring border control services that that airport handled.

In effect the Court would impose what it felt was a fair distribution of the border control costs, a decision that the courts have traditionally regarded as the exclusive preserve of the executive. Traditionally the decision would be quashed,

<sup>20</sup> *Waikato Regional Airport v Attorney-General* [2001] 2 NZLR 670.

<sup>21</sup> *Waikato Airport v Attorney-General* above n 20, 702-703.

<sup>22</sup> *Waikato Airport v Attorney-General* above n 20, 716.

the charges refunded in full and the decision left to the Ministry of Agriculture and Fisheries to make again, with due consideration of the relevant factors.

This increased willingness of the courts to substitute their decision for those of the executive has placed them closer to the decision making process. If this continues the temptation for the executive to appoint judges who are sympathetic to their policy decisions will increase accordingly.

However, the increasing scope of judicial review is not the only reason the risk of political appointments has increased. The recent introduction of the Supreme Court could be seen as creating further incentives for political appointments to the judiciary.

## 2 The introduction of the Supreme Court

It has been argued that the establishment of a Supreme Court, in place of the Privy Council, has served to underscore and increase the importance of ensuring that judges are appointed in a manner that ensures their political independence.<sup>23</sup> The prospect of appointment by a single political party of the entire highest court of appeal raised widespread public concern.<sup>24</sup> Editorials in the *New Zealand Herald* and *Sunday Star Times* were concerned that the new court would be stacked "with Labour favourites and judicial activists."<sup>25</sup>

The notion that the Supreme Court has increased the risk of political appointments is consistent with the ACT submission on the Supreme Court Bill. The submission argued that when there was a superior court outside New Zealand it was not worth incurring the political cost of stacking the Court. This was because judges appointed to New Zealand courts were not our highest

<sup>23</sup> David Williams QC, above n 3, 41.

<sup>24</sup> "80 pc want a say on new court - poll", *New Zealand Herald*, Auckland, New Zealand, 14 October 2003.

<sup>25</sup> "Stop this stunning abuse of power", *New Zealand Herald*, Auckland, New Zealand, 9 October 2003, "Privy Council stance masks the real issue", *New Zealand Herald*, Auckland, New Zealand, 14 October 2003.

judicial authority and as such were unable to "develop" the law in a particular, politically favoured direction.<sup>26</sup>

Ultimately, the argument that the Supreme Court will encourage political appointments is not persuasive. The vast majority of legal development occurs at the High Court and Court of Appeal level and not at the Privy Council/Supreme Court. Therefore, the trade-off between political cost and legal direction of political appointments is unlikely to have been changed in any meaningful way by the creation of the Supreme Court.

In addition, the concern expressed by the public and media of political appointments to the new court appears to have focused on the appointment of an entire bench by one government rather than on singular appointments. As this is a one-off event, it cannot be used as evidence that the current appointment process is vulnerable to political appointments.

### 3 Other developments

There have been three other recent developments that have brought the judiciary ever closer to the realm of the executive. The first is the advent of Treaty of Waitangi jurisprudence. This has required New Zealand judges to enter into decision making processes reminiscent of constitutional adjudication in the United States.<sup>27</sup> The second development was the passage of the New Zealand Bill of Rights Act 1990, which has given judges a large number of generally stated principles to interpret and apply in respect of executive actions.<sup>28</sup> Finally, New Zealand is tending towards more generalised statutory provisions that provide the judiciary with more scope for interpretation than has been the case in the past.<sup>29</sup> All three of these developments are bringing the judiciary closer to the

<sup>26</sup> *Report from the Justice and Electoral Committee on the Supreme Court Bill*, 28.

<sup>27</sup> Sir Geoffrey Palmer *New Zealand's Constitution in Crisis: Reforming Our Political System* (McIndoe, Dunedin, 1992) 99.

<sup>28</sup> Sir Geoffrey Palmer "Judicial Selection and Accountability: Can the New Zealand System Survive?" in BD Gray and RB McClintock (eds) *Courts and Policy* (Brooker's, Wellington, 1995) 11, 21.

<sup>29</sup> Sir Geoffrey Palmer, above n 28, 20.

executive in terms of decision making and thereby increasing the risk of political appointments.

#### *D Summary of Politicisation*

The current system has long been criticised for a lack of constitutional safeguards that might prevent the influence of political favouritism in the appointment process.

While the system has generally produced a judicial system that is respected around the world as capable and impartial, politically motivated appointments have occurred in the past. In addition, the growth of judicial review proceedings has increasingly placed the courts closer to the executive in terms of policy and decision making. This incursion by the judiciary in areas that have traditionally been the sole preserve of the executive has served to increase the potential for political appointments to the judiciary.

In addition, the development of Treaty of Waitangi jurisprudence, the passage of the Bill of Rights Act and a trend towards more generalised legislation have also increased judicial activity in areas traditionally reserved for the executive.

An argument has also been made that the introduction of the Supreme Court could encourage political appointments as the executive now has the ability to appoint judges to the bench of New Zealand's highest court. However, this argument fails to account for the fact that most legal doctrine is created by the High Court and Court of Appeal. As such, it is unlikely that the Supreme Court will increase the risk of politicising our judiciary.



## II QUALITY OF APPOINTMENTS

The second key hallmark of any appointment system is that it appoints the best available candidates to the bench. However, it has been suggested that our current system fails to accurately identify and secure the most meritorious candidates for judicial appointment.

### A A Lack of Information

In order for the most meritorious candidate to be appointed to a particular vacancy all relevant information on the respective candidates must be available to those making the decision. However, the current system has been criticised for failing to provide adequate data on potential candidates and, as a result, failing to appoint the most appropriate candidates to the bench.

This informational shortage was experienced by Sir Geoffrey Palmer during his term as Attorney General. He found that<sup>30</sup>

there is one serious practical problem ... with the judicial appointments process. It fell to my lot to make many judicial appointments both to the High Court and the District Court. It was difficult to secure adequate systematic data on potential candidates. The "think of a name" theory of appointment is far from satisfactory.

