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**JUDICIAL APPOINTMENTS IN NEW ZEALAND:
AN INCREMENTAL APPROACH TO REFORM**

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Abstract

The current mechanism for judicial appointments in New Zealand is non-transparent and lacks sufficient accountability mechanisms. As a consequence, there is ample scope for an Attorney-General to make appointments based on political or personal preference. In order to promote actual and perceived judicial independence, and due to New Zealand's historically conservative approach to constitutional change, I propose a two-stepped incremental approach to reform which would gradually erode the individual executive discretion of the Attorney-General. First, I argue that the criteria for appointment and a mandatory list of persons to be consulted should be expressly stated in statutory form. As part of this discussion, I assess why and how merit and diversity criteria should be legislated. This formalised approach is required to anchor the Attorney-General's discretion to a prescribed process, which in turn would lead to increased public accessibility and accountability. Secondly, I propose the establishment of a Judicial Appointments Commission in New Zealand to act as an independent advisory body to the Attorney-General. Importantly, by retaining an executive official as decision-maker, the accountability pathway of ministerial responsibility is also retained. Ultimately, these steps are necessary to prevent judicial appointments from being made on a "tap on the shoulder" basis.

Keywords: "Judiciary", "Appointments", "Judicial Appointments Commission", "Accountability", "Diversity".

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I Introduction

Judges in New Zealand possess significant and wide-ranging power. They decide on matters such as whether a schoolboy can grow their hair beyond their collar,¹ through to restraining the Prime Minister from making laws by executive decree.² To legitimise this binding power, it follows that the process by which judges are appointed must be accessible, robust and able to be scrutinised by members of the public.

On these bases, New Zealand's system for the appointment of judges is constitutionally unsatisfactory. By convention, the Attorney-General makes judicial appointments, guided in wide discretion by self-articulated principles. This executive process lacks sufficient public transparency and precludes any practical accountability mechanisms. It further leaves open the possibility for "tap on the shoulder" appointments based on the Attorney-General's personal or even political preferences.³

Despite these issues, Parliament ignored the chance to make significant changes to the judicial appointments process under the Judicature Modernisation Bill 2013. This ran counter to strong recommendations from the Law Commission that the process and criteria for judicial appointments should be legislated.⁴ Other submissions were made supporting the establishment of an independent appointments body in New Zealand. In light of Parliament's inaction, and a fundamentally conservative approach towards constitutional reform,⁵ I will use this paper as a vehicle to analyse how incremental reform to the current process would result in a more robustly and transparently selected judiciary.

First, in Part II, I will frame the key issues for reform by critiquing the flaws and merits of the current appointments process. Secondly, using evidence from previous movements for change, I will argue that the first incremental step of reform should be the legislation of transparent criteria for appointment and a list of mandatory parties who the decision-maker must consult with. Within this discussion in Part III, I will address why and how New Zealand should adopt a statutory criterion requiring diversity to be considered in judicial appointments. Importantly, my analysis of diversity does not seek to explore deeper social, cultural or racial issues, but instead the *mechanism* by which diversity might be included into judicial appointments.

In Part IV, I will argue that the second incremental step of reform should be to establish a Judicial Appointments Commission in New Zealand as an independent advisory body to the Attorney-General. This group decision-making process would provide robust and transparent recommendations to the Attorney-General, either in singular name or shortlist form. In this discussion, recent reform experiences from the United Kingdom and Canada will be used to highlight how a Judicial Appointments Commission could be composed in New Zealand and how it would improve accountability pathways. Further to this recommendation, I will assess whether Parliament should take a third step to re-vest the appointment power in an independent

¹ *Battison v Melloy* [2014] NZHC 1462.

² *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC).

³ Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 139–140.

⁴ Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) at R12–R17 [Law Commission Report].

⁵ Interview with Robin Palmer, Professor of Law at the University of Canterbury (The Law Foundation, NZLF Snapshot Series, 13 September 2017).

body. Ultimately, I will conclude that this proposition is only necessary against a backdrop of wide constitutional change. This is because it removes the accountability mechanism of ministerial responsibility, and requires considerable further research on its practical and constitutional consequences in New Zealand.

In assessing the need for reform, I have grounded my analysis in constitutional *principle*. Underlying my critique of the current executive appointments process is the notion that the appointment of judges and their continued independence from the executive and legislature are key ingredients for a “democracy based on the rule of law”.⁶ In this way, any appointments system must be independent from political or personal preference. Furthermore, because judges exercise considerable public power in determining, enforcing and protecting the rights of citizens, the judicial appointments process in New Zealand must be more publicly transparent.⁷ It is therefore vital that “all judges should be appointed by a transparent process, with clear criteria, and adequate and appropriate consultation” to preserve the court’s legitimacy in binding dispute resolution between citizens and the state.⁸ Consequently, I will use the principles of judicial independence and transparent government to test against the current and proposed systems of appointment throughout this paper.

For reasons of scope, I will only refer to the appointment of judges to the High Court, Court of Appeal and Supreme Court in New Zealand (together, “the senior courts”) in this paper. The appointment mechanism for the District Court is different in nature and process,⁹ and falls outside the intended reach of this paper. I also acknowledge that while I have broken down this reform process into discrete progressive steps, a future government may have an appetite for drastic or immediate change in the appointments process. In that case, the arguments advanced in this paper remain equally valid, albeit in concurrent form.

II *Framing the Issues: The Current Appointments Process*

A *Introduction*

In New Zealand, constitutional convention holds that judges are appointed to the senior courts by the Governor-General on the advice of the Attorney-General, who acts in his or her role as First Law Officer of the Crown.¹⁰ Therefore, any appointment is effectively decided by the Attorney-General.¹¹ He or she will typically seek the advice of the Chief Justice and the Solicitor-General by convention.¹² In practice, while the executive branch of government makes judicial appointments, the Attorney-General is required by constitutional convention to

⁶ Geoffrey Palmer “The Judiciary as an Institution” (2015) 46 VUWLR 257 at 257.

⁷ At 257.

⁸ Advisory Group on the Establishment of the Supreme Court *Replacing the Privy Council: A New Supreme Court* (April 2002) at 39; BV Harris “A Judicial Commission for New Zealand: A Good Idea that Must not be Allowed to Go Away” (2014) NZ L Rev 383 at 385.

⁹ Ministry of Justice *Judicial Appointments: Office of District Court Judge* (August 2012).

¹⁰ Cabinet Office *Cabinet Manual 2008* at [1.12]–[1.13]; although the Attorney-General described this process as a prerogative power established under letters patent in a recent Official Information Act 1982 request: Attorney-General’s response to request for information on the appointment of van Bohemen J to the High Court (Obtained under Official Information Act 1982 Request to Hon Christopher Finlayson, Attorney-General); see also Senior Courts Act 2016, s 100.

¹¹ Courts of New Zealand “Appointments” (2017) <www.courtsofnz.govt.nz>; Senior Courts Act 2016, s 100; Geoffrey Palmer *Reform: A Memoir* (Victoria University Press, Wellington, 2013) at 300–301.

¹² Courts of New Zealand, above n 11.

act independently of any political considerations.¹³ Beyond these conventional norms, and a few self-articulated guiding principles,¹⁴ the Attorney-General is unfettered in their discretion to make appointments. Consequently, the issues in the current system relate to judicial independence from executive influence, and transparency in government.

These issues can broadly be stated in four main categories. First, there is an absence of a list of persons which the Attorney-General is required to consult before making any appointment. Secondly, there are no fixed appointment criteria which the Attorney-General is required to apply when making appointments. Even in his self-articulated Judicial Appointments Protocol (the “protocol”), the current Attorney-General does not define “merit” or “diversity”, nor provide tangible mechanisms by which they might be considered. Thirdly, the Solicitor-General typically plays an active administrative and consultative role in appointments, despite often being later appointed to the judiciary themselves. Lastly, in questioning the first three issues above, the current process lacks tangible accountability mechanisms to scrutinise the decision-maker.

The lack of transparency and accountability in the current system was considered in Parliament’s recent Judicature Modernisation Bill process, which aimed to “[provide] courts that are modern and accessible for New Zealanders”.¹⁵ Consequently, to increase openness and integrity in the selection and appointment process, s 93 of the Senior Courts Act 2016 was enacted. That section requires the Attorney-General to publish information explaining how he or she makes judicial appointments and seeks expressions of interest from judicial candidates.¹⁶

It is my view that this perceived transparency ‘reform’ is merely a token gesture. While this new statutory duty appears constitutionally important, it embodies the current government’s attitude towards judicial appointments – retaining the status quo. This is evidenced by the fact that the Attorney-General has not updated the protocol since 2014.¹⁷ Consequently, the protocol still refers to the Judicature Act 1908 and the Supreme Court Act 2003 as the instruments for the appointment of judges in New Zealand, rather than the Senior Courts Act which consolidates those two statutes.¹⁸ Disregarding its incorrect citations, the protocol is useful to examine the Attorney-General’s articulation of the judicial appointment process in New Zealand.

In light of the four issues stated above, and due to Parliament’s inaction, I will now critique the Attorney-General’s articulation of the current process in the protocol.

B Background and Outline of the Protocol

The protocol applies to New Zealand’s senior courts.¹⁹ Fundamentally, it states that the appointment of judges reflects two main constitutional goals: “to settle disputes between

¹³ Courts of New Zealand, above n 11.

¹⁴ Crown Law Office “Judicial Appointments Protocol” (21 May 2014) <www.crownlaw.govt.nz> at 1 [Crown Law Office “Protocol”].

¹⁵ Hon Amy Adams MP “Bill updates 108-year courts legislation” (11 October 2016) Beehive Government Website <www.beehive.govt.nz>.

¹⁶ Senior Courts Act 2016, s 93.

¹⁷ Crown Law Office “Protocol”, above n 14, at 1.

¹⁸ Senior Courts Act 2016, s 3.

¹⁹ The highest court is the Supreme Court, which consists of the Chief Justice and four to five other judges. This is followed by the Court of Appeal, which consists of a President and five to nine other judges, and then

citizens and the state, and in doing so, to clarify and declare the law of New Zealand”.²⁰ This is because the foundational principle of the judiciary is that “organised society needs courts to be confidently accepted as the legitimate fora for resolving disputes”.²¹ Unlike other roles in government, judicial appointments often last for 20 years or more.²² Due to this tenure, a loss of public confidence in the judiciary can lead to longstanding barriers to justice in the courts.²³

Importantly, the protocol states that the separation of powers between the three branches of government ensures that the judiciary considers issues independently and free from “inappropriate pressures” such as politics.²⁴ For this to occur, “the judiciary must appreciate that they are not part of the political process and the public [must] understand” the constitutional bounds of each branch.²⁵ In essence, an independent judiciary is required in order to “objectively and fairly apply the law that binds the other branches [of government]”.²⁶

It follows that the legal structure of government must hold the judiciary as actually, *and in perception*, to be independent from the executive and all other individuals and organisations.²⁷ As a consequence, this must include a judicial appointments process that has a key aim of “furthering ... the actual and perceived independence of the judiciary”.²⁸

To address these constitutional demands the current Attorney-General, Hon Christopher Finlayson MP, has written a foreword to the protocol.²⁹ In his foreword, he articulates six principles to ensure transparency and integrity in the appointment process:³⁰

- (i) Clear and publicly identified processes for selection and appointment;
- (ii) Clear and publicly identified criteria against which persons considered are assessed;
- (iii) Clear and publicly identified opportunities for expressing an interest in appointment;
- (iv) A commitment to actively promoting diversity in the judiciary without compromising the principle of merit selection;
- (v) Advertising for expressions of interest, recognising that selection should not always be limited to those who have expressed interest;

the High Court, which consists of the Chief Justice and no more than 55 other judges. Judges sitting on all of these Courts are considered Judges of the High Court: Senior Courts Act 2016, ss 6–7, 45 and 66.

²⁰ Crown Law Office “Protocol”, above n 14, at 2.

²¹ BV Harris, above n 8, at 385.

²² Law Commission *Report*, above n 4, at [5.2]

²³ At [5.3].

²⁴ Crown Law Office “Protocol”, above n 14, at 2.

²⁵ John G. Roberts, Chief Justice of the United States of America “In Conversation” (Public Lecture at Victoria University of Wellington, 26 July 2017) <www.victoria.ac.nz>.

²⁶ John G. Roberts, above n 25.

²⁷ BV Harris, above n 8, at 385.

