Judiciary (pillar 3)

Summary

The judiciary meets high standards of independence, integrity, and accountability. The judiciary provides a system of justice in accordance with the requirements of a legislative framework. Although the judiciary is an arm of government it operates independently of the executive. It is accountable through a system of appeals and through the Judicial Conduct Commissioner, which is an independent agency.

Several reports have reviewed the operation of the court system and the judiciary, including *Review of the Judicature Act 1908: Towards a new Courts Act*,[292] *Review of Public Prosecution Services,*[293] *A Review of the Role and Functions of the Solicitor-General and the Crown Law Office*,[294] and *Follow Up Review of the Crown Law Office*,[295] and a major restructuring occurred of the public sector, including the Ministry of Justice, which is responsible for the administration and resources of the judiciary and the courts.[296]

The Law Commission's review of the Judicature Act 1908 identified areas in need of reform, including the need for a more transparent process of appointment of High Court judges and more resources for the judiciary to be able to report independently on their activities. The government announced it will implement the recommendation to make the appointment of judges more transparent.[297] There is no commitment, however, to increase resources to the judiciary or for the judiciary to report independently on its activities.

Although the various reviews identify areas for improvement (for example, the Ministry of Justice's engagement with stakeholders such as the judiciary is seen as weak),[298] the reviews overall support the conclusion that New Zealand has a judiciary that has independence, integrity, and accountability. It is important to note that most of the reviews do not primarily focus on the judiciary but on the administration of justice from

[292] Law Commission, *Review of the Judicature Act 1908: Towards a new Courts Act*, NZLC R126 (Wellington: Law Commission, 2012).

[293] John Spencer, *Review of Public Prosecution Services*, 2011. www.justice.govt.nz/publications/global-publications/p/prosecution-review/review-of-public-prosecution-services

[294] Miriam Dean and David Cochrane, *A Review of the Role and Functions of the Solicitor-General and the Crown Law Office* (Wellington: Crown Law Office, 2012). www.crownlaw.govt.nz/uploads/review_2012.pdf

[295] State Services Commission, Treasury, and Department of the Prime Minister and Cabinet, *Follow Up Review of the Crown Law Office* (Wellington: Crown Law Office, 2013). www.crownlaw.govt.nz/uploads/pif-crownlaw-followup.pdf

[296] State Services Commission, Treasury, and Department of the Prime Minister and Cabinet, *Formal Review of the Ministry of Justice* (Wellington: New Zealand Government, 2012). www.ssc.govt.nz/sites/all/files/pif-moj-review-july2012.pdf

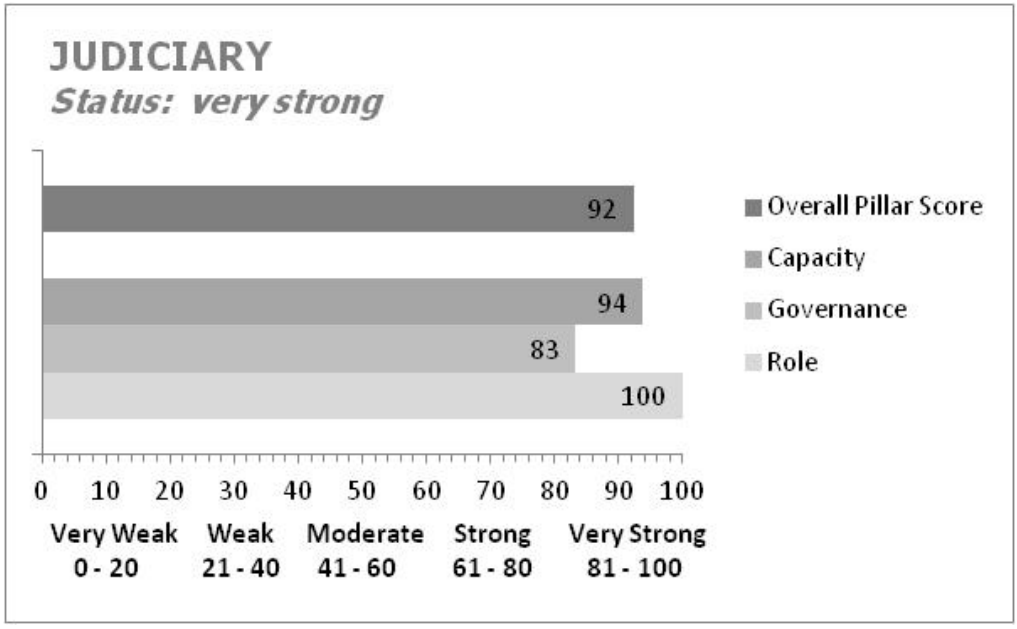
[297] Judith Collins, "100 year old court legislation in for overhaul", 17 April 2013. www.beehive.govt.nz/release/100-year-old-court-legislation-overhaul. For a full account of the recommendations accepted by the government, see New Zealand Government, *Government Response to Law Commission Report on* The Public's Right to Know: Review of the official information legislation (Wellington: House of Representatives, 4 February 2013). www.justice.govt.nz/publications/global-publications/g/government-response-to-law-commission-report-on-the-publics-right-to-know-review-of-the-official-information-legislation*'*