Sir Geoffrey Palmer went on to note that in London the department of the Lord Chancellor kept files on many members of the bar. Those files recorded the cases they were in, comments on their performance, notes relating to temperament and any other information deemed to be relevant. Such a system does not exist in New Zealand to any meaningful extent.<sup>31</sup>

<sup>30</sup> Sir Geoffrey Palmer, above n 28, 46.

<sup>31</sup> Sir Geoffrey Palmer, above n 28, 46.

## **B Other Process Problems**

The lack of a systematic database is not the only reason the current system has been criticised for failing to ensure the best candidates are appointed to a given vacancy. The process functions of search, short-listing, interview and referee checking have all been described as “fragmented, incoherent, poorly resourced and out of line with best practice in both the private and public sector.”<sup>32</sup>

Two main factors have been identified as inhibiting the proper operation of these essential process functions.

Firstly, there is a lack of coherence in the current process. This is because the Minister of Justice and the Attorney-General are not always the same person. They are not now and were not immediately prior to the current administration. Therefore, while the Judicial Appointments Unit is run by the Minister of Justice, the actual appointments are made by the Attorney-General. It would be a far more efficient system if all advice, consultation and record keeping were consolidated with one group of officials who reported to, and were held accountable by, one minister who was in charge of all judicial appointments.<sup>33</sup>

Secondly, it has been suggested that the Judicial Appointments Unit lacks the necessary resources to conduct its appointment functions in a manner that is conducive to appointing the most meritorious candidates to the bench.<sup>34</sup>

## **C Summary of Quality of Appointment Criticisms**

The current appointments system has been criticised for failing, at a practical level, to accurately identify and secure the most meritorious candidates for judicial appointment.

<sup>32</sup> Chen Palmer and Partners “Judicial Administration Issues” Memorandum to Hon Margaret Wilson, Attorney-General, (2002) 14.

<sup>33</sup> Sir Geoffrey Palmer, above n 28, 47.

<sup>34</sup> Chen Palmer and Partners, above n 32, 15.

This criticism is based primarily on the lack of an adequate systematic database on potential candidates. In the absence of such information it is impossible to appoint the best possible candidates on a regular basis. In addition, the Judicial Appointments Unit has been criticised for failing to follow best practices in relation to other important process functions such as search, interview and short-listing. The two main reasons for these practical shortcomings have been identified as a lack of coherence and a poorly resourced appointments agency.

### **III PUBLIC CONFIDENCE IN APPOINTMENTS**

The third key hallmark of any judicial appointment system is that it must engender public confidence in those it ultimately appoints as members of the judiciary. Again, our current process has been attacked for failing to engender this confidence.

#### **A The Lack of a Representative Judiciary**

An obvious feature of the current appointment process is that it has produced a judiciary that is predominantly white, male and middle-class.<sup>35</sup> The Select Committee Report on the Supreme Court Bill noted that a "common theme was that if the judiciary continues to be drawn from a narrow demographic group, public confidence is likely to be undermined."<sup>36</sup>

This is not to say that merit should not be the defining criteria of judicial appointments. However, the suggestion is that the current process has not produced a culturally diverse bench and that this may be to the detriment of the judiciary, and the perception of the judiciary by the public.

This argument was well summarised by John McGrath QC, Solicitor General in a recent article in the New Zealand Law Journal. He notes that<sup>37</sup>

<sup>35</sup> Jack Hodder "Judicial Appointments in New Zealand" [1974] NZLJ 80, 85.

<sup>36</sup> Justice and Electoral Committee, above n 26, 32.

<sup>37</sup> John McGrath QC, Solicitor-General "Appointing the Judiciary" [1998] NZLJ 314, 316.

Preservation of public confidence in both the quality and the impartiality of the judiciary is vital. There is clearly a risk of loss of confidence if the public doubts that merit is the basic contention for all judicial appointments. There is also, however, a risk of loss of confidence if the appointments system is seen as one that undervalues social awareness and the importance of working towards a goal of better representation of society in the courts. That is because the public recognises that the work of judges involves constant application of their perception of community standards.

Therefore, it is arguable that the current system, which has produced a bench dominated by white males, is in danger of alienating the public and eroding their confidence in the judicial system.

### ***B A Lack of Transparency in the Process***

It is also argued that a representative judiciary is not enough, in itself, to engender public confidence. It is further argued that a reasonable public will not respect public institutions the make-up of which they do not understand. As President Havel recently observed<sup>38</sup>

I am deeply convinced that the clearer more transparent and comprehensible our legal system is to citizens, the greater our hope that it will be respected.

Unfortunately John McGrath QC has concluded that<sup>39</sup>

Measured against this standard, the judicial appointments system for the High Court and Court of Appeal, as I have to say, is not transparent. The key aspects are shrouded in mystery, which inevitably inhibits the community's ability to understand the process. The prospect of gaining an increased public respect for the process while these characteristics remain, is doubtful.

The main reason the current system lacks transparency is that it is essentially a very discreet process. It is conducted under wraps by, or on behalf of, the Attorney-General. In addition there is minimal opportunity for those interested in

---

<sup>38</sup> "The State of the Republic" *The New York Review*, New York, United States of America, 5 March 1988, 42-43.

a position to ensure that they are considered.<sup>40</sup> Despite the fact that a list of criteria for selecting judges has been recently released, the majority of the system remains shrouded from the general public and this is unlikely to engender public confidence in those it appoints.

### *C Summary of Public Confidence Criticisms*

The current appointment process has been criticised for failing to engender the requisite public confidence in those it appoints.

These criticisms may be split into two broad categories. First, the system has been criticised for failing to appoint a representative judiciary. The work of judges involves a constant application of their perception of community standards. If those judges are not seen as representative of society the general public is unlikely to believe that their perceptions are reflective of the community and this is unlikely to engender the necessary public confidence.

The second argument put forward is that the system also lacks transparency. The majority of the selection process is carried out in secret by, or on behalf of, the Attorney-General. It is argued that the public will not respect a public institution the make-up of which they do not understand.