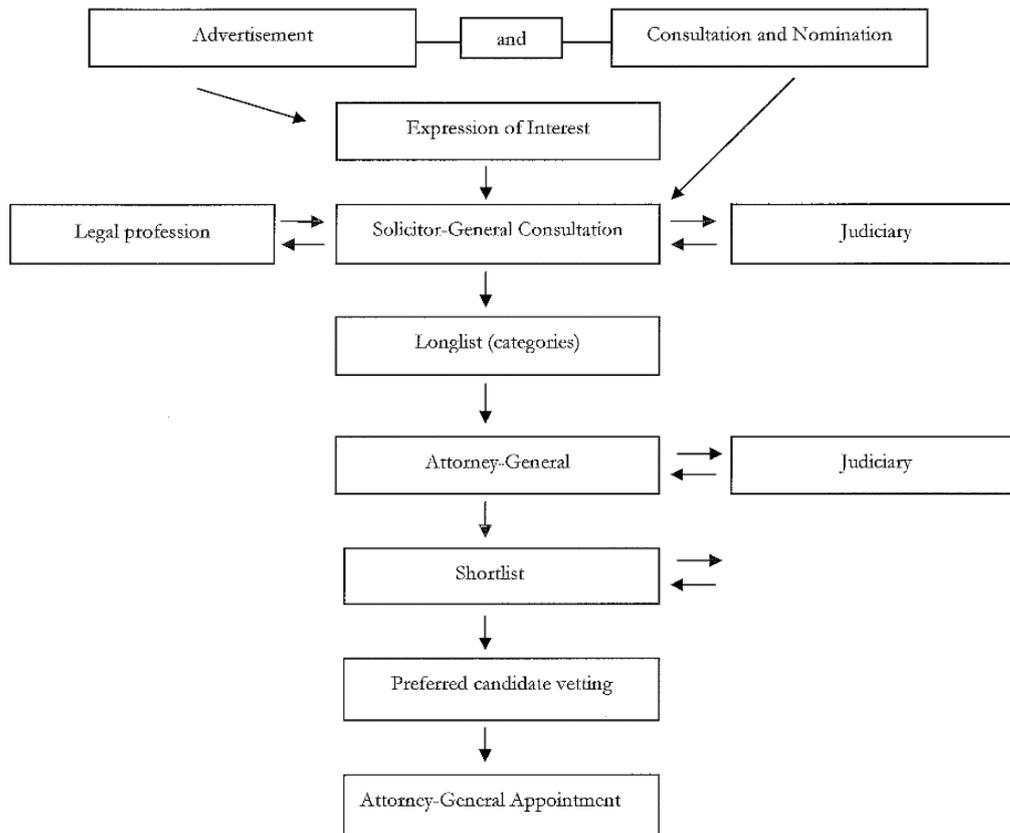
²⁸ At 384.

²⁹ Crown Law Office “Protocol”, above n 14, at 1.

³⁰ At 1.

- (vi) Maintaining, on a confidential database, a register of persons interested in appointment.

Bearing these principles in mind, and the legal requirement that senior court judges must have held a practising certificate as a barrister or solicitor for at least seven years,³¹ the protocol provides a diagram to explain the current process for High Court appointments:³²



While this diagram appears to show a robust and thorough approach to judicial appointments, it is not necessarily indicative of the true nature of the process. Significantly, the Attorney-General has the constant discretion to circumvent the protocol. In practice, it is likely that the expression of interest stage is largely negated by the opportunity for candidates to be nominated by the Attorney- or Solicitor-General.³³ Problematically, this only involves “such consultation as [the Attorney-General] believes necessary”, before appointing a judge from that shortlist.³⁴ There are also no means to access information about candidates who have expressed interest,

³¹ Senior Courts Act 2016, s 94.

³² Should the process work as prescribed in the protocol, candidates who have expressed interest are rated by the Solicitor-General in consultation with senior members of the judiciary and legal profession. The Solicitor-General then categorises these candidates on the longlist as either suitable for immediate appointment, possibly suitable within two to three years, and those in neither category. If the Attorney-General so chooses, he or she may consult on those candidates or interview them, before the Solicitor-General undertakes significant background checks to “confirm there are no matters in their background of a sort that might cause difficulties after appointment”. Finally, the Attorney-General notifies Cabinet of an appointment by convention, before recommending the candidate to the Governor-General for official appointment: Crown Law Office “Protocol”, above n 14, at 4–6.

³³ At 4–5.

³⁴ At 5; the protocol states that in practice this will always include consultation with the Chief Justice.

or whether an appointment has come from within those expressions or outside of them.³⁵ While it is important to retain the Attorney-General's power to appoint the best possible candidate, it is my view that the protocol tip-toes around the significant potential for an Attorney-General to appoint the judiciary on a discretionary 'tap on the shoulder' basis. It is apparent that the Attorney-General's current discretion grants them the power to bypass a rigorous consultation process and ignore the merit of other candidates.³⁶

For appointments to the appellate courts the protocol outlines a slightly different, but further problematic, process. These appointments are generally made from serving judges of the High Court, who are already known to the Attorney-General.³⁷ Consequently, there is no expression of interest advertisement,³⁸ encouraging "tap on the shoulder" appointments. This danger of appointments by personal or political preference is heightened for the appellate courts because candidates will have "already demonstrated their abilities as judges and possibly where they sit on the legally liberal to legally conservative spectrum".³⁹ The only safeguard in this process is that by convention the Attorney-General acts on the advice of the Chief Justice (who will confer with other appellate court judges) to create a shortlist of no more than three names.⁴⁰ Then, after considering the "overall make-up" of the court, the Attorney-General makes his or her recommendation.⁴¹ By waiving the expression of interest process, stating that the Attorney-General will already know the candidates, and allowing him or her to determine the composition of the bench, the protocol reinforces even greater executive discretion with regard to appellate court appointments.

Consequently, even the perfect operation of the protocol is not without flaws. This is primarily due to the fundamental roles of the Attorney- and Solicitor-General providing obstacles to accountability and transparency, and the absence of safeguards against the Attorney-General's unfettered discretion. While the Attorney-General's self-articulated guiding principles appear to embody a robust and transparent process, there are no means by which the Attorney-General can practically be held to account for acting outside the scope of the protocol. As a result, New Zealand's appointments process by an executive individual "remains unsatisfactory when tested against constitutional principle and when contrasted with the successful experience of judicial commissions in comparative jurisdictions".⁴² This is because there is scope for judicial independence to be compromised by the "influence of executive government" or the "personal preferences of [the] Attorney-General".⁴³ The role of the Attorney-General as a singular discretionary decision-maker, and the Solicitor-General as a potentially interested party must be examined to assess the holes in accountability and transparency in the current process.

³⁵ Persons who have expressed interest as judicial candidates are retained on a confidential register by the Attorney-General's Appointments Unit: Crown Law Office "Protocol", above n 14, at 4.

³⁶ Palmer and Butler, above n 3, at 139–140; BV Harris, above n 8, at 387.

³⁷ Crown Law Office "Protocol", above n 14, at 7.

³⁸ At 7; bizarrely, there is no available information in the protocol or elsewhere on how the Chief Justice is selected.

³⁹ BV Harris, above n 8, at 390.

⁴⁰ Crown Law Office "Protocol", above n 14, at 8.

⁴¹ At 8.

⁴² BV Harris, above n 8, at 384.

⁴³ At 384–385.

C *The Roles of the Attorney- and Solicitor-General*

The Attorney-General is the First Law Officer of the Crown,⁴⁴ who by constitutional convention appoints judges apolitically, independent from other ministers.⁴⁵ However, he or she appears to remain a minister exercising an executive function during the appointments process.⁴⁶ I argue that this distinction raises several key issues with accountability pathways and transparency.

First, there are not enough safeguards in the High Court appointment process to ensure that the Attorney-General does not simply follow personal or political preference.⁴⁷ Most worryingly, Geoffrey Palmer has stated that as Attorney-General he “tried hard to put a stamp on the judiciary” and that personal preferences “play an important role” in judicial appointments.⁴⁸ Furthermore, the Attorney-General “may hold other portfolios and ... may be presumed to be committed to the general ideology of the incumbent government”.⁴⁹ This can create a perceived lack of judicial independence from the executive.⁵⁰ Grounding this evidence against the protocol, the Attorney-General’s wide-ranging discretion allows a choice of whether they consult on the shortlist of candidates, whether they interview any of those candidates, and who will ultimately be appointed.⁵¹ As a result, the current process for High Court appointments exists with “little expectation of candidates taking the initiative to apply”.⁵² I argue that this provides copious scope for an Attorney-General to appoint judges on a “tap on the shoulder” basis, using his or her wide-ranging discretion to bypass due process.⁵³

Secondly, and perhaps more concerningly, the distinction between the Attorney-General’s role as a minister or First Law Officer leads to a lack of accountability measures grounding his or her discretion. Significantly, the Attorney-General uses this distinction to reject Official Information Act 1982 requests into judicial appointments because he holds judicial appointments information in his capacity as First Law Officer of the Crown.⁵⁴ This has been upheld by several Ombudsman reviews.⁵⁵ Consequently, no information used or generated in the judicial appointments process will fall under the scheme of that Act or be made available to the public. The Attorney-General also has no obligation to periodically or individually report on appointments, nor are they amenable to judicial review. The only apparent safeguard within the High Court appointment process appears to be the role of the Chief Justice, who can

⁴⁴ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 822; EW Thomas “The Independence of the office of Attorney-General” [2009] NZLJ 213 at 213.

⁴⁵ BV Harris, above n 8, at 393.

⁴⁶ At 393.

⁴⁷ At 384–385.

⁴⁸ Geoffrey Palmer “Judicial Selection and Accountability: Can the New Zealand System Survive?” in BD Gray and RB McClintock (eds) *Courts and Policy: Checking the Balance* (Brookers, Wellington, 1995) 11 at 47; Palmer *Reform: A Memoir*, above n 11, at 302.

⁴⁹ BV Harris, above n 8, at 394

⁵⁰ At 394.

⁵¹ Crown Law Office “Protocol”, above n 14, at 4–5.

⁵² BV Harris, above n 8, at 388.

⁵³ Palmer and Butler, above n 3, at 139–140; BV Harris, above n 8, at 387.

⁵⁴ Attorney-General’s response to request for information on the appointment of van Bohemen J to the High Court (Obtained under Official Information Act 1982 Request to Hon Christopher Finlayson, Attorney-General).

⁵⁵ Rachel Pettersen *Ombudsman’s Finding on a Complaint by George Morrison against the Attorney-General under the Official Information Act 1982 (OIA)* (5 September 2017).

influence and veto the shortlist of candidates before the Attorney-General makes their decision.⁵⁶

Despite this, one of the key arguments for the Attorney-General retaining the power of appointment is that it allows for political accountability in Parliament.⁵⁷ This is because ministerial responsibility gives “democratic legitimacy” to appointments,⁵⁸ in that the Attorney-General may be subjected to criticism in Parliament for their decisions.⁵⁹ The flow on effect is one of deterrence. As the Attorney-General will be aware of political accountability, he or she will therefore be motivated to make thorough decisions.⁶⁰ In fact, New Zealand’s current system of executive appointment is described by the Ministry of Justice as a “democratic model that facilitates ministerial accountability to Parliament for all decisions related to judicial appointments”.⁶¹ However, *in practice*, it is questionable whether Parliament would inquire into the Attorney-General’s exercise of discretion.⁶² This is evidenced in situations of judicial misconduct, where Parliament has not required the Attorney-General to account for the appointment of the judge in question.⁶³ There is also a danger that the Attorney-General could attempt to side-step this accountability pathway by distinguishing his or her appointments role as a non-partisan First Law Officer of the Crown, not subject to ministerial responsibility. It is worth investigating whether the Attorney-General should be required to make appointments in his or her ministerial capacity to ensure the availability of political accountability.

The other issue with political accountability is that in holding the Attorney-General to account, “critics would inevitably look beyond ... to [the] government for attribution of blame”.⁶⁴ This would undermine judicial independence and the separation of powers in New Zealand.⁶⁵ In such a situation, the incumbent government would have little power to change or revoke an appointment. This is because they could only “exercise a right held in common with everybody else to initiate the judicial discipline process” under the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.⁶⁶ In reality, this would only ever relate to the judge’s conduct, and could not be used to review the process or substance of their appointment by the Attorney-General. Nevertheless, it is my view that the threat of political backlash may be a reason for retaining at least some appointment power in the Attorney-General, and should be considered in any reform in light of its justification for the current process.

Thirdly, further to the role of the Attorney-General, the current model allows the Solicitor-General to threaten the independence of the judiciary.⁶⁷ This is because while the Solicitor-

⁵⁶ Crown Law Office “Protocol”, above n 14, at 5; Palmer “Judicial Selection and Accountability”, above n 48, at 43; Palmer *Reform: A Memoir*, above n 11, at 300-301.

⁵⁷ Palmer “Judicial Selection and Accountability”, above n 48, at 82–83.

⁵⁸ Michael Kirby “Modes of Appointment and Training of Judges - A Common Law Perspective” (2000) 26 Commonwealth Law Bulletin 540 at 544.

⁵⁹ Palmer “Judicial Selection and Accountability”, above n 48, at 42.

⁶⁰ BV Harris, above n 8, at 396.

⁶¹ Ministry of Justice *Appointing Judges: A Judicial Appointments Commission for New Zealand? A Public Consultation Paper* (April 2004).

⁶² BV Harris, above n 8, at 395.

⁶³ At 395.

⁶⁴ At 396.

⁶⁵ At 396.

⁶⁶ At 396.

⁶⁷ At 395; Palmer “Judicial Selection and Accountability”, above n 48, at 52.