[298] State Services Commission et al., 2012: 19.

the perspective of value for money and customer satisfaction. This perspective is part of the Better Public Services initiative of the present government.[299] The effects on the judiciary of the implementation of this new shift in focus will take time to become apparent, so rather than make assumptions about possible outcomes, the focus in this analysis is on the evidence available. The characterisation of the relationship between the Ministry of Justice and the judiciary as one of "partnership" has been criticised because it is seen to undermine the notion of judicial independence.[300]

The judiciary is an important check on executive decision making. It displays high standards of independence, accountability, and integrity. The court system is seen to be free of corruption and unlawful influence. There are some specific transparency issues – a lack of financial disclosure by members of the judiciary, weaknesses in public access to court information, a lack of regular reporting to the public on the activities of the judiciary (which is linked to the adequacy of administrative resources), and a need for more transparency in judicial appointments. The recommendations in Chapter 6 relating to the judiciary address these transparency requirements.

Figure 5: Judiciary scores



Source: Transparency International New Zealand, 25 October 2013.

Structure and organisation

The judiciary as a state institution plays an important role in the maintenance of and support for good governance generally and, specifically, is the institution relied on to redress abuse of executive power. The jurisdiction, independence, and accountability of the judiciary are achieved through a combination of legislation, convention, and practice.

[299] Better Public Services Advisory Group, *Better Public Services Advisory Group Report* (Wellington: State Services Commission, 2011). www.ssc.govt.nz/sites/all/files/bps-report-nov2011_0.pdf

[300] Justice Andrew Tipping, "Final sitting", retirement speech, 2012. my.lawsociety.org.nz/news/justice-andrew-tippings-final-sitting-speech/Final_Sitting_Address_-_17_August_2012.pdf

There is a hierarchy of courts in New Zealand – Supreme Court, Court of Appeal, High Court, and District Court.[301] Judges appointed to the High Court are eligible for appointment to the Court of Appeal and Supreme Court. There are also specialist courts – Family Court, Youth Court,[302] Employment Court, Environment Court, Māori Land Court, and Courts Martial Court (and Appeal Court). Twenty-eight tribunals, authorities, and committees established by legislation hear and resolve disputes over fact and law.[303] The function, powers, and jurisdiction or authority of these bodies is set out in legislation. This assessment has focused on the independence, integrity, and accountability of the judicial members of the Supreme Court, Court of Appeal, High Court, and District Court.

3.1.1 Resources (law)

To what extent are there laws seeking to ensure appropriate salaries and working conditions of the judiciary?

Score: 5

Judges have appropriate and protected salaries with working conditions in courts administered by the Ministry of Justice.

Although the Remuneration Authority determines judicial salaries, the funding of judges' remuneration and the administration of the courts is the responsibility of the Ministry of Justice. The former process accords independence to the judiciary, while the latter is subject to political priorities.[304] The Remuneration Authority is established under the Remuneration Authority Act 1977. Decisions of the authority are published.[305] Under the Constitution Act 1986, the salaries of judges cannot be reduced.[306] The New Zealand judiciary, unlike the Australian judiciary, has no independent control over expenditure. The level of consultation or influence over judicial resources is dependent on the relationship between the Chief Executive of the Ministry of Justice and the Chief Justice. The nature of this relationship is confidential to the parties as no formal constitutional rules govern the relationship.

3.1.2 Resources (practice)

To what extent does the judiciary have adequate levels of financial resources, staffing and infrastructure to operate effectively in practice?

Score: 4

The members of the judiciary have adequate salaries. There is potential for conflict over resources as the Ministry of Justice pursues cost efficiencies.

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[301] Supreme Court Act 2003, Judicature Act 1908, and District Courts Act 1947.

[302] Technically, the Family Court and Youth Court are divisions of the District Court.

[303] Listed at www.justice.govt/tribunals.

[304] For an understanding of the resourcing of the judiciary and the courts, see www.justice.govt.nz and Treasury, "Performance information for appropriation: Vote Courts 2012/13", in *Justice Sector: Information supporting the estimates 2012/13,* 2012. www.treasury.govt.nz/budget/2012/ise/v7/ise12-v7-pia-courts.pdf

[305] Judicial Salaries and Allowances Determination 2012.

[306] Constitution Act 1986, section 24.

The spending and governance of the judiciary is part of Vote Justice, which is part of the budget process. Parliament agrees the expenditure, and the Appropriations Select Committee reviews it.