### **PART 3: A JUDICIAL APPOINTMENTS COMMISSION**

Given the reasonably extensive list of criticisms levelled at our current appointments system it is unsurprising that there has been a strong push for reform over the years. In particular, a Judicial Appointments Commission has received strong support as a possible alternative to the current regime.

The possibility of a Judicial Appointments Commission in New Zealand has been raised several times in the past.

---

<sup>39</sup> John McGrath QC, above n 37, 316.

The 1978 report of the Royal Commission on the Courts recommended the establishment of a Judicial Commission with the power to recommend judicial appointments. The proposal lapsed due to a lack of support from the judiciary.<sup>41</sup>

Support for a Commission resurfaced in the 1990s, partly in response to similar discussions and initiatives taking place overseas but also in response to a lack of satisfaction with the existing process. These concerns were partly addressed by the reforms of 1998.<sup>42</sup>

Most recently, the possibility of a Judicial Commission was raised in response to the Supreme Court debate. Many submissions on the Supreme Court Bill expressed concern about the appointment process, and insisted on the creation of an Appointments Commission before they would support the Bill.<sup>43</sup>

This part of my paper discusses the potential membership, appointment process and powers of any Judicial Appointments Commission established in New Zealand.

## **I MEMBERSHIP**

There are two main models in relation to the membership of any Judicial Appointments Commission. They are generally referred to as the legal establishment model and the supplemented legal establishment model.<sup>44</sup>

### **A The Legal Establishment Model**

The legal establishment model, as the name suggests, advocates a membership that consists solely of members of the legal community. Such a model was

---

<sup>40</sup> John McGrath QC, above n 37, 316.

<sup>41</sup> Ministry of Justice, above n 2, 29.

<sup>42</sup> Ministry of Justice, above n 2, 30.

<sup>43</sup> Ministry of Justice, above n 2, 31.

<sup>44</sup> John McGrath QC, above n 37, 317.

recommended by the 1978 Royal Commission for the Courts and is currently endorsed by the New Zealand Law Society's Courts and Tribunals Committee.<sup>45</sup>

The Royal Commission's report recommended a Commission that consisted of the Chief Justice (Chair), High Court Judge, Chief District Court Judge, Solicitor-General, Secretary for Justice and two representatives of the legal profession.<sup>46</sup>

### *B The Supplemented Legal Establishment Model*

The supplemented legal establishment model advocates the varying or supplementing of the legal establishment model by the addition of lay representatives appointed by the Attorney-General.<sup>47</sup>

## *II THE APPOINTMENT PROCESS*

The appointment process involves four phases, the initial phase, the formal interview, advice to the minister and appointment.<sup>48</sup>

The initial phase begins with the Minister advising the Commission of an upcoming vacancy and requesting that it begin the selection process. The Commission then advertises the position and sets out the criteria for appointment. A short-list is then prepared after a review of the applicants, referee checks, and "discrete soundings" at the bench and bar.<sup>49</sup>

Next, most Commissions require a formal interview with all short-listed applicants. Applicants are then further short-listed and rated.<sup>50</sup>

<sup>45</sup> John McGrath QC, above n 37, 317.

<sup>46</sup> *Report of the Royal Commission on the Courts*, above n 12, 196-198.

<sup>47</sup> John McGrath QC, above n 37, 317.

<sup>48</sup> Ministry of Justice, above n 2, 27.

<sup>49</sup> Ministry of Justice, above n 2, 27.

<sup>50</sup> Ministry of Justice, above n 2, 27.

The Commission is then required to provide advice to the Minister. That advice may consist of a single name or a small list. Where more than one name is supplied, the candidates may or may not be ranked.<sup>51</sup>

When the Minister receives the list they are usually able to accept, reject or ask the Commission to reconsider (depending on the powers given to the Commission). The Minister is not obliged to accept or select from the recommended names in the order that they are ranked.<sup>52</sup>

In most jurisdictions where a Judicial Commission exists, appointments can be made only on the Commission's recommendation. Some Commissions (e.g. Israel and South Africa) make a recommendation directly to the Head of State. However, most provide their advice to the Attorney-General or Minister of Justice.<sup>53</sup>

### **III JUDICIAL COMMISSIONS AND THE POWER OF APPOINTMENT**

There are a variety of models for Judicial Appointments Commissions in respect of their power over appointments. The recent UK Consultation Paper on judicial appointments identified three possible models.<sup>54</sup>

#### **A Appointing Commissions**

An Appointing Commission is, constitutionally, the most different from the current process undertaken in New Zealand. An Appointing Commission directly advises the Governor-General on judicial appointments, completely circumventing the advisory role currently undertaken by the Attorney-General.<sup>55</sup> In other words, the Commission has the final say on judicial appointment.

<sup>51</sup> Ministry of Justice, above n 2, 27.

<sup>52</sup> Ministry of Justice, above n 2, 27.

<sup>53</sup> Ministry of Justice, above n 2, 28.

<sup>54</sup> Department for Constitutional Affairs "Constitutional Reform: A New Way of Appointing Judges" CP 10/03 July 2003, paras 34-52. Available on-line at [www.dca.gov.uk/consult/jacommission](http://www.dca.gov.uk/consult/jacommission).

<sup>55</sup> David Williams QC, above n 3, 63.



## *B Recommending Commissions*

In contrast, a Recommending Commission would take responsibility for the application, consultation, recommendation and administrative process of judicial appointments.<sup>56</sup> However, those recommendations would then be passed on to the Attorney-General for a final decision on appointment.

This model can be structured in a number of different ways. The Attorney-General can be granted a wide discretion where a list of candidates is recommended to the Attorney-General, who is then free to appoint any individual on that list. If the Attorney-General did not wish to appoint any of the recommended names it would be possible for them to require the Commission to supply a new list of names. However, if a more limited discretion was granted, a single candidate or smaller list may be presented with clear rankings. The expectation would be that the Attorney-General appoint the highest ranking member of that list, although they would be free to appoint another member of the list or request the Commission to produce another list of names.