General generally assists the Attorney-General with administrative matters in appointments, there is a significant history of Solicitors-General subsequently being appointed senior court judges.⁶⁸ Therefore, I argue that a Solicitor-General should not be allowed to influence the appointment of judges who will be their “future colleagues on the bench”.⁶⁹ This is because these appointees, when consulted by the Chief Justice regarding future appointments, can favour a former Solicitor-General who assisted with their own appointment.⁷⁰ Furthermore, the Solicitor-General is a litigator who acts on behalf of the Crown, and should not be able to influence the judges which he or she will appear in front of. I argue that the Solicitor-General is a party too interested in the outcome of judicial appointments to be involved in the process, even administratively.

A unique and pertinent illustration of the current process was the appointment of Pheroze Jagose to the High Court in July 2017. Importantly, there is no reason to query his appointment on a substantive level, due to outstanding personal characteristics and an impressive record as a barrister.⁷¹ There is, however, an element of awkwardness in his selection. This is because Jagose J is the brother of the current Solicitor-General, who typically plays an important assistive role in judicial appointments. One can only assume that the Solicitor-General would have recused herself in this case, although there is no formal way to access information on this point. Due to the relatively small nature of New Zealand’s legal profession, perceived conflicts of interest are often unavoidable. To minimise the risk of any such perceptions, reform of the current process would lead to greater transparency and accountability in similar awkward appointments.

It must also be remembered that it is legally possible for the Attorney-General to unilaterally overhaul the judicial appointments process. Without any mandatory requirements in law, the Attorney-General could simply ignore constitutional convention and create a new process altogether.⁷² Such a move would raise significant political and constitutional issues. With this in mind, and the above concerns over a lack of transparency and accountability in the current process, it must be asked how to best fetter and monitor the Attorney-General’s discretion.

For these reasons, statutory reform should be considered to anchor the Attorney-General, or other alternative decision-maker, to legally enforceable standards which would ensure that the process is publicly available for scrutiny.⁷³ In the absence of legislation, two of the key mechanisms in the protocol which attempt to fetter the Attorney-General’s discretion are appointment criteria and consultation with interested parties.

D Current Criteria for Appointment and Consultation Process

Primarily, the protocol states that judicial appointments are made “on the basis of merit”.⁷⁴ Despite this, “there is a commitment to actively promoting diversity in the judiciary, taking into account all appropriate attributes”.⁷⁵ Problematically, there is no explanation of what an

⁶⁸ BV Harris, above n 8, at 395; for example Collins, Arnold, McGrath, Neazor, White, Savage and Wild JJ.

⁶⁹ At 395.

⁷⁰ At 395.

⁷¹ New Zealand Law Society “New High Court Judge Appointed” (11 July 2017) <www.lawsociety.org.nz>.

⁷² BV Harris, above n 8, at 386.

⁷³ At 391–392.

⁷⁴ Crown Law Office “Protocol”, above n 14, at 3.

⁷⁵ At 3.

“appropriate attribute” might be. The protocol justifies this by optimistically stating that the Attorney-General is a decision-maker who will “ensure a consistent and principled approach” to judicial appointments.⁷⁶ With respect, it is my view that blind trust in the Attorney-General’s decision-making ability is constitutionally dangerous. There is currently no indication of what the Attorney-General considers “merit”, and even whether this is subjectively or objectively considered. There are also no means to ascertain who the Attorney-General may have consulted, if anyone.

This lack of transparency is best illustrated under the equivalent discretionary executive appointments system in Australia.⁷⁷ Notably, Hayne J was appointed to the High Court of Australia when “the Attorney-General simply telephoned one afternoon to offer him the position, confirmed the appointment half an hour later, and it was publicly announced 20 minutes after that”.⁷⁸ To avoid such a situation, New Zealand must be able to compare any decision the Attorney-General makes against clear criteria for appointment and be satisfied that the correct interested parties have been consulted. Under the current protocol, this is not the case.

It is worth noting, however, that the protocol does articulate some key personal characteristics that a successful candidate should embody. These are designed to acknowledge the judiciary’s role in making decisions that affect the rights of individuals and the public.⁷⁹ To ensure that a prospective judicial candidate is suitable to be a High Court Judge, they must exemplify the following four characteristics:⁸⁰

- (a) Legal ability: including a “sound knowledge of the law and experience of its application” and the “capacity to discern general principles of law and in doing so weigh competing policies and values”, as well as the “overall excellence of [the] person as a lawyer demonstrated in a relevant legal occupation”;
- (b) Qualities of character: including honesty, impartiality, patience and other qualities relating to integrity and good judgment;
- (c) Personal technical skills: including effective oral and written skills, mental agility, and efficiency and clarity in judgment; and
- (d) Reflection of society: in that the prospective candidate will be “aware of, and sensitive to, the diversity of modern New Zealand society” as well as New Zealand’s “life, customs and values”.

While it might be inferred that these are appointment criteria, or even a definition of merit, it is unclear how they might be assessed. The only information that a prospective candidate will need to provide in the process is a curriculum vitae, a declaration that “there are no matters of

⁷⁶ Crown Law Office “Protocol”, above n 14, at 3.

⁷⁷ Australian Government Attorney-General’s Department “Court Appointments” (2017) <www.ag.gov.au>.

⁷⁸ Andrew Lynch “Australia is lagging behind the world’s best on judicial appointments reform” (13 August 2015) *The Conversation* <www.theconversation.com>.

⁷⁹ Crown Law Office “Protocol”, above n 14, at 2.

⁸⁰ At 3–4.

the sort that might cause difficulties after appointment”, and a completed expression of interest form.⁸¹

The expression of interest form is accessible on the Crown Law website.⁸² Its purpose is to provide a range of personal information to supplement the candidate’s curriculum vitae.⁸³ Generally, it relates to a candidate’s work history and legal experience.⁸⁴ Notably, the form requires the candidate to identify their gender, ethnicity and iwi affiliations.⁸⁵ However, this is qualified by a heading that states “the following information is for statistical purposes”.⁸⁶ Despite the Attorney-General’s articulation of the importance of diversity,⁸⁷ the expression of interest form makes it unclear whether a candidate’s gender, ethnic and cultural diversity are in fact substantive considerations. Furthermore, the Attorney-General can simply choose to circumvent the expression of interest stage by using his or her discretion to nominate a different candidate who has not applied.⁸⁸ This discretionary power tends to undermine the robustness of the process by allowing the Attorney-General to bypass the stage at which a candidate’s application can be compared against criteria.

Puzzlingly, the only real qualification of diversity considerations appears in the protocol’s explanation of appellate court appointments:⁸⁹

In addition to the criteria by which [High Court] judges are selected, the Attorney-General will consider the overall make-up of the court, *including the diversity of the bench* and the range of experience and expertise of the current judges. The appellate courts should consist of judges who collectively represent a range of expertise, skills, experience, qualities and perspectives.

By framing this consideration “in addition” to the High Court process, the protocol appears to suggest that the High Court does not include a consideration of the “diversity of the bench”.⁹⁰ One can speculate that an appellate court sitting with multiple judges might require a further diversity requirement to ensure a range of personal values are present in cases of significance.⁹¹ However, by stating that the appellate courts should consist of a range of diverse judges, the inference can be made that this is not a priority for High Court appointments.

Significantly, this might lead to a paradox in the appointment of a diverse judiciary. If the published High Court process does not require a consideration of diversity, then the potential exists for a homogenous bench in the High Court. Consequently, when the Attorney-General selects appellate court appointments from judges of the High Court, his or her consideration of

⁸¹ Crown Law Office “Protocol”, above n 14, at 7.

⁸² Crown Law Office “Expression of Interest to be Appointed to the Bench of the High Court” (2017) <www.crownlaw.govt.nz> [Crown Law Office “Expression of Interest form”].

⁸³ Crown Law Office “Protocol”, above n 14, at 7.

⁸⁴ Crown Law Office “Expression of Interest form”, above n 82.

⁸⁵ Crown Law Office “Expression of Interest form”, above n 82.

⁸⁶ Crown Law Office “Expression of Interest form”, above n 82.

⁸⁷ Crown Law Office “Protocol”, above n 14, at 1.

⁸⁸ At 4–5.

⁸⁹ At 8 (emphasis added).

⁹⁰ At 8.

⁹¹ Rachel Cahill-O’Callaghan “Reframing the judicial diversity debate: personal values and tacit diversity” (2015) 35(1) LS 1 at 10.

the diversity of the bench can extend only as far as judges who may have been appointed without judicial diversity in mind.

It is of course difficult to tell whether this paradox is evident in practice, as the Attorney-General holds significant discretion in the appointment of High Court judges. It is possible that diversity plays an important role in his considerations and consultations, as articulated in his principles in the protocol.⁹² However, it must be remembered that these are not mandatory considerations, and could be disregarded by the current or future Attorneys-General at any stage. It also must be noted that ss 95 and 96 of the Senior Courts Act 2016 allow for the appointment of a Judge to the Court of Appeal or Supreme Court without experience on the High Court bench. This could circumvent the diversity paradox, but is highly unusual in practice.⁹³ With confusion over what constitutes “merit” or “diversity”, and no concrete terms by which the public can be confident that the Attorney-General assesses candidates, there is a need for legislative reform designed to anchor his or her discretion.

Furthermore, there are insufficient means to ascertain who the Attorney-General may have consulted for each appointment, and whether these parties were appropriate persons. In any given appointments process, consultation is a key element to ensure that a wide range of opinions inform the ultimate decision.⁹⁴ Currently, the Attorney-General commonly consults with the Chief Justice and anyone else who “he or she believes necessary”.⁹⁵ In practice, it is likely that a “heavy dependence” is placed on consultation.⁹⁶ However, Parliament’s inaction and a governmental attitude that “there is no suggestion that the present procedure has not served the country well”,⁹⁷ has left the Attorney-General still able to simply consult anyone “he or she believes necessary”.⁹⁸ In essence, the Attorney-General is free to consult everyone or no one. This could lead to either inefficient use of executive time or, more dangerously, a process by which key stakeholders are not adequately involved. In the absence of a legislative list against which consultation can be tested, the Attorney-General’s process remains non-transparent, and ultimately inaccessible by meaningful accountability mechanisms.

After a close examination of the current protocol, it is apparent that there are inadequate safeguards against the Attorney-General’s wide-ranging individual discretion. This raises four significant issues of transparency, accountability and judicial independence. First, the Attorney-General is not bound to consult any parties during the process. Secondly, he or she is not bound to follow clear merit or diversity criteria when making appointments. Thirdly, the Solicitor-General may be perceived to be an interested party in any appointment. Lastly, the current process lacks a tangible means of accountability against the decision-maker. For these reasons, New Zealand must consider legislative reform.

⁹² Crown Law Office “Protocol”, above n 14, at 1.

⁹³ A recent example is the appointment of Lord Sumption straight from the bar to the United Kingdom Supreme Court.

⁹⁴ BV Harris, above n 8, at 385.

⁹⁵ Crown Law Office “Protocol”, above n 14, at 5.

⁹⁶ BV Harris, above n 8, at 389.

⁹⁷ Courts of New Zealand, above n 11.

⁹⁸ Crown Law Office “Protocol”, above n 8, at 5.

III *The First Step: Legislating the Current Process*

A *Introduction*

The importance of legislating the judicial appointments process is best illustrated by the Judicature Modernisation Bill 2013, which gave Parliament the opportunity to consider statutory reform. Part 1 of the Bill became the Senior Courts Act 2016, and aimed to “enhance public confidence in the justice system through clearer, updated statements of how the senior courts are arranged and operated”.⁹⁹ In the general policy statement of the Bill, the reform is described as implementing “the Government’s response to the Law Commission’s report *Review of the Judicature Act 1908: Towards a New Courts Act*”.¹⁰⁰ While the Government’s response was to reject nearly all of the Law Commission’s recommendations, their constitutional basis and subsequent debate during the Judicature Modernisation Bill is useful to inform the argument for legislating the appointments process.

Primarily, legislation of the appointments process would ensure that the Attorney-General operates within a “transparent process, with clear criteria, and adequate and appropriate consultation”.¹⁰¹ Because the current protocol exists only as a “matter of convention”, it is difficult to tell whether it is used for senior courts appointments.¹⁰² As a result, and due to evidence of “uneven” employment of procedural mechanisms by different Attorneys-General,¹⁰³ “it would engender public confidence and transparency to state [the process] explicitly”.¹⁰⁴ In their submissions on the Bill, the Law Society concluded that a lack of “formal checks and balances ... upon the executive’s power to appoint judges” was a “matter of such constitutional importance” that required urgent legislation of the process.¹⁰⁵

Legislation of the Attorney-General’s appointment power also has significant benefits for public accountability. Because an appointments process empowered by statute would become a “statutory power of decision”, it is possible that the Attorney-General’s decision could become amenable to judicial review on the grounds of legitimate procedural expectation.¹⁰⁶ While this would be open to arguments over intensity of review, “the underlying principle that the judicial review jurisdiction of the High Court is available to oversee the legality of public authority decision-making” should be upheld for judicial appointments.¹⁰⁷ At the very least, it is my view that this extra accountability pathway would act to deter the Attorney-General from acting outside the scope of any legislated process or criteria.