The question of adequate resources in terms of salaries is linked to the ability to attract suitable candidates to serve on the judiciary, and there is no evidence of the lack of such candidates. The Judicial Salaries and Allowances Determination 2012 sets out the current salaries for the judiciary. The Chief Justice receives an annual salary of NZ$460,000 plus an allowance of NZ$7,900, Supreme Court judges NZ$431,500, Court of Appeal judges $405,000, High Court judges $385,500, and District Court judges NZ$293,000. The Law Society and Momentum Legal Salary Survey 2012 gives some indication of remuneration in the legal profession.[307] For example, equity partners or directors of law firms are reported as having salaries of NZ$40,000–2 million while barristers with over 10 years' experience receive NZ$20,000–650,000. The income of Queen's Counsel is unavailable but it is assumed to be much higher. Although judges are normally appointed from Queen's Counsel or lawyers with over 10 years' experience, who often have an income higher than judges, there is no evidence of a lack of candidates for the appointment to the judiciary. The Remuneration Authority, which determines the salaries, takes account of the "need to achieve and maintain fair relativity with the level of remuneration received elsewhere".[308]

Resources are available to the judiciary for training and development. Changes to the system, such as the e-bench project, have had judicial input and justice officials believe the system is working well so far, although more training is required. There is no evidence of a lack of computer resources. As the courts are undergoing restructuring there is some instability of staff as new positions are created and appointments made.[309]

However, the Chief Executive of the Ministry of Justice notes in a formal review: "We need to work in partnership with the judiciary to deliver improvements in the accessibility, timeliness and predictability of justice delivered by courts and tribunals and to develop agreed, appropriate targets for these areas that are reported on publicly."[310] The lead reviewers noted: "Justice delivered by courts and tribunals needs to be accessible, timely, predictable and deliver correct outcomes according to the law. The Ministry cannot deliver on its own. Judges are constitutionally independent and decide how a case is dealt with and what is correct outcomes according to law."[311] The reviewers noted the relationships between the Ministry on the one hand and the judiciary and the legal profession on the other are "difficult".[312] The reviewers argue for

[307] New Zealand Law Society and Momentum Consulting Group, *Law Society/Momentum Legal Salary Survey 2012*, 2012. my.lawsociety.org.nz/in-practice/practice-management/human-resources-and-remuneration/new-zealand-law-societymomentum-legal-salary-survey-2012/Law_Society_and_Momentum_Legal_Salary_Survey_2012_Report.pdf.

[308] Explanatory memorandum, Judicial Salaries and Allowances Determination 2012. www.legislation.govt.nz/regulation/public/2012/0424/latest/DLM4940731.html

[309] State Services Commission et al., 2012.

[310] State Services Commission et al., 2012: 4.

[311] State Services Commission et al., 2012: 9.

[312] State Services Commission et al., 2012: 12.

a closer "partnership" to achieve key operational targets. The next review will assess what measures have been taken to develop a closer partnership.

The concept of partnership was criticised in a speech by a retiring Supreme Court justice, Justice Tipping, who said the relationship between the Ministry and the judiciary should be one of "mutual cooperation" rather than partnership. This separation was necessary to maintain the separation and balance of powers.[313]

The recent review of the public prosecutions service recommended the need for cost-efficient service.[314] The Crown Law Office has also been reviewed.[315] In March 2013, a follow-up review of Crown Law noted, "There has been substantial progress on organisational development since the original [Performance Improvement Framework], and high standards of legal service have been maintained".[316] The reviewers further noted that Crown Law now faces the critical implementation period and there is a need for a better understanding and demonstration of value for money.[317] Those interviewed indicated that contracting out the Crown prosecution duties does not necessarily ensure a better service in the public interest. Also the fact lawyers working for the Public Defence Service are employees of the Ministry of Justice raises a question of the independence of public defenders in terms of their obligation to the court.

The regular future performance reviews of the Ministry of Justice and Crown Law Office will provide evidence of the impact of these changes on the administration of justice and the work of the judiciary.

A recent annual report of the Judicial Conduct Commissioner also commented on the increasing workload and the need for more resources (that subsequently have been made available) to assist with the workload.[318]

3.1.3 Independence (law)

To what extent is the judiciary independent by law?

Score: 5

Judicial independence is a fundamental tenet of New Zealand law and is well protected.

New Zealand's constitutional arrangements do not provide for a clear separation of powers. There is no written constitution as such but a collection of laws, conventions, and practices. An understanding of the absence of constitutional legislation in the sense of superior law that overrides other laws is fundamental to an understanding of the role of the judiciary in New Zealand. The sovereignty and supremacy of Parliament is a fundamental tenet of New Zealand's constitutional arrangements. The judiciary in

[313] Tipping, 2012.

[314] Spencer, 2011.

[315] Dean and Cochrane, 2012.

[316] State Services Commission et al., 2013: 7.

[317] State Services Commission et al., 2013: 9.

[318] Office of the Judicial Conduct Commissioner, *Annual Report for 2011/2012*, 2012. www.jcc.govt.nz/pdf/annual-report-11-12.pdf

New Zealand is the third arm of government, but is subject to the entrenched notion of parliamentary sovereignty. This means the judiciary interprets the law but does not make new laws.