## *C Hybrid Model*

In addition to the Appointing and Recommending Commission models, the United Kingdom Consultation Paper also mentioned the possibility of a hybrid model. Under the hybrid model the Commission would be an Appointing Commission for the majority of appointments. However, the Commission would act in a recommendatory role for more senior positions, presumably appointments to the Court of Appeal and Supreme Court in the New Zealand context.<sup>57</sup>

<sup>56</sup> David Williams QC, above n 3, 64.

<sup>57</sup> David Williams QC, above n 3, 65.

#### **IV SUMMARY OF JUDICIAL APPOINTMENTS COMMISSION MODELS**

Potential models for a Judicial Appointments Commission in New Zealand may be distinguished on two main grounds, membership and powers of appointment.

The two main models in respect of membership are the legal establishment model and the supplemented legal establishment model. Under the legal establishment model the Commission would consist entirely of members of the legal community. In contrast, under the supplemented legal establishment model the Commission would also include a number of lay people to represent the community which the judge is required to serve.

There are then three primary models that relate to the powers of appointment that would be granted to a Judicial Appointments Commission in New Zealand. An Appointing Commission would advise the Governor-General directly and therefore remove the Attorney-General from the process. However, a Recommending Commission would merely provide advice to the Attorney-General who would ultimately refer his or her preferred candidate to the Governor-General for appointment. A Hybrid Commission has also been suggested with appointing powers for lower courts and recommendatory powers in relation to the higher courts.

#### **PART 4: IS A JUDICIAL APPOINTMENTS COMMISSION THE ANSWER?**

Ultimately, this paper is intended to come to a conclusion as to whether a Judicial Appointments Commission is more desirable than the current process in the New Zealand context.

In order to determine this question the various Commission models are assessed in terms of their likely impact on the key values of any appointment process. I.e.

political neutrality, quality of appointments and maintaining public confidence in the judiciary.

## ***I POLITICAL NEUTRALITY***

As mentioned earlier in this paper, a common criticism of the current appointments process is that it lacks sufficient constitutional safeguards to protect the process and, by extension, the independence of the judiciary from political interference. Therefore, it is necessary to consider whether the establishment of a Judicial Appointments Commission would help address this concern.

### ***A The Argument for a Judicial Appointments Commission***

Those in favour of a Judicial Appointments Commission argue that it would reduce the role of the Attorney-General in the appointment process. In so doing the role of the executive is reduced, along with its ability to interfere in the appointment process.

This argument is given the most weight when applied to the Appointing Commission model. Under this model the executive, in the form of the Attorney-General, is removed from the process altogether as the Governor-General does not have a discretionary role in the appointment of judges.

### ***B The Argument Against a Judicial Appointments Commission***

#### ***1 Is there a genuine risk of political interference?***

The first point to note is that the argument in favour of a Commission is dependent upon an acceptance that the current process is genuinely in danger of becoming politicised. New Zealand does not, despite one or two exceptions, have a history of political appointments to the judiciary. Although recent developments have perhaps increased the risk of a politicised judiciary there is no

evidence to date that suggests any recent judicial appointments have been politically motivated. However, it is arguable that an independent judiciary is of such fundamental importance that the risk of political interference is enough to warrant a review of our current process.<sup>58</sup>

## 2 *A lack of accountability*

While the introduction of an Appointing Commission would reduce the role of the executive it would also create several constitutional difficulties.<sup>59</sup>

In New Zealand, accountability for appointments is achieved through the system of ministerial responsibility to Parliament. Appointments can be questioned debated and the Minister held accountable for his choice. The scope also exists for Select Committee examination of appointments. This has not occurred, presumably because appointments in recent years have not been open to question.<sup>60</sup> Therefore, as an elected member of the executive, the Attorney-General is currently accountable to Parliament, and the voting public, for any politically motivated appointments to the bench.<sup>61</sup> In contrast, a Judicial Appointments Commission could not be held accountable in the same manner<sup>62</sup>

The matter of accountability is discussed in the Ministry of Justice discussion paper on the possibility of a Judicial Appointments Commission in New Zealand. It states that<sup>63</sup>

The proposed commission for England and Wales will be required to present an annual report to the Minister, who must present it to both Houses of Parliament. As well, the commission's annual accounts must be audited by the Comptroller and Auditor-General, and this report presented by the Minister to Parliament.

<sup>58</sup> Sir Thomas Eichelbaum, above n 13, 90.

<sup>59</sup> David Williams QC, above n 3, 63.

<sup>60</sup> Sir Geoffrey Palmer, above n 28, 42.

<sup>61</sup> David Williams QC, above n 3, 63.

<sup>62</sup> Department for Constitutional Affairs, above n 53, para 38.

<sup>63</sup> Ministry of Justice, above n 2, 28.

Clearly, such a system is focused on the financial accountability of the entity and provides little in the way of accountability for actual appointments. The assumption appears to be that once the executive is removed from the process it can no longer be subjected to political interference. This, as we shall see later, is a dangerous assumption.

The typical response to the accountability critique is to promote a Commission based on the recommending model. The UK Consultation Paper states that<sup>64</sup>

While retaining ministerial involvement and accountability, this model would significantly curtail that involvement by placing the entire appointments process in the hands of the Commission. However, the Minister would still remain ultimately accountable to Parliament for the appointments process. This model therefore preserves the constitutional convention that The Queen acts on the advice of Her ministers and also retains formal accountability to Parliament for the appointment of judges, a central function of the state.

While this argument is attractive in theory, the Attorney-General is unlikely to remain “ultimately accountable to Parliament” in practice.

If the Attorney-General is no longer responsible for the appointment process, they are unlikely to be held accountable to Parliament for appointments made on the basis of that process. As Sir Geoffrey Palmer has noted

Should the Attorney be restricted to the names put forward by the Commission or Board, he or she is not going to feel much responsibility or accountability. Nor will it have to be shouldered. Explanations to Parliament, the public and elsewhere will be that the only power of choice the Attorney had was to choose between names advanced. Ministerial responsibility will be effectively subverted for judicial appointments.

Therefore, the introduction of a Judicial Appointments Committee, whether appointing or recommending, would destroy the inherent set of political checks

---

<sup>64</sup> Department for Constitutional Affairs, above n 53, para 48.

and balances in the current system. In addition, there is no guarantee that the Commission itself would be free from political interference.