Although it is apparent that reform would have significant constitutional benefits for New Zealand’s judicial appointments process, the question must be asked why Parliament has been reluctant to make changes. I argue that this is best illustrated by an analysis of *how* reformists

⁹⁹ Judicature Modernisation Bill 2013 (178-2) (explanatory note).

¹⁰⁰ Judicature Modernisation Bill 2013 (178-2) (explanatory note).

¹⁰¹ Law Commission *Report*, above n 4, at [5.4] and [5.16]; Advisory Group on the Establishment of the Supreme Court *Replacing the Privy Council: A New Supreme Court* (April 2002) at 39.

¹⁰² Law Commission *Report*, above n 4, at [5.15].

¹⁰³ At [5.16] and [5.18].

¹⁰⁴ New Zealand Law Society “Submission to the Justice and Electoral Committee on the Judicature Modernisation Bill 2013” at [45].

¹⁰⁵ At [44].

¹⁰⁶ Judicial Review Procedure Act 2016, ss 3 – 5; see Matthew Smith *The New Zealand Judicial Review Handbook* (Brookers, Wellington, 2011) at ch 55.

¹⁰⁷ BV Harris, above n 8, at 403–404; *Wilson v Attorney-General* [2011] 1 NZLR 399 (HC).

have argued for statutory appointments processes in the past. Proposals of legislative reform in New Zealand have generally fallen into one of three distinct categories, either:

- (1) retaining the Attorney-General as the decision-maker, but creating better accountability and transparency through statutory appointment criteria and mandatory consultation requirements;
- (2) retaining the Attorney-General as decision-maker, but creating an independent advisory body which recommends appointments to the Attorney-General, thus limiting his or her discretion; or
- (3) replacing the Attorney-General as the decision-maker with an independent body.

Most movements for reform in New Zealand have sat under the first category, which reinforces the current process in clear and transparent statutory form. The second view, which I term the “mixed approach”, is one that gained traction in the United Kingdom’s establishment of a Judicial Appointments Commission in 2005. The third (and most radical) category, usually raised by academics, argues for the re-vesting of the appointments power a completely independent body.¹⁰⁸ The issue, however, is that these approaches have been considered as disparate and irreconcilable. The result is that reformists agree that the process needs constitutional change, but cannot agree *how* reform should proceed. For this reason, the path to change is decelerated by academic and legal disagreement.

Consequently, rather than isolating the different movements for legislative reform into three separate categories, I argue that the better view is to see each category as an incremental step towards complete judicial appointments reform. It is my view that the first logical step to improve accountability and transparency in the process is the legislation of criteria for appointment and a mandatory list of persons that the Attorney-General must consult. While this retains the Attorney-General as decision-maker, it largely anchors him or her to explicitly stated procedural requirements. The second incremental step is a review of whether the Attorney-General should remain as the decision-maker, or should be restricted or replaced by an independent body. The viability and scope of a Judicial Appointments Commission in New Zealand is considered in Part IV.

Having framed the transparency and accountability benefits of legislative reform and how it might be achieved, I will now consider the first step of incremental reform in this Part III. This is a question of why and how the consultation process and appointment criteria should be included in statute.

B Consultation Criteria

In any given appointments process, consultation is a key element to ensure that a wide range of opinions inform the ultimate decision.¹⁰⁹ Currently, the Attorney-General commonly consults with the Chief Justice and anyone else who “he or she believes necessary”.¹¹⁰ In essence, the Attorney-General is free to consult everyone or no one. This could lead to either

¹⁰⁸ Palmer and Butler, above n 3, at 137–141.

¹⁰⁹ BV Harris, above n 8, at 385.

¹¹⁰ Crown Law Office “Protocol”, above n 4, at 5.

inefficient use of executive time or, more dangerously, a process by which key stakeholders are not adequately involved. In practice, the current Attorney-General has stated that:¹¹¹

The consultation undertaken for vacancies in the High Court usually includes the Solicitor-General, the Chief Justice, the Presidents of the New Zealand Law Society and the New Zealand Bar Association and the relevant Heads of Bench. In addition, depending on the circumstances, I may also consult more widely in the community. ... [A]ny consultation must be sufficiently flexible to allow me, as Attorney-General, to consult with others as the circumstances arise.

As the Law Commission and Law Society note, there would be no additional burden in legislating mandatory consultation with those parties mentioned above by the Attorney-General.¹¹² In addition, a further clause could be written to read, “and any other appropriate persons”. This would ensure the consultation process remained “sufficiently flexible” as stressed by the Attorney-General, while still holding the decision-maker to a mandatory consultation list. Importantly, the Law Commission noted that “submitters almost unanimously agreed with this formulation, and with our proposed list of people to be consulted”.¹¹³

While I agree with all the other people to be consulted, I argue that the Solicitor-General should not be involved in the consultation process. This is because of the history of Solicitors-General being subsequently appointed to the bench, and the danger that a Solicitor-General may be able to influence their future colleagues or the judges that they appear in front of in their current role as a Crown lawyer. As a consequence, I suggest the following provision is inserted into statute, based on the Law Commission recommendations:¹¹⁴

- (1) Before making any appointment, the Attorney-General is required to consult:
 - (a) the Chief Justice, in the case of an appointment to the Senior Courts, and the Chief District Court Judge, in the case of appointment to the District Courts;
 - (b) the Head of Bench of the court to which the appointment will be made;
 - (c) the President of the New Zealand Law Society;
 - (d) the President of the New Zealand Bar Association; and
 - (e) such other persons as he or she considers to be appropriate.

This approach appears consistent with consultation processes in similar jurisdictions using executive appointment. Legislation in both the United Kingdom and Canada requires the Chief Justice to be consulted, as well as a member of the court to which the appointment will be made.¹¹⁵ Given the small number of appointments each year and the small size of New

¹¹¹ Letter from Hon Chris Finlayson MP (Attorney-General) to Nadya Berova (research assistant to BV Harris) regarding the judicial appointment process (7 March 2012) at 2 (copy with BV Harris).

¹¹² Law Commission *Report*, above n 4, at [5.56] and R17; Law Society, above n 104, at 45.

¹¹³ Law Commission *Report*, above n 4, at [5.55].

¹¹⁴ At R17.

¹¹⁵ Constitutional Reform Act 2005, s 88(3); Office of the Commissioner for Federal Judicial Affairs Canada “Terms of Reference of the Advisory Board” (14 July 2017) <www.fja.gc.ca> at Part 8(e).

Zealand's legal profession, further consultation with the Presidents of the Law Society and Bar Association would not be overly onerous. Importantly, those parties would provide further reference as to a candidate's character and skill that a sitting judge might not otherwise be able to provide. The Attorney-General's discretion would be retained in para (e), which empowers them to consult any other "appropriate" persons. Such a provision would also expressly allow Attorneys-General to look beyond traditional candidates from the independent bar, and seek appropriate references. In practice, this might include the Māori Law Society or Women's Lawyers Association, but these are not included as mandatory consulted parties as they would not be necessary or appropriate for all appointments.¹¹⁶

Significantly, the Law Commission also recommended that consultation should be mandatory for elevations of judges to higher courts.¹¹⁷ The current protocol holds that a full consultation is only necessary for "first instance" appointments, and not for appointments to the appellate courts.¹¹⁸ However, because the "profession has a vital interest in [promotions to the appellate courts] [it] is likely to have information that would be of substantial importance in making promotions".¹¹⁹ Because there are very few appellate court appointments, I hold the view that there would be no extra burden on the Attorney-General to undertake a full consultation process.¹²⁰

Having assessed why the Attorney-General should be bound by mandatory consultation provisions, and who those consulted parties should be, it must then be asked by what criteria the Attorney-General should measure each candidate.

C Statutory Criteria for Appointment

While critics of statutory appointment criteria argue that a decision-maker's flexibility in appointments should not be restricted by legislation, the Law Commission recommended that the use of statutory criteria was necessary for "public confidence and transparency".¹²¹ Because it is difficult to tell whether the Attorney-General applies the criteria from the current protocol, "it would engender public confidence and transparency to state them explicitly [in legislation]" in order to hold him or her to account for their application.¹²² The key question is then over which criteria should be included in statute. A common starting point involves two criteria: merit and diversity.

1 Merit

In the United Kingdom, Australia and New Zealand, decision-makers stress the importance of merit as the primary criterion in any judicial appointment.¹²³ However, merit is often unproblematically accepted as an objective standard by which decision-makers justify their

¹¹⁶ Law Commission *Report*, above n 4, at [5.56]

¹¹⁷ At [5.38].

¹¹⁸ At [5.25].

¹¹⁹ At [5.27].

¹²⁰ At [5.28].

¹²¹ At [5.50].

¹²² Law Society, above n 104, at [45].

¹²³ See generally Lizzie Barmes and Kate Malleson "The Legal Profession as Gatekeeper to the Judiciary: Design Faults in Measures to Enhance Diversity" (2011) 74(2) MLR 245; Cahill-O'Callaghan, above n 91; Kcasey McLoughlin "The Politics of Gender Diversity on the High Court of Australia" (2015) 40 Alt LJ 166.

appointments.¹²⁴ Problematically, merit “shifts in cultural and social values” across different temporal and political periods,¹²⁵ and inherently retains “a mystique, malleability and subjectivity that can be used to justify, criticise or constrain any policy”.¹²⁶ This is emphasised by the current protocol in New Zealand, which leaves merit undefined.¹²⁷ I argue that leaving the conception of merit to a decision-maker’s subjective view risks the homogenisation or politicisation of the judiciary. For instance, one Attorney-General in New Zealand might view a specific characteristic as a meritorious quality in appointment, while his or her successor might not.¹²⁸

It is my view that while legislating a merit appointment criterion might have little practical impact on the current process, it would have the important effect of improving transparency as to what the decision-maker considered merit. In this way, the Law Commission’s recommended statutory criterion of merit, including four defined sub-criteria, took the crucial step of drafting a section of legislation that would ensure better public accessibility and accountability. Although these criteria were never considered by Parliament, they provide a useful starting point for further reform. The recommended statutory section holds that the decision-maker must be satisfied that:¹²⁹

- (a) the person to be appointed a judge must be selected by the [decision-maker] on merit, having regard to that person’s –
 - (i) personal qualities (including integrity, sound judgment, and objectivity);
 - (ii) legal abilities (including relevant expertise and experience and appropriate knowledge of the law and its underlying principles);
 - (iii) social awareness of and sensitivities to tikanga Māori; and
 - (iv) social awareness of and sensitivities to other the other diverse communities in New Zealand; and
- (b) regard has been given to the desirability of the judiciary reflecting gender, cultural and ethnic diversity.

Significantly, these merit sub-criteria almost exactly mirror the Attorney-General’s current appointments protocol, which describes “legal ability, qualities of character, personal and technical skills and reflection of society” as key considerations.¹³⁰ Importantly, the Attorney-General defines the “reflection of society” heading as awareness of and sensitivity to “the

¹²⁴ Barmes and Malleson, above n 123, at 255.

¹²⁵ At 256.

¹²⁶ Margaret Thornton “Affirmative Action, Merit and the Liberal State” (1985) 2 AJLS 28 at 29.

¹²⁷ Crown Law Office “Protocol”, above n 14, at 3.

¹²⁸ This is evidenced in Australia, where the first two female judges appointed to the High Court were justified by the then Attorney-General “based upon one criteria and one criteria alone, and that is merit”, while a subsequent Attorney-General was eager to explicitly appoint “the fourth woman” to the Court based on gender. McLoughlin argues that gender politics and public values at the time can play a large role in what an Attorney-General might consider as “merit”: McLoughlin, above n 123, at 168–169.

¹²⁹ Law Commission *Report*, above n 4, at [5.46] and [R16].

¹³⁰ Crown Law Office “Protocol”, above n 14, at 3–4.

diversity of modern New Zealand society”,¹³¹ which matches sub-criteria (a)(iii) and (iv). Consequently, it is my view that the merit criterion (a) and its sub-criteria should be incorporated into legislation.

2 Diversity

The Law Commission’s criterion (b), which relates to diversity, is much more problematic. It raises questions of how and why diversity should be promoted in judicial appointments, and whether a mandatory consideration in statute can achieve this. Rather than focus on the “deeper social, economic and political factors” involved in promoting diversity, the use of diversity as a statutory criterion must be assessed as a *mechanism* by which change and equality are achieved in the judiciary.¹³² In this way, my analysis will focus on how “institutional and regulatory activity [is] designed to promote diversity”. This is a question of process, rather than outcome.

In parliamentary debates over the Judicature Modernisation Bill, the inclusion of a statutory diversity provision was considered for the judicial appointments process. Jacinda Ardern MP noted that 72 per cent of judges in 2013 were male, and that no information on ethnic diversity in the judiciary is publicly available.¹³³ Metiria Turei MP and Louisa Wall MP respectively argued that a diversity provision would ensure “natural checks on unconscious biases” in appointments, and would address “institutional racism” within the judiciary.¹³⁴ Ms Wall further proposed Supplementary Order Paper 217 (SOP), which supported the Law Commission recommendations for appointment criteria in statute that reflected diversity in New Zealand’s society.¹³⁵ The SOP proposed adding cl 104A, which read:¹³⁶

104A Reflection of gender, cultural, and ethnic diversity in judicial appointments

All recommendations regarding the appointment of judges must take into account the desirability of the judiciary reflecting the gender, cultural, and ethnic diversity of New Zealand.