The independence of the judiciary is primarily protected through a statutory safeguard against removal from office. First, the tenure of judges is guaranteed by provisions in the Constitution Act 1986. Section 23 of that Act provides that a judge of the High Court cannot be removed from office except by the Governor-General acting on an address of the House of Representatives on the grounds of misbehaviour or incapacity to fulfil the functions of the office. Section 24 provides that the salaries of High Court judges cannot be reduced during their commission. District Court judges may be removed from office by the Governor-General on the grounds of misbehaviour or inability under section 7 of the District Courts Act 1947. Secondly, all judges retain their appointment until the age of 70.[319] Thirdly, the Remuneration Authority, an independent statutory body, determines all judicial remuneration.[320]

Appointments to the High Court and higher judiciary are made by the Governor-General on the recommendation of the Attorney-General, who is a member of the executive, with the administrative process directed by the Solicitor-General. The provisions of the Judicature Act 1908 govern these appointments. The District Courts Act 1947 governs the appointment of District Court judges, who are also appointed by the Governor-General on the recommendation of the Attorney-General, but with the process directed by the Secretary for Justice (who leads the Ministry of Justice). The only statutory qualification for appointment to the judiciary is that the appointee has held a practising certificate as a barrister and solicitor for seven years. Appointment to the Māori Land Court also requires knowledge of te reo (Māori language) and tikanga (Māori law, rules, and practice) and appointments are made after consultation with the Minister of Māori Affairs.

Several conventions are designed to protect the independence of the judiciary. For example, the convention that members of Parliament and ministers of the Crown do not criticise the judiciary is incorporated within the Standing Orders of Parliament.[321] Judges are also accorded immunity from civil action when acting within their judicial functions.

3.1.4 Independence (practice)

To what extent does the judiciary operate without interference from the government or other actors?

Score: 5

The judiciary is free from external interference.

[319] Judicature Amendment Act 1908, section 13.

[320] Remuneration Authority Act 1977.

[321] Standing Orders 112–114.

Codes of practice and informal understandings have evolved relating to the judicial appointment process, but concern has been expressed about the lack of transparency in appointments, at the High Court level in particular (see below).

The issue of the independence of the judiciary was raised during the process of disestablishing appeals to the Privy Council and establishing the New Zealand Supreme Court as the final court of appeal. Since the Supreme Court has heard appeals, the issue of independence has not been raised. Issues around judicial conflicts of interest and recusal attracted public attention over allegations of inadequate disclosure by Justice Wilson when sitting on the Court of Appeal in relation to his financial relationship with counsel appearing before him. Those allegations led to a complaint to the Judicial Conduct Commissioner, litigation, and, ultimately, the resignation of the judge.[322]

The relationship between the legislature and the judiciary is formally set out in the Standing Orders of the House of Representatives.[323] These Standing Orders were recently amended because a few members of Parliament were making disparaging references to the decisions of the courts and referring to matters before the courts but not determined. If a member of Parliament wishes to refer to matters under adjudication or subject to a suppression order, the member must notify the Speaker, and the Speaker may permit reference to the matter after balancing the privilege of freedom of speech against the public interest in maintaining confidence in the judicial resolution of disputes. The Speaker also takes into account the constitutional relationship of mutual respect that exists between the legislative and judicial branches of government and the risk of prejudicing a matter under adjudication. The Standing Orders also clearly state a member may not use offensive language against a member of the judiciary.

There is no evidence of judges having to be removed before their retirement age of 70.[324] After retirement, judges may be appointed as acting or temporary judges.[325] Before such appointments are made, the New Zealand Law Society is consulted to ensure there are no quality issues. The need for some acting or temporary judges is understood as an administrative necessity, but it is not a practice that should be commonly used. The need for temporary judges arises from the statutory cap on the number of judges that can be appointed. The Judicature Act 1908 sets a limit of 55 High Court judges,[326] and the District Courts Act 1947 sets a limit of 156 District Court judges.[327]

Judges also deal frequently with judicial review matters, and there is no evidence that the executive influences the judiciary. A current example of a high-profile case dealt with by the courts is the matter dealing with the legality of the police search warrants in

[322] For details, see *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 122; [2010] 1 NZLR 76.

[323] Standing Orders 112–114.

[324] Office of the Judicial Conduct Commissioner, 2012.

[325] Judicature Act 1908, sections 11 and 11A.

[326] Judicature Act 1908, section 4.

[327] District Courts Act 1947, s5(2).

the "Kim Dotcom case" where the Chief Judge of the High Court held that the arrest warrants were not issued in compliance with the law.[328]

A potential indirect threat to the independence of the judiciary may be found in the current justice policy[329] that is aimed at making the whole justice system more cost efficient by changing the rules relating to civil and criminal procedure. For example, setting quotas and time limits may interfere with the rule of law and the rights of litigants if they impede access to the courts. Any serious concerns relating to the above matters should be addressed in the next performance review.

3.2.1 Transparency (law)

To what extent are there provisions in place to ensure that the public can obtain relevant information on the activities and decision-making processes of the judiciary?

Score: 4

The public generally has good access to information, and access will improve with the planned extension to the Official Information Act 1982. The judiciary does not produce an annual report.