### *3 The potential politicisation of the Commission*

It is submitted by critics of the current process that the appointment of judges is at risk of becoming a political exercise. If this is accepted then the appointment of a Judicial Appointments Commission's members could itself become a highly political exercise.<sup>65</sup>

Several members of the Commission (e.g. the Chief Justice) are appointed on the basis of their position within the legal community. However, it is also likely that several members, particularly members of the legal profession and any lay people appointed under the supplemented legal establishment model, will have to be appointed by the executive and presumably by the Attorney-General.

Given the role of the Commission, if the executive cannot be trusted to appoint judges in a non-partisan manner it is difficult to believe that the appointment of the Commission's membership would be carried out any more impartially. Therefore, if the present system is under threat from politicisation, the appointment of a Commission would merely ensure that any interference was one step removed. That is it would transfer that interference from the actual appointment of judges to the appointment of the Judicial Appointments Commission.

### *C Summary of the Politicisation Arguments*

Our current appointment process has been criticised for failing to provide sufficient constitutional safeguards to prevent political interference in the appointment process.

---

<sup>65</sup> Ministry of Justice, above n 2, 30.

Those in favour of a Judicial Appointments Commission argue that it would heavily reduce or eliminate the role of the executive in the appointment process. Therefore, the executive would have little opportunity to interfere in the appointment process. However, there are several counter-arguments to this position.

The first point to note is that the argument in favour of a Commission is dependent upon an acceptance that political interference is, or is likely to become, a feature of our current system. Although recent developments have brought the executive and judiciary closer together there is little evidence to suggest that this has produced, or is likely to produce, a politicised judiciary.

In addition, the introduction of a Commission would remove the checks and balances inherent to the current process. A Judicial Appointments Commission, whether appointing or recommending, could not be held accountable to Parliament, or the voting public. And neither would an Attorney-General acting on the advice of that Commission.

Finally, there is also a risk that appointments to the Commission would themselves become highly political, and could enable political patronage.

## **II QUALITY OF APPOINTMENTS**

A second common criticism of our current appointment system is that it suffers from serious process problems and, as such, fails to appoint the most meritorious candidates to the bench.

The reasons for this are threefold. First there is a lack of information available on prospective candidates. Second there is a lack of coherence in the current process, and finally, the process itself is under-resourced.

Again, it is necessary to consider whether the establishment of an Appointments Commission would serve to rectify these problems.

## A *The Argument in Favour of a Judicial Commission*

### 1 *Information*

The creation of a Judicial Appointments Commission would not, in itself, make up for the lack of a systematic database on prospective candidates. However, it would highlight the need for such an initiative and so a database may well be the indirect result of establishing a Commission.

### 2 *Coherence*

Currently the appointment process is administered by the Judicial Appointments Unit in the Ministry of Justice while the appointments themselves are made by the Attorney-General. Therefore, as the Minister of Justice and Attorney are not necessarily the same person, the Minister responsible for the Judicial Appointments Unit may well be different from the Minister to whom the Unit provides its substantive recommendations.<sup>66</sup>

The introduction of an independent Judicial Appointments Commission would bring together in one place all of the work to support all judicial appointments and ensure a single person was responsible for the oversight of the process.<sup>67</sup>

### 3 *Resources*

In order for any appointment process to function successfully it must have sufficient funding. It is arguable that the Judicial Appointments Unit is not well placed to lobby for funding as it is currently subsumed by the Ministry of Justice.

In contrast, an independent Judicial Appointments Commission would be well placed to lobby the Government directly for funding and would not have to compete with other departments within the Ministry of Justice.

<sup>66</sup> Sir Geoffrey Palmer, above n 28, 47.



## *B The Argument Against a Judicial Commission*

In his report on judicial administration issues Sir Geoffrey Palmer concluded that the process problems associated with the current process could be rectified without the creation of a new independent agency.<sup>68</sup>

Instead he recommended the creation of a new Judicial Appointments Liaisons Office with some degree of independence as to its substantive responsibilities, but still accountable to a Chief Executive in the normal way.<sup>69</sup>

As the Office is not to be a new or independent entity it would be located in a core Government Department or Ministry. Given that the Ministry of Justice, for the reasons discussed earlier, is not a desirable location the two possible locations from a practical point of view are the Crown Law Office and the Department for Courts.

Sir Geoffrey Palmer concluded that the Crown Law Office was the better choice.<sup>70</sup>

Consultations showed virtually unanimous opposition to the Department for Courts carrying out the function so far as the Judiciary and the Law Society were concerned, but there was widespread support for the Crown Law Office. Since the Solicitor-General is a constitutional officer already involved with higher judicial appointments, and with responsibility for aspects of the Government's relationship with the Judiciary, location in the Crown Law Office, of which the Solicitor-General is the administrative head, is constitutionally appropriate and, in our view, clearly the most desirable option.

The report also recommended that the Judicial Appointments and Liaisons Office be headed by a Deputy Solicitor-General. This would ensure that the Solicitor-General was not burdened by the detail of the work while making sure that the

<sup>67</sup> Chen Palmer and Partners, above n 32, 14.

<sup>68</sup> Chen Palmer and Partners, above n 32, 15.

<sup>69</sup> Chen Palmer and Partners, above n 32, 16.

<sup>70</sup> Chen Palmer and Partners, above n 32, 17.

Office was still responsible to the Solicitor-General as the Chief Executive of the Crown Law Office.

### *1 Coherence*

Placement within the Crown Law Office would be an effective solution to the coherence problems associated with the current process. The Judicial Appointments and Liaisons Office would report to the Solicitor-General as its Chief Executive and the Attorney-General as the responsible Minister. Therefore, the Minister receiving the recommendations would also be the Minister responsible for the Office, avoiding the division of responsibility between the Minister of Justice and the Attorney-General that can occur under the present system.

### *2 Resources*

Also, as a semi-independent entity headed by a largely autonomous Deputy Solicitor-General the Office would have many of the same resourcing benefits associated with a Judicial Appointments Commission. I.e. it could be set up in such a manner that it lobbied for, and received, Government funding directly rather than through the Crown Law Office.