In the Committee of the Whole House stage, Ms Wall added that the SOP would ensure “minimum levels of acceptability” in legislation for the composition of New Zealand’s judiciary.¹³⁷ However, it was not adopted.¹³⁸ The Minister of Justice, Hon Amy Adams MP, justified the National Party’s rejection of the SOP by stating that “there are already very clear protocols” which ensure that judicial appointments are made with a consideration of diversity.¹³⁹ Ms Adams then challenged whether there even was a “demonstrable problem in [the] area” of diverse appointments.¹⁴⁰ This was because she believed that sufficient female

¹³¹ Crown Law Office “Protocol”, above n 14, at 4.

¹³² Barmes and Malleson, above n 123, at 246.

¹³³ (18 February 2015) 703 NZPD 1728.

¹³⁴ (11 October 2016) 717 NZPD 14130–14134.

¹³⁵ Supplementary Order Paper 2016 (217) Judicature Modernisation Bill 2013 (178-2).

¹³⁶ At cl 104A.

¹³⁷ (14 September 2016) 717 NZPD 13723.

¹³⁸ At 13735.

¹³⁹ At 13724.

¹⁴⁰ At 13724.

judges were being selected on the basis of merit, without a quota system or statutory regime.¹⁴¹ Ms Adams concluded by stating that the current Attorney-General has proven that the existing process is successful and should not be changed.¹⁴²

The response of Ms Adams reaffirms the current government's laissez-faire attitude towards matters of political and constitutional importance. Her suggestion that diversity is not an issue in judicial appointments fails to consider the historic oppression of Māori and women in the legal profession.¹⁴³ Furthermore, while she believes that the current Attorney-General has made sufficiently diverse appointments based on merit alone, Ms Adams is failing to protect the judiciary against the prejudices and preferences of future Attorneys-General. It could also be questioned whether Ms Adams was defending the Attorney-General's widespread discretion in an act of political solidarity as ministerial colleagues. Despite this unsuccessful attempt to include a diversity criterion in statute to guide judicial appointments, it provides a useful starting point to assess how such a provision could be better framed, justified and drafted in the future.

Usefully for the purposes of this paper, the inclusion of a statutory diversity criterion for judicial appointments is not just a New Zealand-centric issue. For instance, the United Kingdom Supreme Court is “the domain of public school educated white males, who have graduated from Oxbridge”.¹⁴⁴ Furthermore, the United Kingdom judiciary has been described as “white men from a relatively narrow set of social and educational backgrounds”.¹⁴⁵ Similarly in Australia, the use of a merit criterion alone has led to a “masculinised” judiciary due to historic power imbalance between genders.¹⁴⁶ In fact, across countless jurisdictions, appointments processes have historically “evolved to meet the interests of traditional judiciary candidates” due to absences of formal appointment requirements and the exclusive use of merit criteria.¹⁴⁷ Consequently, the relationship between merit and diversity criteria is difficult to grasp. Are they mutually exclusive considerations? Or is the better view that they inform each other?

Historically, diversity has been considered “merit’s servant or foot soldier”.¹⁴⁸ However, I hold the view “it is entirely possible to implement measures to secure a more diverse judiciary without sacrificing merit”.¹⁴⁹ In order to avoid a “tokenistic” approach,¹⁵⁰ a formalised mechanism to promote diversity would ensure that judicial appointments are not made “at the whim of the politics of the day”.¹⁵¹ I argue that while merit and diversity are certainly not mutually exclusive criteria, the judicial appointments process in New Zealand must legitimise

¹⁴¹ (14 September 2016) 717 NZPD 13724.

¹⁴² At 13725.

¹⁴³ For analysis of the impact on Māori of the institutional design of British courts see Shaunnagh Dorsett *Juridical Encounters: Māori and the Colonial Courts, 1840–1852* (Auckland University Press, 2017); for a detailed history and current processes designed to support women in the law see New Zealand Law Society “Women in the Law” (2017) <www.lawsociety.org.nz>.

¹⁴⁴ Rachel Cahill-O’Callaghan, above n 91, at 2.

¹⁴⁵ Barmes and Malleson, above n 123, at 256.

¹⁴⁶ McLoughlin, above n 123, at 168.

¹⁴⁷ Barmes and Malleson, above n 123, at 255.

¹⁴⁸ Erika Rackley *Women, Judging and the Judiciary: From difference to diversity* (Routledge, 2012) at 194.

¹⁴⁹ McLoughlin, above n 123, at 170.

¹⁵⁰ At 168.

¹⁵¹ At 170.

considerations of diversity in transparent and accessible terms. I will now assess why and how New Zealand should implement statutory criteria that include diversity as a consideration.

It must first be asked why the judiciary should be diverse and what diversity actually means. There are two distinct arguments for diversity on the judiciary: either that the composition of the judiciary should be a proportionate reflection of society, or that a more diverse range of backgrounds leads to more informed decision-making.¹⁵² In regard to the first argument, “the notion that any judicial officer should represent the interests of their gender (or class or race) is objectionable” because the judiciary is not an institution that must answer to political or democratic pressure.¹⁵³ I would further add that the constitutional principle of judicial independence must not be threatened by placing pressure on the Attorney-General to select a representative judiciary. Instead, a decision-maker must realise that “the greater the diversity of participation by [judges] of different backgrounds and experiences, the greater the range of ideas and information contributed to the institutional process”.¹⁵⁴ This supports the second argument, that a diverse range of backgrounds and ideas are “invariably expressed in the decision [judges] give, constituting inarticulate premises in the process of judicial reasoning”,¹⁵⁵ and must be encouraged to inform better decision-making.

This leads to what has been called “tacit diversity”.¹⁵⁶ Tacit diversity is the acknowledgment that “judicial decision making is subject to tacit influences that are associated with overt demographic differences”.¹⁵⁷ This is distinguished from “explicit diversity”, which holds that a visibly representative judiciary is necessary to ensure public confidence by reflecting the community it serves.¹⁵⁸ In essence, tacit diversity defines an effective judiciary as one which includes judges with a range of different skills and experiences from a diverse range of backgrounds, regardless of how their background represents their community. As a result, public confidence in the judiciary grows because a “litigant [is] able to go into the court and see more than one person who shares at least some of her experiences”.¹⁵⁹ In this way, a tacitly diverse judiciary is one which “effectively constitutes the *collective* moral code of society”.¹⁶⁰ This is reinforced by Lady Hale, who submitted to the Select Committee on the Constitution that:¹⁶¹

... in disputed points you need a variety of perspectives and life experiences to get the best possible results. You will not get the best possible results if everybody comes at the same problem from exactly the same point of view. You need a variety of dimensions of diversity, I am talking not only about gender and ethnicity but

¹⁵² McLoughlin, above n 123, at 167.

¹⁵³ At 167.

¹⁵⁴ L Epstein, J Knight and A Martin “The norm of prior judicial experience and its consequences for career diversity on the US Supreme Court” (2003) 91 Cal L Rev 903 at 944.

¹⁵⁵ R Stevens “Reform in haste and repent at leisure: Iolanthe, the Lord High Executioner and Brave New World” (2004) 24 LS 33 at 78.

¹⁵⁶ Cahill-O’Callaghan, above n 91, at 5.

¹⁵⁷ At 5.

¹⁵⁸ At 4.

¹⁵⁹ House of Lords Select Committee on the Constitution *Judicial Appointments Process: Oral and Written Evidence* (2012) at 265.

¹⁶⁰ Alan Paterson and Chris Paterson “Guarding the Guardians? Towards an Independent, Accountable and Diverse Senior Judiciary” (March 2012) Centre Forum <www.centreforum.org> at 12.

¹⁶¹ Select Committee on the Constitution *Judicial Appointments* (House of Lords, HL Paper 272, 28 March 2012) at [90].

about professional background, areas of expertise and every dimension that adds to the richer collective mix and makes it easier to have genuine debates.

Traditionally, incorporating diversity in the judiciary has been treated as something of a paradox. This is because while the legal profession has accepted that the judiciary should contain a diverse range of judges, there has been a hesitance to recognise or select judicial candidates from outside traditional legal pathways or backgrounds.¹⁶² This can lead to a chilling effect, whereby potential candidates are deterred from applying for selection as a judge because they feel that their background “[does] not belong to the perceived stereotype”.¹⁶³

By framing diversity as tacit rather than explicit, it is my view that more diverse candidates would be encouraged to apply. This is because, as Lady Hale states above, their backgrounds and experiences are viewed as valued perspectives from which disputes could be better solved. A key example is in sexual assault cases, where a study of 8000 judgments in the United States Court of Appeals for the Federal Circuit found that the presence of a female judge consistently caused male colleagues to find more often in favour of the victim.¹⁶⁴ This was because female judges brought approaches that were distinct from their male colleagues, which facilitated a better exchange of information and ideas when making the judgment.¹⁶⁵ The tacit approach to diversity also lessens any political pressure placed on the decision-maker to appoint a representative judiciary in a tokenistic fashion.

It then follows that the Law Commission’s recommended diversity criterion (b) above, which is only concerned with how the composition of the judiciary *reflects* gender, cultural and ethnic diversity,¹⁶⁶ must be dismissed in favour of a mechanism designed to create *tacit diversity*. This is consistent with the Law Society’s submission that diversity should not be confined to “gender, cultural and ethnic” categories, but rather left as a broad statutory criterion to include all dimensions of a candidate’s background.¹⁶⁷ It is my view that once tacit diversity is accepted as the reason for including a range of different perspectives on the bench, a decision-maker will be more empowered to make diverse appointments that benefit the judiciary’s dispute resolution capabilities.

Having established *why* judicial diversity is crucial, it must then be asked *how* it can be achieved. Problematically, statutory appointment criteria empowering a Judicial Appointments Commission or other decision-maker to consider diversity can often lead to a regulatory bind.¹⁶⁸ For instance, the Judicial Appointments Commission in the United Kingdom has been tasked with achieving “equality goals ... [but lacks] the capacity to meaningfully attain them”.¹⁶⁹ This is in part due to the overarching Equality Act 2010 (UK), which “constrains dynamism in [a Judicial Appointments Commission’s] pursuit of equality goals”.¹⁷⁰ Furthermore, all diversity mechanism reform in the United Kingdom is located at the entry-

¹⁶² Barmes and Malleson, above n 123, at 267–268.

¹⁶³ Cahill-O’Callaghan, above n 91, at 4.

¹⁶⁴ Cahill-O’Callaghan, above n 91, at 7; C Boyd, L Epstein and A Martin “Untangling the causal effects of sex on judging” (2010) *Am J Pol Sci* 389 at 406.

¹⁶⁵ Cahill-O’Callaghan, above n 91, at 7–8.

¹⁶⁶ Law Commission *Report*, above n 4, at [5.49] and [R16].

¹⁶⁷ Law Society, above n 104, at [46] and [47.2].

¹⁶⁸ Barmes and Malleson, above n 123, at 259.

¹⁶⁹ At 259.

¹⁷⁰ At 259.

point to the judiciary, the “stage of the process directly under the control of government”, but the pool of potential candidates is actually controlled by the composition of the legal profession.¹⁷¹ This approach to reform has been termed “soft target radicalism”, as it does not address the role of the profession as “gatekeeper” to the judiciary. In this way, it has been argued that the “legal profession de facto determines” which identities are appointed as judges because senior legal positions often exclude women and members of different ethnic minorities.¹⁷²

With respect, “soft target radicalism” is the best way forward. While regulation of equality throughout the entire legal profession sounds appealing,¹⁷³ a more realistic solution lies at the point of entry to the judiciary for two reasons. First, the regulation of equality by the government in private law firms is untenable, but also of decreasing utility. This is because there has been increased visible diversity in gender and ethnicity at graduate level across the “legal services market”,¹⁷⁴ and therefore no great need to regulate recruitment within private practice. There may be an issue of inequality in senior legal positions,¹⁷⁵ but the ordinary business practice of promotion in New Zealand’s small legal market should not be second-guessed by public regulation. There is also sufficient freedom and flexibility in New Zealand to empower a decision-maker to dynamically consider diversity without the restriction of an equivalent Equality Act regime.

Secondly, a mechanism within reach and “under the control of the government” may in fact lead to better accountability. For example, the concept of ministerial responsibility could be preserved any New Zealand reform by retaining the Attorney-General as decision-maker, acting on the recommendations of an independent advisory body.¹⁷⁶ By legislating appointment criteria, in particular diversity, the decision-maker would be required to answer to Parliament and the public in their application of that criteria. If diversity mechanisms were imposed beyond the entry-point to the judiciary, enforcement of those mechanisms would become an expensive and time-consuming exercise. It is therefore my view that any diversity mechanism applied in New Zealand must occur at the point of entry to the judiciary, and a degree of ministerial responsibility is retained.