The Criminal Procedure Act 2011 provides that there is a presumption that every criminal hearing is open to the public,[330] but the court, under sections 200 and 205, may grant a suppression order relating to identity or evidence if specified criteria are complied with. There has been media controversy about name suppression, and the Law Commission recently reported on the issue.[331] The Criminal Procedure Act 2011 incorporates the law relating to suppression.[332] For example, the fact a person seeking name suppression is well known is not a reason for the suppression of name.

The public does not have access to transcripts unless there is a good reason but all proceedings are held in public. Access to documentation of court proceedings is governed by the Criminal Proceedings (Access to Court Documents) Rules 2009 and Civil High Court Rules.[333, 334]

The Official Information Act 1982 also provides a means to access further information not publicly available. The courts are not subject to the Act but a recent review by the Law Commission[335] recommended that it be extended to the courts in respect of statistical and administrative information. In a press statement on 4 February 2013, the Minister of Justice announced that the government would progress this recommendation.

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[328] *Dotcom v Attorney-General* [2012] NZHC 1,494.

[329] State Services Commission et al., 2012.

[330] Criminal Procedure Act 2011, section 196.

[331] Law Commission, *Suppressing Name and Evidence,* NZLC R109, 2009.

[332] Criminal Procedure Act 2011, sections 200–204.

[333] Civil High Court Rules, rules 3.5–3.16.

[334] The government recently announced it would take steps to improve and clarify rights to access court records information: Collins, 2013.

[335] Law Commission, NZLC R125, 2012.

Apart from the High Court in 2011, there has been no recent independent reporting from the judiciary on the activities of the judiciary and the court system. The Law Commission in its review of the Judicature Act 1908 sought consultation on this matter and recommended that there should be a statutory requirement on the Chief Justice to publish an annual report on the judiciary covering matters agreed between the Ministry of Justice and the Chief Justice.[336] The judiciary in its submission on this matter noted such a report should not be to Parliament as the judiciary is a separate branch of government. The Law Commission agreed with this position and suggested the report should be made public but not to Parliament. One of the barriers to judicial reports is a lack of resources.

3.2.2 Transparency (practice)

To what extent does the public have access to judicial information and activities in practice?

Score: 4

The public has good access to judicial information, but there is insufficient transparency in the judicial appointment process.

Annual reports, Statements of Intent, and a variety of performance statistics are publicly available.

The public has access to judicial decisions through the Judicial Decisions Online website.[337] The reasoning of the judges is in the judgment. The judiciary is conscious of the need to make their judgments accessible but there is a risk that explanation beyond the written judgment will undermine the legitimacy of the decision itself and the appeal process. Judges do participate in conferences and the Chief Justice in particular through lectures and conference papers undertakes a responsibility to explain the law.[338]

The Ministry of Justice website provides statistics on the work undertaken by the courts, such as number of cases, completion rates, and customer satisfaction. The statistics provide a form of transparency but they are related to government policy targets and may be characterised more in terms of compliance than transparency.[339]

All legislation is publicly available in hard copy and online. Specialist courts such as the Family Court provide additional information through pamphlets and forms to assist Court users. The Courts of New Zealand website also provides information about both the judiciary and the administration of the courts.[340]

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[336] Law Commission, NZLC R126, 2012.

[337] Ministry of Justice, "Judicial decisions online". https://forms.justice.govt.nz/jdo/Introduction.jsp

[338] Recent speeches of the Chief Justice, include Sian Elias, "Fundamentals: A constitutional conversation", Harkness Henry Lecture, University of Waikato, 2011, and Sian Elias, "Justice for one half of the human race?", address to the Canadian Chapter of the International Association of Women Judges, 2011. www.courtsofnz.govt.nz/from/speeches-and-papers

[339] www.justice.govt.nz/justice-sector/statistics

[340] www.courtsofnz.govt.nz/

Concerns have been expressed about a lack of transparency in the appointment of High Court judges and promotion of judges to appeal courts. The Law Commission[341] has recently issued a report recommending a review of the Judicature Act in which, after extensive consultation, it recommended greater statutory transparency in the appointment process.[342] The evidence collected by the Law Commission shows a growing consensus that more transparency is needed in the appointment and promotion of judges. A lack of transparency can affect the morale of sitting judges and those qualified for appointment as well as deterring qualified lawyers from accepting appointment. It means applicants do not know if their application was considered fairly and according to accepted criteria.

The government, after consideration of the Law Commission report, has announced an overhaul of the Judicature Act 1908 that will include "steps to improve and clarify rights to access court record information, for example, statistical information about court cases and expenditure" and "making the processes and criteria for appointing judges more transparent by requiring the judicial selection and recommendation process to be published by the Attorney-General. It did not accept the Law Commission's recommendations as to the qualities required for an appointment or who should be consulted before the appointment is made".[343]

On the other hand, there is a consensus that the two Royal Commissions of Inquiry into the Pike River Coal Mine Tragedy and the Canterbury Earthquake were conducted in an open and transparent way that enables the various responsible agencies and individuals to be held accountable.

3.2.3 Accountability (law)

To what extent are there provisions in place to ensure that the judiciary has to report and be answerable for its actions?

Score: 4

The appeal process provides accountability for judicial decisions and the Judicial Conduct Commissioner for judicial conduct.