### *3 Information*

Much like the Judicial Appointments Commission, the creation of a Judicial Appointments Office within the Crown Law Office would not, in itself, make up for the lack of a systematic database on prospective candidates. However, it too would highlight the need for such a system and could well provide the necessary impetus for the creation of such a system.

Therefore, the creation of a Judicial Appointments and Liaisons Office within the Crown Law Office would be as effective as the creation of a new independent

agency in remedying the process problems inherent to the current system. Indeed a new agency may well be a less efficient and less cost effective option.

#### 4 *The advantages of a Judicial Appointments and Liaisons Office*

Sir Geoffrey Palmer's report notes three factors that suggest the introduction of a new agency would be a less desirable solution to the process problems.

Firstly, a new agency would require new overheads, including management and governance. Secondly, it would spread the limited critical mass in the justice sector even further, and it would increase rather than decrease the transaction costs of consultation.<sup>71</sup>

The other clear advantage of Sir Geoffrey Palmer's proposal is that it would maintain the political checks and balances of the current system. As noted above, the Attorney-General would no longer be responsible to Parliament, or the voting public, for appointments made pursuant to the recommendations of an independent agency. However, under the Crown Law Office proposal the Attorney-General is the Minister responsible for the Judicial Appointments and Liaisons Office as well as the appointments themselves. As such he would be politically accountable to Parliament for both the recommendations of his office and the appointments he has made.

Therefore, a Judicial Appointments Office within the Crown Law Office would be a more efficient, and more cost-effective solution to the existing process problems. In addition, it would maintain the political checks and balances that a Judicial Appointments Commission would destroy.

---

<sup>71</sup> Chen Palmer and Partners, above n 32, 15.

*C Summary of the Process Arguments*

Finally, the current appointment process has been criticised for failing to help alleviate the process problems that prevent the current system from appointing the most meritorious candidates to the bench.

The failure to appoint a representative judiciary, and the lack of transparency in the appointment process.

The creation of a Commission would provide greater coherence within the system by ensuring the entire process was carried out within the new agency. It is also true that an independent agency would be better placed to lobby Parliament for the funding necessary to carry out its functions in a manner that ensures the best candidates are appointed to the bench. Finally, the creation of a Commission would also highlight the need for a systematic database on prospective candidates and could well result in the creation of such a system.

However, a strong argument against the Commission can be made on the basis that a better solution to the process problems is available, namely the creation of a Judicial Appointments and Liaisons Office within the Crown Law Office. The Office would provide greater coherence by ensuring the Minister who appoints judges is also responsible for the Office who recommends those appointments. Also, the proposed Office would be semi-autonomous and headed by a deputy Solicitor-General which would place it in a better position to apply for funding than the current Judicial Appointments Unit. In addition, the creation of a new Office responsible for Judicial Appointments would provide a similar impetus for the creation of a systematic database to that created by the formation of a Judicial Appointments Commission.

The Crown Law Office proposal also has a number of advantages when compared to the creation of a new agency. It is a more efficient and cost-effective proposal and, as the Attorney-General is the Minister responsible for the Office, the political checks and balances of the current appointment system are maintained.

<sup>1</sup> See Paul East, Attorney-General, Speech Made by Address to Law Society Conference, 19 March 1993, p.2.

### III PUBLIC CONFIDENCE IN THE JUDICIARY

Finally, the current appointment process has been criticised for failing to engender the requisite public confidence in those it appoints.

These criticisms may be split into two broad categories. The failure to appoint a representative judiciary, and the lack of transparency in the appointment process.

Therefore, it is necessary to consider whether the creation of an independent Commission would help alleviate either criticism.

#### A *The Lack of a Representative Judiciary*

##### 1 *A representative bench*

It has been strongly argued that the adoption of a Judicial Appointments Commission would actually lead to a more conservative and less representative bench than under the current system. Former Attorney-General, the Hon Paul East noted that<sup>72</sup>

In recent months there has been some criticism of the manner in which we appoint our Judges. There have been suggestions put forward that there should be some form of judicial commission to undertake this role. For my part, I think there are some problems with such a proposal. Inevitably, the judicial commission would be made up of a number of judges. Why should it be sitting judges who should determine who has qualified to join their ranks? I agree that any reappraisal of the judicial system should include a willingness to look at the pool of lawyers from which we pick our judges. My hesitation is that a judicial commission is more likely to continue to pick from the traditional pool rather than to strive to ensure the judiciary is representative of the whole cross section of society.

These concerns have been echoed by Sir Geoffrey Palmer. He adds that the likely result of a Judicial Appointments Commission is to transform the judiciary into a

<sup>72</sup> Hon Paul East, Attorney-General, Speech Notes for Address to Lawlink Conference, 19 March 1993, 8-9.

self-perpetuating oligarchy where future appointments would be dictated by the existing white, male, middle-class bench.<sup>73</sup> The suggestion is that such a Commission would be overly cautious, with a tendency towards safe appointments and blandness.<sup>74</sup>

The obvious response to this argument is a Commission based on the supplemented legal establishment model. The inclusion of lay people on the Commission would be expected to prevent the judiciary from transforming into, or being perceived as, a self-perpetuating oligarchy as well as ensuring a more representative bench. However, there are serious difficulties with this proposal.

The primary problem with the supplemented legal establishment model is that the lay representatives are unlikely to possess detailed legal knowledge. As such they are also unlikely to exert much influence over those on the Commission who are members of the legal profession. Sir Geoffrey Palmer has noted that<sup>75</sup>

Obviously, a judicial commission could be constructed which had no representation of Judges or minimal representation, but then it would have to consult the Judges. Furthermore, in my experience Judges are anxious to exert influence on appointments. It is clearly right that they should be properly consulted. It is not right that they should drive the process and I believe they would under most variations of the Judicial Commission proposal, even if it appeared they did not. If Judges are in the Commission they will exert great weight on the opinion of lay members.