The question then remains over how a statutory criterion could be worded to ensure that diversity is appropriately considered and achieved on the judiciary. Scholars in Australia have argued that poorly articulated diversity mechanisms can lead to “positive discrimination”, whereby minority groups are “perceived as ‘queue jumpers’ because they allegedly owe their appointment to affirmative action rather than to real ‘merit’”.¹⁷⁷ This is affirmed by Lord

¹⁷¹ Barnes and Malleson, above n 123, at 257.

¹⁷² At 249 and 263.

¹⁷³ At 270.

¹⁷⁴ Barnes and Malleson, above n 123, at 250; furthermore, in New Zealand, gender equality can be seen in the legal profession, where 51 per cent of the profession are male: Geoff Adlam “Spotlight on Barristers” *LawTalk* (New Zealand, Issue 905, April 2017) at 84.

¹⁷⁵ In the United Kingdom, senior legal positions are becoming more dominated by lawyers from private school backgrounds and above average income families. Despite equality at graduate level, 50 of all male lawyers in the United Kingdom are partners, compared to just 22 per cent of all female lawyers: Barnes and Malleson, above n 123, at 251–253.

¹⁷⁶ BV Harris, above n 8, at 397.

¹⁷⁷ McLoughlin, above n 123, at 167; Rosemary Hunter “Fear and Loathing in the Sunshine State” (2004) 19(44) *Australian Feminist Studies* 145 at 153.

Sumption, who gave the following reasons against a mechanism of positive discrimination, despite its ability to quickly achieve diversity on the bench:¹⁷⁸

... it dilutes the standard of those appointed, it devalues the esteem of the position, it is patronising to the candidate who is appointed, and ... it is unfair to the (better) candidate who loses out.

Such a method is evident in the United Kingdom, where judicial appointments are made by a Judicial Appointments Commission which is bound by a “tipping point” or “tie break” provision.¹⁷⁹ That provision, derived from s 159 of the Equality Act 2010 (UK), empowers the Commission to choose a candidate for the purpose of promoting judicial diversity where two candidates are tied on merit.¹⁸⁰ This positive discrimination provision has been widely criticised for only applying at the final stage of selection, which “blunts” the ability of the decision-maker to consider diversity throughout the consultation and shortlisting process.¹⁸¹ It also gives weight to the allegation that appointments can be made for gains in “political currency” or “gender politics”.¹⁸²

It is apparent that a “tie-break” or “tipping point” provision has the potential to create controversy and ill-feeling between potential candidates. It is my view that, although well-intentioned in the United Kingdom, a “tie-break” provision in New Zealand would likely be too divisive or radical to be considered. Perhaps more importantly, an overly complex matrix of equality and diversity law would handicap the decision-maker’s ability to achieve results, which consequently reinforces the status quo in appointments.¹⁸³ There is no need to over-complicate a statutory regime in New Zealand by including a “tie-break” provision. The absence of an equivalent equality regime also gives Parliament greater freedom to legislate a meaningful and workable diversity criterion.

Consequently, it is my view that New Zealand could find a carefully crafted compromise somewhere between appointments based solely on merit, positive discrimination, and other complex legal considerations. The crucial task would be to draft a diversity criterion that is simple and transparent, while also retaining enough discretion for the decision-maker to appointments based on tacit diversity to ensure better judging. The criterion must not be too narrow as to confine diversity to rigid categories, but also not as wide as to mirror the current scheme of unfettered discretion to potentially avoid diversity altogether.

The Law Commission’s recommendation evidences the narrow approach, stating that appointments can only be made once.¹⁸⁴

¹⁷⁸ Lord Sumption “Home truths about judicial diversity” (Bar Council Law Reform Lecture, 2012) <www.supremecourt.govt.uk> at 22–24; Shona Wilson “Judicial Diversity: Where Do We Go From Here?” (2013) 2 CJICL 7, at 11–12.

¹⁷⁹ Constitutional Reform Act 2005 (UK), s 63.

¹⁸⁰ Section 63(4).

¹⁸¹ Graham Gee and Kate Malleson “Judicial Appointments: Diversity and the Equal Merit Provision” (6 May 2014) UK Constitutional Law Association <www.ukconstitutionallaw.org>.

¹⁸² McLoughlin, above n 123, at 167 and 169.

¹⁸³ Barmes and Malleson, above n 123, at 255 and 259.

¹⁸⁴ Law Commission *Report*, above n 4, at R16.

- (b) regard has been given to the desirability of the judiciary reflecting gender, cultural and ethnic diversity.

With respect, I reject this approach for two reasons. First, it confines diversity to “gender, cultural and ethnic” considerations, which tends to ignore that diverse experience and background may not actually fall within those categories. It also fails to protect against future iterations of diversity, and completely ignores obvious categories such as sexual orientation or disability as can be seen in Canadian appointments.¹⁸⁵ Secondly, the Law Commission suggests that the diversity criterion should be designed for the purpose of “reflecting” society. For the reasons outlined above, the purpose of a diversity criterion should not be to proportionately represent all the demographics in society. Instead, it must recognise that different perspectives, backgrounds and experiences are invaluable for the ultimate purpose of the judiciary – making sound binding decisions in law and equity.

On the other hand, the Law Society’s approach that diversity should be left undefined is possibly too broad. It leaves open the possibility that a decision-maker sees trivial traits or experiences as evidence of diversity, in order to justify selecting a homogenous judiciary. A balance must be found between the Law Commission and Law Society approaches. For these reasons, I suggest a broad provision that caveats diversity so that for any given appointment:

- (b) regard has been given to the desirability of a diverse range of backgrounds, perspectives and experiences on the judiciary.

Regardless of how it is drafted, New Zealand needs a statutory provision that defines and requires diversity to be considered at the entry-point to the judiciary. New Zealand has a long history of world-leading movements to promote equality,¹⁸⁶ yet over 65 per cent of its judiciary are male,¹⁸⁷ and no reliable statistics exist on cultural, ethnic, racial or sexual diversity. Despite this, it appears that scrutiny is intensifying on the New Zealand judiciary. The “Feminist Judgments Project Aotearoa”, due for publication in late 2017, is examining how implicit biases from a male-dominated judiciary have affected decision-making. Furthermore, a heated protest occurred outside the Supreme Court in Wellington on 7 April 2017, calling for the Attorney-General to be held to account for appointing on a “tap on the shoulder” basis.¹⁸⁸ In order to avoid further public disillusionment and possible constitutional issues, I strongly urge Parliament to reconsider the need for clear statutory criteria detailing both merit and diversity considerations in judicial appointments. This transparency would engender public confidence in not only the decision-maker, but also the judiciary to make sound decisions from a variety of diverse backgrounds and perspectives.

D Conclusion

I propose that Parliament’s first incremental step of reform is to implement statutory appointment criteria and consultation provisions, and apply those to the Attorney-General’s current process. Based on the Law Commission recommendations, Law Society submissions,

¹⁸⁵ Office of the Commissioner for Federal Judicial Affairs Canada “Terms of Reference of the Advisory Board” (14 July 2017) <www.fja.gc.ca> at Part 8(f).

¹⁸⁶ See for example the women’s suffrage movement in the late 1800s: Ministry for Culture and Heritage “Women Win the Right to Vote” (8 August 2017) New Zealand History <www.nzhistory.govt.nz>.

¹⁸⁷ Geoff Adlam “Spotlight on the Judiciary” *LawTalk* (New Zealand, Issue 903, February 2017) at 76–77.

¹⁸⁸ KiwisFirst “Secret Path to NZ Judicial Appointments” (protest flier, 7 April 2017).

and scholarship on merit and diversity, I suggest that the statutory appointment criteria would read:

- (a) the person to be appointed a judge must be selected by the Attorney-General on merit, having regard to that person's –
 - (i) personal qualities (including integrity, sound judgment, and objectivity);
 - (ii) legal abilities (including relevant expertise and experience and appropriate knowledge of the law and its underlying principles);
 - (iii) social awareness of and sensitivities to tikanga Māori; and
 - (iv) social awareness of and sensitivities to other the other diverse communities in New Zealand; and
- (b) regard has been given to the desirability of a diverse range of backgrounds, perspectives and experiences on the judiciary.

I also suggest that a mandatory list of persons to be consulted should be included in statute. This would include the Chief Justice, the Head of Bench of the court which the appointment is to be made, the President of the New Zealand Law Society, the President of the New Zealand Bar Association, and any other appropriate person. Notably, I would exclude the Solicitor-General in order to promote better perceived independence between the executive and judiciary.

As stated above, the Attorney-General presumably follows most of these considerations in practice currently, so statutory provisions are unlikely to create any noticeable differences in appointments. However, increasing transparency and public confidence through legislating these provisions would cause significant “gains in constitutional propriety”.¹⁸⁹ They would also help alleviate the perceived “systematic disadvantage and marginalisation of certain identity groups” in judicial appointments.¹⁹⁰

Importantly, I would further suggest a provision clarifying that the Attorney-General makes appointments in his or her capacity as a Minister of the Crown. Currently, the Attorney-General makes judicial appointments in his or her role as First Law Officer of the Crown.¹⁹¹ Simultaneously, he or she is also a Minister of the Crown, holding other portfolios.¹⁹² The ability of the Attorney-General to ‘switch hats’ in order to avoid public accountability mechanisms must be restrained. At present, he or she is able to refuse Official Information Act requests by distinguishing judicial appointments as occurring in a “law officer” role, therefore falling outside that Act.¹⁹³ Furthermore, it is entirely possible that the Attorney-General could

¹⁸⁹ BV Harris, above n 8, at 393.

¹⁹⁰ Barmes and Malleson, above n 123, at 246.

¹⁹¹ Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 822; EW Thomas “The Independence of the office of Attorney-General” [2009] NZLJ 213 at 213.

¹⁹² BV Harris, above n 8, at 394.

¹⁹³ Attorney-General’s response to request for information on the appointment of van Bohemen J to the High Court (Obtained under Official Information Act 1982 Request to Hon Christopher Finlayson, Attorney-General).

use this distinction to escape theoretical ministerial responsibility. This seemingly insignificant clarification would greatly benefit transparency and accountability in the process by removing the Attorney-General's ability to choose the capacity in which they make judicial appointments.

Overall, I argue that Parliament's first incremental step in reform must be to fetter the Attorney-General's discretion in statutory appointment criteria and consultation requirements. Because much of the reform proposed in this part likely occurs in practice anyway, there would be little further burden on the Attorney-General being held to explicit standards in the appointments process. However, as stated above, legislation of the process would lead to numerous constitutional gains in transparency and accountability. The question must then be asked whether the establishment of an independent body guided by these statutory provisions would be a suitable second incremental step of reform to further increase openness and robustness in judicial appointments in New Zealand.

IV The Second Step: Establishing an Independent Body

A Introduction

Despite their success overseas, the establishment of a Judicial Appointments Commission in New Zealand has received little support from lawmakers. The Law Commission dismissed submissions for an independent advisory body in its report on the Judicature Modernisation Bill 2013.¹⁹⁴ They described New Zealand's judicial landscape as incomparable to other jurisdictions with judicial appointment bodies, due to "a world of difference" between the amount of judges appointed in each country.¹⁹⁵ Because New Zealand only makes "about a dozen" appointments each year, the Law Commission suggested that a Judicial Appointments Commission would "require resources quite disproportionate to the number of appointments made in New Zealand".¹⁹⁶

Conversely, many "senior judges and former Heads of Bench" made strong submissions during the Bill process for the establishment of a Judicial Appointments Commission in New Zealand.¹⁹⁷ This was because "some promising names had not been brought forward" for judicial appointments in the past, and a group recommendation by an independent advisory body would ensure a more robust and accountable process than appointment by the Attorney-General.¹⁹⁸ It is concerning that current and past senior members of the judiciary have advocated for a change in the appointments process, despite being appointed in the current manner. Perhaps more concerningly, the benefits of establishing an independent body were never brought before Parliament in the Judicature Modernisation Bill process.

The key benefit of a Judicial Appointments Commission is removing the ability of the Attorney-General to individually and subjectively determine the qualities of those appointed to the bench.¹⁹⁹ As a result, a Judicial Appointments Commission has strong constitutional legitimacy because "modern society accepts that group decision-making in respect of public

¹⁹⁴ Law Commission *Report*, above n 4, at [5.21]–[5.23].

¹⁹⁵ At [5.21]–[5.22].

¹⁹⁶ At [5.22].

¹⁹⁷ At [5.23].

¹⁹⁸ At [5.23].

¹⁹⁹ BV Harris, above n 8, at 394.

matters is often likely to produce better outcomes than individual decision-making”.²⁰⁰ In practice, an independent group collectively reaches more robust decisions than an empowered individual consulting others.²⁰¹ Certainly in the United Kingdom, the establishment of a Judicial Appointments Commission has “put paid to any notions of prejudice in the selection process”.²⁰² While the effectiveness of independent decision-making bodies depends largely on their “legal architecture”,²⁰³ it is my view that a carefully empowered Judicial Appointments Commission is necessary in New Zealand to remove the possibility of “tap on the shoulder” appointments by an empowered executive individual.