Accountability for judicial decisions is through the appeal process. Under the Judicature Act 1908, a judge may give a judgment in writing or orally.[344] If it is given orally, the affected parties or their counsel must be given a reasonable opportunity to be present when judgment is given or to hear the judgement via telephone, conference call, or video link. The Supreme Court Act 2003 requires the court to give reasons for the refusal to give leave.[345] Immunity for the judiciary does not apply for corruption and criminal offences.

[341] Law Commission, NZLC R126, 2012.

[342] Law Commission, NZLC R126, 2012: 57.

[343] Collins, 2013.

[344] Judicature Act 1908 schedule 2, clause 11.3.

[345] Supreme Court Act 2003, section 16.

Members of the judiciary are held accountable for their conduct through the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004. The purpose of the Act is "to enhance public confidence in and to protect the impartiality of, the judiciary" by providing an independent investigation through a fair process that "recognises and protects the requirements of judicial independence and natural justice". An independent commissioner conducts the investigation and the Office of the Judicial Conduct Commissioner produces an annual report detailing the number of complaints and the action taken.

3.2.4 Accountability (practice)

To what extent do members of the judiciary have to report and be answerable for their actions in practice?

Score: 4

The accountability process appears to be adequate in practice.

The Judicial Conduct Commissioner appears to be active and effective. For example, in 2011/12, there were 328 new complaints and 146 outstanding complaints.[346] The most common complaint was that a decision was wrong, which falls outside the commissioner's jurisdiction. Other complaints specified perceptions of rudeness, unfairness, inappropriate remarks, a failure to listen, a failure to take note of material, prejudice, bias, predetermination, conflicts of interest, and corruption.

The annual Judicial Conduct Commissioner's report for 2011/12 noted that allegations of corruption are taken "especially seriously".[347] After investigation of the few allegations of corruptions, however, no evidence was found to support any assertion of corruption. The action the commissioner can take is to:

- dismiss the complaint or take no further action because it is outside jurisdiction (this happened to 364 complaints in 2011/12)
- refer it to the Head of Bench (8 complaints were dealt with in this way in 2011/12)
- recommend the Attorney-General appoints a judicial panel (no matters were so referred in 2011/12).

The appeal process is routinely used. There is public access to court proceedings including (with the permission of the court) the televising of court proceedings. The courts in practice endeavour to write decisions that are readily understood by the court users and often also provide press releases summarising the decision and reason for it. The media also asserts an influence on the public perception of the conduct of the judiciary.[348]

[346] www.jcc.govt.nz/pdf/annual-report-11-12.pdf at p 5.

[347] Office of the Judicial Conduct Commissioner, 2012: 8.

[348] The *New Zealand Herald* ran a week of articles and commentary on the judiciary during 15–19 April 2013.

3.2.5 Integrity mechanisms (law)

To what extent are there mechanisms in place to ensure the integrity of members of the judiciary?

Score: 4

A code of judicial conduct covers judges' financial interests, but asset disclosure is not required. Integrity mechanisms will be improved when new rules and processes are put in place to govern conflicts of interest.

The expected conduct of the judiciary is extensively set out in *Guidelines for Judicial Conduct.*[349] The Heads of Bench and the Judicial Conduct Commissioner ensure compliance with these guidelines. These guidelines cover judges' financial interests. Under the Judicature Act 1908, judges are prohibited from having outside employment or holding other offices without the permission of the Chief High Court Judge.[350] There is a convention that judges do not appear in court once they have retired from the Bench, but they can undertake opinion work as well as arbitration and mediation work. Judges also do not undertake other paid work while appointed to the Bench.

A member's bill (non-government bill) before Parliament provides for the disclosure of judges' assets.[351] The Law Commission considered whether there should be such a legal requirement and recommended against legislation.[352] However, it also recommended that if there were such a register:

- it should include sufficient detail to disclose the nature of the judges' interests (subject to privacy interests)
- a person in the office of or nominated by the Chief Justice should compile and maintain it
- a fair and accurate summary of the information should be published
- the information should be publicly available on the Courts of New Zealand website.

It has been argued that the provisions of the bill would be a disincentive for experienced practitioners to undertake appointment as it would be an invasion of their privacy.[353]

It is a criminal offence to bribe or offer to bribe a judicial officer or for a judicial officer to accept a bribe.[354]

The Law Commission also reviewed the issue of judicial conflict of interest and when judges should recuse themselves.[355] The Law Commission expressed the view that the

[349] *Guidelines for Judicial Conduct* (Courts of New Zealand, approved in 2003, reviewed last in March 2013). www.courtsofnz.govt.nz/business/guidelines/guidelines-for-judicial-conduct [accessed 1 June 2011].

[350] Judicature Act 1908, section 4(2A).

[351] Register of Pecuniary Interests of Judges Bill 2010.

[352] Law Commission, NZLC R126, 2012.

[353] The government has announced it will not support a register of judges' pecuniary interests: "Appendix 1", *Government Response to the Law Commission's Report*, 2013.