This view, that any lay members are likely to be ineffective, was also recognised by the 1978 Report of the Royal Commission on the Courts which first proposed the formation of a Judicial Commission in New Zealand. That report conceded that it was “troubled”<sup>76</sup> by the issue of non-representation on the Appointments Committee by non-lawyers but ultimately concluded that lay persons could not really contribute to the appointment process because they would not possess any real knowledge of the skills and qualities of potential appointees. Accordingly the

<sup>73</sup> Sir Geoffrey Palmer, above n 28, 82.

<sup>74</sup> Sir Geoffrey Palmer, above n 28, 81.

<sup>75</sup> Sir Geoffrey Palmer, above n 28, 81-82.

<sup>76</sup> *Report of the Royal Commission on the Courts*, above n 12, 202.

Royal Commission took the view that “the idea of involving laymen ... may be no more than an attempt to meet fashionable demand”.<sup>77</sup>

## 2 *Is the appointment system to blame for the absence of a representative bench?*

It is also worth noting that it is far from clear that the current appointment system is responsible for the lack of a representative bench.

In his article, *The Judicial Appointment Process*, David Williams QC argues strongly that merit, and not a representative judiciary must be the basis for all judicial appointments. While Mr Williams acknowledges that the appointment of judges of differing genders and ethnic backgrounds can enrich a court, he believes that it is<sup>78</sup>

necessary to stress the danger and the temptation of allowing diversity to permit only moderately qualified candidates to be selected ahead of much better qualified candidates in terms of practical experience in the law and intellectual and analytical ability. In other words, merit, defined primarily as intellectual and analytical ability accompanied by the necessary qualities of character, should always remain the final determining factor for appointments to the Bench, and the best qualified candidate should be selected irrespective of their gender, cultural or social background.

Therefore, Mr Williams concludes that diversity must never displace merit when determining the most appropriate appointments. The only time diversity should be considered is where there is a choice between a number of equally well-qualified candidates. In that case, to give preference to, say, a woman is justifiable in the public interest and as a long-term benefit to the court.<sup>79</sup>

Therefore, the current appointment system cannot be blamed for the lack of a representative bench if it is due to a lack of qualified candidates from certain sections of society. As Attorney-General, Sir Geoffrey Palmer found that he

<sup>77</sup> *Report of the Royal Commission on the Courts*, above n 12, 202.

<sup>78</sup> David Williams QC, above n 3, 51.

<sup>79</sup> David Williams QC, above n 3, 51.

spent a lot of time searching for qualified women and Maori to become Judges and found that the number of people at that time with the relevant experience were few. [He was] confident that the situation [would] improve in relation to women as their numbers in the legal profession continue to climb. So it [would] be with Maori.

Therefore, it is arguable that the current bench merely reflects the fact that the profession is dominated by white males. They are therefore likely to produce the more meritorious candidates who should be, and are, appointed under the current system. Therefore, the key to a more representative bench may not be a change to the appointment system but to encourage a wider cross-section of society to enter the profession in the first place.

## **B The Lack of Transparency**

### *1 Would a Commission improve transparency?*

While the current system has been criticised for a lack of transparency, it is far from clear that the creation of a Judicial Appointments Commission would, in itself, improve transparency.

As John McGrath QC, Solicitor-General has noted<sup>80</sup>

Various models for reform offer greater or lesser transparency. But much can also be achieved to improve transparency without great change to the present appointment model.

Therefore, while a Judicial Appointments Commission could be created in a manner that improves transparency by, for example, making public the process by which the Attorney-General forms a short-list and makes appointments, the same measures could equally be applied to the current system without the creation of an entirely new agency. This is because public scrutiny is not linked

<sup>80</sup> John McGrath QC, above n 37, 316.



to the structure of an appointment system but to the level of disclosure within that system.

## 2 *Is transparency necessarily a good thing?*

It is also important to note that an argument can be made that too much transparency in the process could be detrimental to the quality of appointments.

Most High Court judges in New Zealand would accept appointments at a considerable financial cost to themselves. The strong sense of duty that may motivate acceptance of an offer of appointment may be undermined if the candidate believes his or her suitability may undergo severe public scrutiny.<sup>81</sup> In addition, the potential damage to the reputation of a failed candidate whose application was in the public sphere could also discourage potential candidates from putting their names forward. Therefore, an increase in transparency could discourage quality candidates from applying, or accepting, a position on the bench. This would decrease the quality of appointments made by either the current process or a Judicial Appointments Commission.

## C *Summary of Public Confidence Arguments*

Critics of the current system have argued that it fails to engender the necessary public confidence in our judiciary. This is because the process has not produced a representative judiciary and because the process is largely shrouded in secrecy. However, it is far from clear that the creation of a Judicial Appointments Commission is the answer to these problems.

Indeed, the creation of such a Commission is likely to result in a more conservative bench as the existing white, male, middle class bench would dominate the Commission and its appointments. The appointment of lay people to the Commission is unlikely to prevent the creation of this self-perpetuating

---

<sup>81</sup> PJ Butler "The Office of High Court Judge" LLM Research Paper: Legal Profession and the Law (1994) 11.

oligarchy as they are unlikely to possess the specialised skills required to prevent members of the legal profession from dominating proceedings.

Also, the existence of a non-representative judiciary is not necessarily a product of the current appointment system. Merit must always be the primary criteria for appointments with diversity used only in tie-breaker situations. Therefore, the lack of diversity on the bench is perhaps more of a reflection of a lack of diversity within the legal profession as a whole, rather than of a conservative appointment process. As the number of women, Maori and other ethnic groups entering the profession increase, so too should their representation on the bench.

The creation of a Judicial Appointments Commission, in itself, is also unlikely to improve transparency in the system. Any steps taken to increase transparency within the Commission could equally be applied to the existing process without the creation of a new agency.

Finally, it should be noted that too much transparency in the appointments system could decrease the quality of appointments. The prospect of public scrutiny of a candidate's suitability and the possibility of a public failure to be appointed at all may discourage meritorious candidates from accepting a position on the bench or from applying in the first place.