In light of this, the Law Commission’s rejection of a Judicial Appointments Commission in New Zealand is flawed for two key reasons. First, the independence of the judiciary in New Zealand is currently compromised by the “maintenance of the real power of appointment in the Attorney-General”.²⁰⁴ A body that is actually, *and in perception*, independent of all three branches of government would address this issue.²⁰⁵ Secondly, despite the Law Commission’s concerns over time and expense, “any modest increase in expense [comparative to the current process] will be more than outweighed by the gains in constitutional propriety”.²⁰⁶ If New Zealand were to establish an independent advisory body, it is my view that these gains can be separated into three distinct categories:

- (1) better accountability pathways, as evidenced by annual reporting to Parliament and the public by the Judicial Appointments Commission on its performance, ministerial responsibility of the Attorney-General as ultimate decision-maker, and the threat of judicial review;
- (2) public confidence:
 - (a) in a body which is empowered by, and accountable to, clear and transparent statutory provisions;
 - (b) in a transparently and robustly appointed judiciary as a legitimate forum for dispute resolution; and
 - (c) that a decision made by a group is better than a decision made by an individual who consults others; and
- (3) the removal of the ability of the Solicitor- and Attorney-General to make appointments on a non-transparent “tap on the shoulder” basis.

The question then remains whether New Zealand should adopt a Judicial Appointments Commission as an independent advisory body to the Attorney-General (the “mixed approach”), or whether the appointments power should be completely re-vested in that body.

B The “Mixed Approach” – An Independent Advisory Body

The second incremental step that I propose for judicial appointments reform in New Zealand is the implementation of what I term, the “mixed approach”. This model retains the Attorney-

²⁰⁰ BV Harris, above n 8, at 394.

²⁰¹ At 394.

²⁰² Barrie L Nathan “Who Judges who Judges? Judicial Appointments and Disappointments” (2013) 8 J Comp L 405 at 412.

²⁰³ Barmes and Malleson, above n 123, at 257.

²⁰⁴ BV Harris, above n 8, at 393.

²⁰⁵ At 393.

²⁰⁶ At 393.

General as the ultimate decision-maker, but replaces his or her discretionary process with an independent Judicial Appointments Commission established and empowered by statute to undertake consultation and recommend candidates using clear criteria.²⁰⁷ Then, that Commission would then recommend one candidate, or a small shortlist of candidates, to the Attorney-General for appointment.²⁰⁸ This method of appointment is evident in recent reform in the United Kingdom and Canada, which provides useful justification for its workability in New Zealand.

In the United Kingdom, the Constitutional Reform Act 2005 established a Judicial Appointments Commission,²⁰⁹ largely to combat the criticism that the previous process was non-transparent and allowed “white Oxbridge males [to select] white Oxbridge males” for judicial appointments.²¹⁰ While the Lord Chancellor has retained the ultimate decision-making power, his or her discretion has been restricted by the Judicial Appointments Commission controlling the application and consultation process for appointments to the High Court.²¹¹ Once the Commission has undertaken this process in accordance with its empowering statutory provisions, it recommends one name to the Lord Chancellor for each judicial vacancy.²¹² The Lord Chancellor can then accept or reject the recommendation, or ask the Commission to reconsider that candidate.²¹³ In a 2012 review of the process, the House of Lords noted only four occasions where the Lord Chancellor had not accepted the Commission’s recommendation,²¹⁴ and proclaimed the implementation of the Judicial Appointments Commission method a success.²¹⁵ A similar approach is employed in Canada, where each district has its own Judicial Advisory Committee. Judicial candidates must apply for assessment as judicial candidates by their regional Committee,²¹⁶ before being categorised as “recommended” or not.²¹⁷ The Governor-General then makes appointments on the advice of Cabinet, which uses the Committee recommendations.²¹⁸

Evidence from these jurisdictions has shown that by including a Judicial Appointments Commission in the appointments process, further transparency and robustness would be promoted through new accountability pathways in New Zealand. First, a Judicial Appointments Commission process empowered by statutory process or criteria would allow for judicial review by an unsuccessful candidate or interested party.²¹⁹ While this would need to be tested for justiciability on the basis of administrative efficiency and expertise,²²⁰ a Commission should embrace “the underlying principle that the judicial review jurisdiction of the High Court

²⁰⁷ BV Harris, above n 8, at 397.

²⁰⁸ At 400.

²⁰⁹ Constitutional Reform Act 2005 (UK), s 61.

²¹⁰ Lord Phillips “Constitutional Reform: one year on” (Judicial Studies Board Annual Lecture, 2007) at 8.

²¹¹ Constitutional Reform Act 2005 (UK), ss 85–94B.

²¹² Section 85–94B.

²¹³ Section 85–94B.

²¹⁴ Select Committee on the Constitution *Judicial Appointments* (House of Lords, HL Paper 272, 28 March 2012) at [2].

²¹⁵ Select Committee on the Constitution *Judicial Appointments* (House of Lords, HL Paper 272, 28 March 2012) at [5].

²¹⁶ Office of the Commissioner for Federal Judicial Affairs Canada “Guide for Candidates” (31 March 2017) <www.fja.gc.ca> at Part A(2).

²¹⁷ At Part A(6).

²¹⁸ At Part A(6)–(7).

²¹⁹ BV Harris, above n 8, at 392.

²²⁰ At 392.

is available to oversee the legality of public authority decision-making”.²²¹ The threat of judicial review on the grounds of legitimate procedural expectation would also ensure strict procedural compliance with an empowering statute.²²² It is important to note that judicial review would need to remain grounded in review of procedure, as merits-based review would undermine a Commission’s expertise.²²³

Secondly, a Judicial Appointments Commission can easily be held to reporting requirements. I argue that New Zealand could adopt a similar performance review scheme to the United Kingdom, where the Commission is required by statute to report annually to the Lord Chancellor.²²⁴ The Lord Chancellor must then present the report to Parliament, and is bound to act on its findings.²²⁵ Failure to comply with these provisions would likely have serious political and constitutional consequences. A similar requirement could be imposed on the Attorney-General under the “mixed approach”. It is my view that imposing reporting requirements on a Judicial Appointments Commission, coupled with the maintenance of decision-making power in the Attorney-General, would promote meaningful ministerial accountability.²²⁶

This leads to the third, and perhaps most significant, accountability mechanism in the “mixed approach” model – the retention of political accountability through executive appointment. As evidenced in the United Kingdom,²²⁷ the benefit of this model is that because the Attorney-General retains the ability to reject or call for further recommendations,²²⁸ his or her discretionary appointments power remains subject to ministerial responsibility. This mechanism is closely-held by supporters of the current system, and its influence on a state actor should not be underestimated.²²⁹ In order to maintain this accountability pathway, but also reform the process to be more transparent and robust, implementing the “mixed approach” to appointments appears sound following the United Kingdom model.

In practice, this would see a Judicial Appointments Commission in New Zealand encourage and field applications to determine the pool of candidates from which appointments would be made. For each appointment, a Commission would undertake consultations with the mandatory range of persons and consider the statutory appointment criteria recommended in Part III, and finally recommend a single candidate or small shortlist to the Attorney-General. Following a Commission’s recommendations, the Attorney-General could undertake his or her own consultation process, ultimately either accepting one of the shortlisted candidates or requesting another recommendation. At no point would the Attorney-General have any influence over the pool of candidates that the Commission considers, nor the shortlist or person that they recommend. This would significantly reduce the perception that the executive was shaping the

²²¹ BV Harris, above n 8, at 403–404; *Wilson v Attorney-General* [2011] 1 NZLR 399 (HC).

²²² Judicial Review Procedure Act 2016, ss 3 – 5; see Matthew Smith *The New Zealand Judicial Review Handbook* (Brookers, Wellington, 2011) at ch 55.

²²³ BV Harris, above n 8, at 405.

²²⁴ Constitutional Reform Act 2005 (UK), sch 12, cl 32; in the United Kingdom the Lord Chancellor plays the same executive appointment role as the Attorney-General in New Zealand.

²²⁵ Constitutional Reform Act 2005 (UK), sch 12, cl 32(2).

²²⁶ BV Harris, above n 8, at 404.

²²⁷ Select Committee on the Constitution *Judicial Appointments* (House of Lords, HL Paper 272, 28 March 2012) at [18].

²²⁸ At 397; Kate Malleson “Creating a Judicial Appointments Commission: Which Model Works Best?” [2004] PL 102; Ron Levy “Judicial Selections Reform in Comparative Context” (2007) 40 UBC Law Rev 591.

²²⁹ See Michael Kirby, above n 58.

composition of the judiciary, while still retaining the ability to hold the Attorney-General accountable for ultimate appointments. Although it might be argued that the Attorney-General should remain independent from political influence in judicial appointments, I hold the view that he or she should embrace the added pressure of accounting to Parliament as a vital constitutional mechanism that ensures transparency and robustness in the process.

From a further practical standpoint, it must also be asked how a Judicial Appointments Commission in New Zealand might be composed. Despite the Law Commission raising concerns over additional time and expense incurred by using an independent body for appointments, it must be possible to “tailor” a Judicial Appointments Commission to fit New Zealand’s judicial scale.²³⁰ This is because successful independent advisory bodies in different overseas jurisdictions vary greatly in size and composition.²³¹ In New Zealand, the process of collecting information and consultation would remain largely the same, and would only require part-time commitment from Commission members.²³² Such an approach is evidenced in Canada, where each District has its own Judicial Advisory Committee tailored to reflect the size of the population. Although each Committee only ever consists of seven members, the provinces of Quebec and Ontario have two and three Committees respectively to reflect their larger size.²³³ A similar approach could be adopted in New Zealand, whether in one singular Judicial Appointments Commission or a few spread across the country.

Importantly, New Zealand must consider how a diverse range of Judicial Appointments Commission members might help increase the credibility of the process. It is generally accepted across most countries with an independent advisory body that an even balance between judges, lawyers and laypersons tends to produce more robust recommendations.²³⁴ This is because the skill and experience of the legal profession is evenly weighted against public confidence, as represented by the laypersons. I share the view of Lord Sumption that judicial dominance on an independent advisory body should be limited to “dilute” shoulder-tapping, but a small percentage of judges is required for their expertise in choosing the best candidate.²³⁵ Furthermore, although laypeople serve “little legal purpose”, they ensure community values are reflected in the process.²³⁶ It is also useful to note that the selection of Committee members in Canada requires a consideration of Indigenous diversity.²³⁷ It is unclear whether this would directly impact diversity on the judiciary itself, but at the very least considers implicitly a diverse range of perspectives and backgrounds at the consultation stage. It is my view that the composition of a Judicial Appointments Commission in New Zealand should be directed by consideration of both diversity in profession *and* background, particularly indigenous Māori interests.

²³⁰ BV Harris, above n 8, at 393.

²³¹ At 399.

²³² At 393.

²³³ Office of the Commissioner for Federal Judicial Affairs Canada “Guide for Candidates” (31 March 2017) <www.fja.gc.ca> at Part A(4).

²³⁴ BV Harris, above n 8, at 393.

²³⁵ At 399; Lord Sumption, above n 178, at 7.

²³⁶ BV Harris, above n 8, at 399.

²³⁷ Office of the Commissioner for Federal Judicial Affairs Canada “Guide for Candidates” (31 March 2017) <www.fja.gc.ca> at Part A(4).

In their draft written constitution, Geoffrey Palmer and Andrew Butler recommend that Members of Parliament sit on a Judicial Appointments Commission.²³⁸ With respect, I disagree for two reasons. First, their draft constitution contemplates the ability of the court to strike down legislation, in which case MPs might be required to give constitutional and democratic integrity to the appointments process. However, the arguments in this paper are not designed to challenge the idea of parliamentary supremacy, nor do they contemplate drastic constitutional restructuring. Secondly, the idea that politicians are members of an independent advisory body, which then selects judges, may create allegations of action for political purposes. This is precisely the opposite of what an independent advisory body seeks to achieve. It is also arguable that democratic legitimacy can be achieved by the inclusion of a healthy proportion of lay-members.²³⁹ Of course, the composition and size of a Judicial Appointments Commission in New Zealand needs further research and debate. However, a mix of lawyers, judges and laypeople working in a part-time capacity would be a credible starting point based on the small number of judicial appointments each year.²⁴⁰

There is, however, one important argument raised by Palmer and Butler that may have weight in New Zealand. That is the implementation of convention or legislation that only allows the decision-maker to appoint candidates who have *applied* to be a judge and have been subsequently shortlisted by in a Judicial Appointments Commission's consultation process.²⁴¹ This is a key feature of the Canadian system, where no potential judges can be assessed or appointed from outside of the pool of candidates who have applied.²⁴² Importantly, this measure would protect against the "politicisation of the judiciary, and the use of judicial appointment for political patronage".²⁴³ It also addresses the concern that the current process for High Court appointments exists with "little expectation of candidates taking the initiative to apply".²⁴⁴ In order to avoid situations like the "phone call" appointment of Hayne J to the High Court of Australia, New Zealand could ensure that a Judicial Appointments Commission is empowered to only consider candidates that have applied for judicial roles. The application process, like in Canada, would also be of significant utility in gathering information about each candidate in the requisite documents to inform discussions about merit and diversity.