[354] Crimes Act 1961, sections 100 and 101.

substantive law relating to recusal as decided in *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*[356] – a case that arose from an allegation of conflict of interest against a Court of Appeal judge – was consistent with other Commonwealth jurisdictions. It found, however, a lack of clarity in the process whereby a judge should be subject to recusal. It, therefore, recommended that there should be a statutory requirement for the Heads of Bench, in consultation with the Chief Justice, to develop clear rules and processes for recusal in their courts, based on a common set of principles developed by the judges. Any rules and process should be published in the *New Zealand Gazette* and on the internet. The government has accepted this recommendation.[357]

3.2.6 Integrity mechanisms (practice)

To what extent is the integrity of members of the judiciary ensured in practice?

Score: 4

There has been no serious questioning of the integrity of the judiciary and practice appears to be consistent with the law.

The Institute of Judicial Studies[358] was established in 1998 and is administered by the Judiciary in partnership with the Ministry of Justice. The institute's objective is to support the development of judges in best practice. It asserts its independence as the guiding principle for managing and developing the education programmes and resources of the institute.

3.3.1 Executive oversight

To what extent does the judiciary provide effective oversight of the executive?

Score: 5

The judiciary is highly effective in providing oversight of the executive.

The primary oversight by the judiciary of the executive is through judicial review. Actions of ministers and public bodies exercising decision-making power are subject to judicial review by the High Court of the process, but generally not of the decision itself. The rationale for this judicial oversight is that public bodies should act according to the law, and it is a means by which those exercising public power are held accountable. A recent review of judicial review in the New Zealand context demonstrates it is a much-used remedy.[359] The courts will not interfere with the right of the executive to make policy decisions, but will ensure any decision made by the executive is made in accordance with the law. In a 1996 Wellington City Council case, the Court of Appeal

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[355] Law Commission, *Review of the Judicature Act 1908: Towards a new Courts Act*, NZLC R 126 (Wellington: Law Commission, 2012), pp. 58–72.

[356] *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2009] NZSC 72; [2010] 1 NZLR 35.

[357] *Government Response to Law Commission Report*, 2013.

[359] Jenny Cassle and Dean Knight, *The Scope of Judicial Review: Who and what may be reviewed,* NZLS Intensive – Administrative Law, 2008. www.vuw.ac.nz

said, "[t]here are constitutional and democratic constraints on judicial involvement in wide public policy issues. There comes a point where public policies are so significant and appropriate for weighing by those elected by the community for that purpose that the Courts should defer to their decision except in clear and extreme cases. The larger the policy content and the more the decision making is within the customary sphere of those entrusted with the decision, the less well equipped the Courts are to reweigh considerations involved and the less inclined they must be to intervene".[360]

In that case, the court found that rating requires the exercise of political judgment by the elected representatives of the community and that this was not one of those extreme cases meeting the stringent test for impugning the rating determinations. In the 2012 case *Atkinson v Ministry of Health*,[361] the Court of Appeal held that the government's policy not to reimburse parents for the care of their adult children with disabilities was discriminatory on the grounds of family status under the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990. These two cases, although involving different issues, demonstrate a shift in the approach of the courts to government policy. There appears to be a greater willingness to review that policy to ensure it is consistent with the law, especially on issues of human rights.

The relationship between the executive and the judiciary is set out in the *Cabinet Manual*.[362] The Attorney-General is the link between the judiciary and the executive government. Members of the executive must exercise judgement when commenting on judicial decisions whether generally or in relation to a specific matter. No view should be expressed that adversely comments on the impartiality, personal views, or ability of any judge. If there is such a concern, the minister should contact the Attorney-General. Ministers also must not involve themselves in the decision whether to prosecute a person. The Attorney-General from time to time will remind ministers of the protocol not to criticise the judiciary.

Members of the executive are subject to judicial review and may be called to give evidence or produce documents. Ministers are not immune from civil or criminal proceedings. There is no evidence of the judiciary being intimidated by the executive.[363] A website set up recently, Judge the Judges, cites no cases of executive direction to the judiciary.[364]

3.3.2 Corruption prosecution

To what extent is the judiciary committed to fighting corruption through prosecution and other activities?

Score: Not scored

The judiciary does not have a role in decisions to prosecute.

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[360] *Wellington City Council v Woolworths* New Zealand Ltd (No 2) [1996] 2 NZLR 537

[361] *Atkinson v Ministry of Health* [2012] NZCA 184.

[362] *Cabinet Manual*, 2008: paras 4.12–4.15.

[363] Office of the Judicial Conduct Commissioner, 2012.

[364] www.judgethejudges.co.nz

The New Zealand legal system is a common law system, and judges play no part in decisions to prosecute or not to prosecute for offences. A judge may decide in the course of legal proceedings that there is no case for the defendant to answer, but there has never been any suggestion that this power has been used corruptly.

There is no evidence the members of the judiciary do not conduct the corruption cases that come before them according to the rule of law. Corruption cases have not involved members of the judiciary but members of the public.