### **CONCLUSION**

This paper identifies three key criteria which are the hallmarks of any successful appointment system. Those criteria are political neutrality, quality of appointment and the maintenance of public confidence in the judiciary.

Our current appointment process has been criticised for failures in relation to each of these key criteria. However, while there are a number of concerns with the current appointment system, the creation of a Judicial Appointments Commission would not result in a system that better satisfies those key criteria.

Firstly, the current system has been criticised for a lack of constitutional safeguards that would prevent the influence of political favouritism in the appointment process. At present the system is protected solely by a convention that judges are not appointed for political purposes. While the system has, in general, not been abused, a number of recent developments have increased the risk of political interference.

The primary development has been the growth of judicial review proceedings which have increasingly placed the courts closer to the executive in terms of policy and decision making. This incursion by the courts into areas that have traditionally been the sole preserve of the executive has increased the potential for politically motivated appointments. Also, the development of Treaty of Waitangi jurisprudence, the Bill of Rights Act and more generalised legislation have increased judicial activity in areas generally reserved for the executive.

The argument in favour of a Judicial Appointments Commission is that it would heavily reduce, or eliminate, executive involvement in the appointment process. This would reduce the opportunity for political interference in the appointment of the judiciary.

However, the creation of a Judicial Appointments Commission would also destroy the political checks and balances inherent to the current process. An Appointments Commission could not be held accountable to Parliament, or the voting public, for its appointments, and neither would an Attorney-General for merely acting on the advice of the Commission. There is also a real risk that appointments to the Commission would themselves become highly political.

Secondly, a number of process problems have been identified with the current system that could prevent the most meritorious candidates from being appointed to the bench. The primary criticism is the lack of an adequate systematic database on potential candidates. In the absence of sufficient information it is difficult to ensure that the most appropriate candidates will always be appointed. In addition, important process functions such as short-listing and interviewing have fallen

short of best practices for two reasons. Firstly, because the Minister of Justice and the Attorney-General are not always the same person, a lack of coherence arises where the Judicial Appointments Unit reports to the Minister of Justice but makes recommendations to the Attorney. Secondly, an under-resourced Judicial Appointments Unit has also been identified as a source of the process problems.

Proponents of a Judicial Appointments Commission argue that it would alleviate the current process problems by introducing greater coherence and by being better placed to lobby Parliament for funding.

The creation of an Appointments Commission would create greater coherence as the entire appointing process would be carried out within the new agency. In addition, as an independent agency they would be better placed to lobby directly for funding than the Judicial Appointments Unit as a division of the Ministry of Justice.

However, it is not true to say that the creation of a new and independent agency is the best way to remedy the current process problems. Those problems could be dealt with equally well by the establishment of a Judicial Appointments and Liaisons Office within the Crown Law Office. As the Attorney-General is the Minister responsible for the Crown Law Office, judicial appointments would be made by the Minister responsible for the Office that makes the recommendations. Therefore, the coherence problems associated with recommendations made by the Ministry of Justice would be avoided and, as a semi-autonomous branch of Crown Law run by a Deputy Solicitor-General, it could lobby Parliament directly for funding rather than depending on the Crown Law Office to secure the necessary funding.

In addition, the Crown Law Office proposal has a number of advantages over the Commission. It would be a more efficient and cost-effective solution, and the inherent political checks and balances within the current system would be maintained.

Finally, the current appointment process has been criticised for failing to maintain public confidence in the judiciary it appoints. These criticisms may be split into two categories, the failure to appoint a representative judiciary and a lack of transparency in the appointment process.

It is argued that the work of judges involves the constant application of their perception of community standards. If those judges, who are predominantly white, male and middle class, are not seen as representative of society the general public is less likely to believe those perceptions are reflective of society and this is unlikely to ensure public confidence in their decisions.

By the same token, the current appointment process is largely shrouded from public scrutiny. Again, it is unlikely that the public will have absolute confidence in an institution, the make-up of which they do not understand.

However, the creation of a Judicial Appointments Commission does not appear to be the answer to these problems. Indeed, an Appointments Commission is more likely to result in an increasingly conservative bench by transforming the judiciary into a self-perpetuating oligarchy. The addition of lay people to the Commission would not remedy the situation as they are unlikely to possess the specialised skills required to prevent members of the legal profession from dominating proceedings.

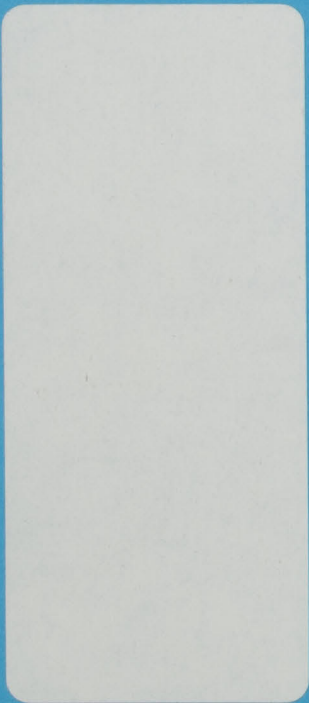
Also, the current lack of diversity on the bench is not necessarily a product of the current appointment system. Past Attorney-Generals have had great difficulty in finding female, Maori or other ethnic groups who were sufficiently qualified to be appointed to the bench. Therefore, the lack of diversity on the bench perhaps reflects the lack of diversity within the legal profession as a whole rather than a conservative appointment process.

The creation of a Judicial Appointments Commission, in itself, is also unlikely to improve transparency in the system. Any steps taken to increase transparency

within the Commission could equally be applied to the existing process without the creation of a new agency.

Therefore, a number of problems exist with the current appointment process and some reform is probably required. However, the creation of a Judicial Appointments Commission is not the best means of addressing those problems. While it would alleviate a number of the existing concerns it would also create a host of new problems. Other options exist for dealing with many of the existing problems, such as centralising the process within the Crown Law Office, and should be implemented to improve the current system without the creation of a new agency and a new set of problems.

AS741  
VUW  
A66  
W747  
2005



VICTORIA UNIVERSITY OF WELLINGTON LIBRARY



3 7212 00887970 0