For the above reasons, it appears that an independent advisory body would be beneficial in New Zealand to ensure better accountability, transparency and public confidence in the judiciary and judicial appointments process. This should be New Zealand's second step in incremental reform, after legislating the consultation and criteria requirements for appointments. If a Judicial Appointments Commission were successful, it must then be asked whether the third step should be taken to vest the appointments power completely in that Commission, removing the Attorney-General from the process altogether.

²³⁸ Palmer and Butler, above n 3, at Article 64(2)(a).

²³⁹ Select Committee on the Constitution *Judicial Appointments* (House of Lords, HL Paper 272, 28 March 2012) at [52].

²⁴⁰ BV Harris, above n 8, at 393.

²⁴¹ Palmer and Butler, above n 3, at Article 64(2)(c) and (3).

²⁴² Office of the Commissioner for Federal Judicial Affairs Canada "Guide for Candidates" (31 March 2017) <www.fja.gc.ca> at Part A(1)–(2).

²⁴³ Palmer and Butler, above n 3, at 141.

²⁴⁴ BV Harris, above n 8, at 388.

C *Re-vesting the Appointments Power – a Possible Third Step?*

Re-vesting the appointments powers in an independent body is not a new concept. Primarily mooted by academics, this radical step has never seriously been considered in New Zealand. It does, however, hold superficial appeal. This is because it firmly reinforces judicial independence in the appointments system. When tested against constitutional principle, an independent body empowered to make appointments is *both actually and perceptively* separate from the executive and legislature. However, it is my view that beyond this outward appearance there are practical issues that warrant a more cautious approach to reform.

First, such an approach completely removes the accountability mechanism of ministerial responsibility. The dangers of removing this pathway are well illustrated by Bruce Harris' proposed "two-body" model. Under this model, an independent Judicial Commission would act upon a Judicial Appointments Commission's recommendations to make appointments outside the reach of the executive.²⁴⁵ As a consequence, the Attorney-General and the mechanism of ministerial responsibility would be removed.²⁴⁶ By severing the role of the executive from the appointments system, transparency in the process would rely upon internal accountability between the Judicial Commission and Judicial Appointments Commission.²⁴⁷ At best, this model would use judicial review and regular reporting as accountability mechanisms.²⁴⁸ At worst, it is my view that the process would again become internalised and inaccessible to those seeking to challenge the body's decisions.

Secondly, it is my view that Harris' logic politicises the process. This is because he suggests that the composition of the Judicial Commission should be determined by the legislature to give it democratic legitimacy in holding the appointments power.²⁴⁹ He optimistically suggests that each member would "commit conscientiously to the apolitical ideal" of the commission.²⁵⁰ However, the danger of executive dominance in Parliament opens the door to political influence even wider than under the current system of appointment by the Attorney-General. He dismisses this counter-argument by stating that if a Judicial Appointments Commission is selected with quality in mind, then this would result in quality in judicial appointments, without the need for the Attorney-General.²⁵¹ While this is a convenient justification for the removal of the Attorney-General, it ignores the fact that the membership of the new empowered appointments body would, by nature, become a political process.

The issues with composing a body empowered to make judicial appointments can be further highlighted in the context of wider constitutional reform. Palmer and Butler's *A Constitution for Aotearoa New Zealand* lays out a draft version of a written constitution in order to provide better accessibility to "fundamental rules and principles under which New Zealand is governed".²⁵² In particular, art 64 provides for the creation of an independent Judicial Appointments Commission, which would be empowered to make judicial appointments

²⁴⁵ BV Harris, above n 8, t 404–406.

²⁴⁶ At 404–405.

²⁴⁷ At 405.

²⁴⁸ At 406.

²⁴⁹ At 403.

²⁵⁰ At 403.

²⁵¹ At 405–406.

²⁵² Palmer and Butler, above n 3, at 7.

itself.²⁵³ Palmer and Butler justify this step by stating that when parliamentary sovereignty is “softened” under a written constitution, the increased importance of the judiciary must be reflected in a more robust appointments process which is free from executive influence.²⁵⁴ They argue that re-vesting of the judicial appointments power in a Judicial Appointments Commission in New Zealand is necessary:²⁵⁵

... to reinforce the current apolitical approach by ensuring that the Government cannot appoint someone to the bench who does not command the respect of the Judiciary, legal profession, MPs and the general public.

However, it is the composition of this body that again raises concerns. Palmer and Butler’s draft constitution would require a Judicial Appointments Commission to consist of not only a mix in skills and experience, but also a mix of diverse backgrounds.²⁵⁶ Stated explicitly in the constitution, this would include “representatives from the judiciary, the legal profession, the House of Representatives and from the general public”.²⁵⁷ As mentioned in Part IV(A) above, it is my view that the step of including Members of Parliament on an independent body should only be considered in the event of drastic constitutional change for reasons of democratic legitimacy. Such an approach is probably justified in contemplation of judges being able to strike down legislation. In any other case, it would be difficult to escape the perception that the new appointments body was not compromised by the influence of the political branches of government.

Consequently, I argue that re-vesting the appointments power is too radical to be considered for short-term reform. Furthermore, the Judicature Modernisation Bill was an important illustration that Parliament would be reluctant to release the appointments power from the grasp of the executive. There also appears to be some benefit in retaining a fettered decision-making power in the executive to include the notion of ministerial responsibility, *in addition* to judicial review and regular reporting to Parliament and the public. As evidenced by Palmer and Butler’s draft constitution, re-vesting the appointments power would only be necessary (and indeed practical) against a backdrop of wider constitutional upheaval.²⁵⁸ It is my view that waiting for constitutional change to justify reforming the judicial appointments process is an untenable approach. The current method needs modification to promote better transparency, robustness and accountability mechanisms long before Parliament turns its mind to re-vesting the appointments power. In any case, further extensive research would need to be commissioned to assess the viability of such an option.

D Conclusion

New Zealand’s reform landscape has the freedom and flexibility to establish a Judicial Appointments Commission in any way that Parliament best sees fit. With careful thought as to its scope and composition, such a body in New Zealand could be formed and empowered

²⁵³ Palmer and Butler, above n 3, at 58.

²⁵⁴ At 135 and 139.

²⁵⁵ At 141.

²⁵⁶ At 140.

²⁵⁷ At 140 and Article 64(2)(a).

²⁵⁸ At 139.

without the constraint of equality legislation or any other regulatory binds.²⁵⁹ I argue that the “mixed approach” model is the best, and most achievable, compromise between a fully independent decision-making body and the current. This would retain the Attorney-General as ultimate decision-maker, but restrict their discretion by using a Judicial Appointments Commission to make a singular or shortlist recommendation for appointment.

Therefore, as a second step in reform, I propose the establishment of an independent advisory body to the Attorney-General in New Zealand. As explained above, a Judicial Appointments Commission would provide three key benefits. First, accountability pathways would be expanded to include annual reporting to Parliament and the public, the possibility of judicial review on legitimate procedural expectations, as well as ministerial responsibility of the Attorney-General as the ultimate decision-maker.²⁶⁰ Secondly, the establishment of a Judicial Appointments Commission would engender public confidence in the process as it would be empowered by, and accountable to, explicit statutory provisions.²⁶¹ As a result, confidence would also grow in a transparently and robustly appointed judiciary as a legitimate forum for dispute resolution.²⁶² Furthermore, the establishment of a Judicial Appointments Commission would loudly signal the end of the allegation that appointments are being made on a “tap on the shoulder” basis.

At a later stage, or if New Zealand encounters drastic constitutional change, Parliament could consider re-vesting the appointments power in a fully independent decision-making body. I argue that making this change now is too drastic. This is because it removes the accountability mechanism of ministerial accountability, and requires considerable further research on its practical and constitutional consequences in New Zealand. Instead, an incremental and transitional approach would slowly ingrain transparency and accountability in the judicial appointments process. This must start with the legislation of statutory criteria for appointment and a mandatory list of persons to be consulted, and be followed by the establishment of an advisory body that further legitimises the independence of the process and the judiciary.

V Conclusion

Throughout this paper, I have proposed multiple changes to different areas of the judicial appointments process. Taken together, these changes could be considered constitutionally radical. As a result, and because New Zealand’s law is naturally “conservative” and unwilling to embrace rapid change,²⁶³ an incremental approach to reform holds the most weight. This is because it pays the most respect to the ingrained mechanisms that subsequent Solicitors- and Attorneys-General have developed, but also recognises that the constitutional principles of judicial independence and responsible government demand legislative action. An incremental approach to judicial appointments reform would allow for the cautious and considered drafting of appropriate statutory appointment criteria and mandatory consultation provisions. It would further ensure the careful implementation of transitional measures towards the establishment

²⁵⁹ Unlike the United Kingdom, in which the Equality Act 2010 (UK) largely disempowers the Judicial Appointments Commission’s ability to make meaningful steps towards a diverse judiciary: see Part III(C)(2) above; Barnes and Malleson, above n 123, at 259.

²⁶⁰ BV Harris, above n 8, at 403–404

²⁶¹ At 403–404

²⁶² At 385.

²⁶³ Interview with Robin Palmer, Professor of Law at the University of Canterbury (The Law Foundation, NZLF Snapshot Series, 13 September 2017).

of a Judicial Appointments Commission as an independent advisory body to the Attorney-General.

First, I propose that Parliament enshrines the Attorney-General's current process in legislation, defining the criteria for appointment and a list of persons that must be consulted. Based on the Law Commission recommendations, Law Society submissions, and scholarship on merit and diversity, I suggest that the statutory criteria would read:

- (a) the person to be appointed a judge must be selected by the [decision-maker] on merit, having regard to that person's –
 - (i) personal qualities (including integrity, sound judgment, and objectivity);
 - (ii) legal abilities (including relevant expertise and experience and appropriate knowledge of the law and its underlying principles);
 - (iii) social awareness of and sensitivities to tikanga Māori; and
 - (iv) social awareness of and sensitivities to other the other diverse communities in New Zealand; and
- (b) regard has been given to the desirability of a diverse range of backgrounds, perspectives and experiences on the judiciary.

I suggest that a mandatory list of persons to be consulted should be included in statute. This would include the Chief Justice, the Head of Bench of the court which the appointment is to be made, the President of the New Zealand Law Society, the President of the New Zealand Bar Association, and any other appropriate persons. Notably, I would exclude the Solicitor-General in order to promote better perceived independence between the executive and judiciary. I would also further clarify that the Attorney-General makes appointments in their role as a minister to prevent them from 'switching hats' to First Law Officer of the Crown to avoid accountability mechanisms.

As stated in Part III above, the Attorney-General presumably follows most of these considerations in practice currently, so statutory provisions are unlikely to create any noticeable differences in appointments. However, increasing transparency and public confidence through legislating these provisions would cause significant "gains in constitutional propriety".²⁶⁴ They would also help alleviate the perceived "systematic disadvantage and marginalisation of certain identity groups" in judicial appointments.²⁶⁵

Secondly, providing the statutory criteria were successful, Parliament could consider whether the establishment of a Judicial Appointments Commission would further improve the robustness of the process. Such a Commission would act as an independent advisory body to the Attorney-General, who would retain the ultimate decision-making power and be accountable in his or her ministerial capacity. Crucially, modern society accepts that a collective decision is more robust than where an empowered individual consults with others.²⁶⁶

²⁶⁴ BV Harris, above n 8, at 393.

²⁶⁵ Barmes and Malleson, above n 123, at 246.

²⁶⁶ BV Harris, above n 8, at 385.

It is also likely that a Judicial Appointments Commission containing lay-members, lawyers and judges would better balance merit and diversity considerations, and remove the allegation that Attorneys- and Solicitors-General act on the basis of personal preference or politics.

By reforming its current appointments process, New Zealand will finally respond to a global trend away from paternalistic appointments, and acknowledge that a Judicial Appointments Commission will ensure more robust and transparent method of appointment. By looking at the experiences in the United Kingdom and Canada, New Zealand can learn that group decision-making from a wide range of perspectives can enrich the dispute resolution process on the judiciary. It is also evident that the merit and diversity mechanisms designed to guide the appointments process in New Zealand lag behind our commonwealth counterparts. These must be incorporated into legislation to provide a solid constitutional and publicly available framework for appointments.

Parliament's hesitance to undertake any major reform in the Senior Courts Act 2016 indicates that the current process is unlikely to change in the near future. Perhaps the next best opportunity for reform would arise if the Labour Party were elected and sought legislative change,²⁶⁷ or if Palmer and Butler's draft constitution were to reach Parliament. In any case, the recommendations put forward in this paper are fundamental starting points for any future reform.

²⁶⁷ The Labour Party all voted in support of Louisa Wall MP's Supplementary Order Paper 217 under the Judicature Modernisation Bill 2013, which would have formalised diversity as a mandatory consideration in judicial appointments: (14 September 2016) 717 NZPD 13735.

VI Word Count

The word count of this paper (excluding non-substantive footnotes, abstract and bibliography) is approximately 14,990 words.

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