Constitutionally, the Attorney-General is responsible through Parliament to the citizens of New Zealand for all public prosecutions and the prosecution system in general. The constitutional convention is that the Solicitor-General, a public official, exercises this responsibility to ensure there is no political interference with prosecutions. The Solicitor-General provides general oversight of the prosecution system through the Prosecution Guidelines [365] that are issued by the Attorney-General and Solicitor-General.

3.4.1 Treaty of Waitangi

The Treaty of Waitangi can be understood to create obligations of partnership, respect and participation. What does the judiciary do to partner with Māori, to respect and affirm Māori rights to make decisions, and to enhance Māori participation in its field of activity? Where the judiciary have legal rights and obligations in this respect given to it by the Crown, how well does it honour them, including any Treaty obligations passed on by the Crown?

Although the Treaty of Waitangi is not enforceable, the judiciary recognises its constitutional status. The Waitangi Tribunal has been established to consider Treaty matters, but has recommendatory powers only. There is a need for more Māori judges.

The Treaty of Waitangi is not legally enforceable as a standalone Treaty.[366] This would require an Act of Parliament specifically giving legal recognition to the Treaty. When this procedure was recommended at the time of the enactment of the New Zealand Bill of Rights Act 1990, it did not receive the support of Māori during the consultation process, so the Treaty was not incorporated into legislation.

Although the Treaty of Waitangi is not legally enforceable, the courts acknowledged its constitutional status in *New Zealand Māori Council v Attorney-General*. [367] The provisions of the Treaty have been incorporated in many Acts of Parliament, and those provisions are subject to the normal rules of statutory interpretation. The Supreme Court Act 2003 provides that one purpose of the Act is "to enable important legal matters, including legal matters relating to the Treaty of Waitangi, to be resolved with an understanding of New Zealand conditions, history, and traditions".[368]

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[365] Crown Law, *Prosecution Guidelines*, January 2010. wwwcrownlaw.govt.nz/uploads/prosecution_guidelines

[366] Margaret Wilson, "The reconfiguration of New Zealand's constitutional institutions: The transformation of tino rangatiratanga into political reality?", *Waikato Law Review* vol. 5, 1997, pp. 17–34.

[367] *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 513.

[368] Supreme Court Act 2003, section 3(a)(ii).

A separate legal regime to deal with Māori land was first enacted in the Native Land Act 1862, and the current legal regime is incorporated in Te Ture Whenua Maori Act 1993 (Maori Land Act 1993). Te Ture Whenua Maori Act 1993 established the Māori Land Court with the primary objective to promote and assist the retention of Māori land and general land owned by Māori, and the effective management, use, and development of that land. The decisions of the court are enforceable.

The Treaty of Waitangi Act 1975 was enacted "to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi by establishing a Tribunal to make recommendation on claims relating to the practical application of the Treaty and to determine whether certain matters are inconsistent with the principles of the Treaty".[369] The decisions of the tribunal are recommendatory only, and this has been criticised because the government may choose not implement the recommendations.

There has also been a move to Rangatahi (Youth) Courts on marae as a means to address offending by Māori youth in a culturally appropriate way. There has been recent publicity critical of the lack of Māori judges to serve on these courts, and the Attorney-General acknowledged more Māori appointments were needed.

The Institute of Judicial Studies is responsible for the professional development of judges and for fostering an awareness of developments in the law and judicial administration. In its 2010–2015 strategic plan, there is included an awareness of the promotion of the Treaty of Waitangi in the context of New Zealand's conditions, history, and traditions.[370] The judiciary has been conscious of the need to ensure Māori are well represented among court officials. Māori is an official language of New Zealand so there is a right to speak and be represented in te reo (Māori language). The need to ensure the judiciary reflects the diversity of New Zealand society, including Māori, is recognised in the recommendations in the Law Commission report on the review of the Judicature Act 1908 that the criteria for appointment to the judiciary should include "social awareness of and sensitivity to tikanga Māori [law, rules, and practice]".[371] The government has not accepted this recommendation.

The number of Māori appointed to the District Court has increased, and some Māori District Court judges are leaders in their field, but only three High Court judges have acknowledged Māori heritage. It is difficult to find the number of Māori judges but the New Zealand Law Society notes that Māori are 5.4 per cent of the lawyer population. Since Māori have only relatively recently entered the legal profession in any numbers and given that the qualifying period is a minimum of seven years for appointment, it may take some time for the number of Māori judges to increase.

[369] Treaty of Waitangi Act 1975, Long Title.

[370] Institute of Judicial Studies, *Strategic Plan 1 July 2010 – 30 June 2015*, 2011. www.ijs.govt.nz/strategic_plan

[371] Law Commission, NZLC R126, 2012: 57

References

"Appendix 1: Law Commission recommendations from its report Review of the Judicature Act 1908: Towards a new Courts Act", *Government Response to the Law Commission's Report: Review of the Judicature Act 1908: Towards a new Courts Act*. (Ministry of Justice, 2013). www.justice.govt.nz/publications/global-publications/g/government-response-to-the-law-commissions-report-review-of-the-judicature-act-1908-towards-a-new-courts-act/appendix-1-law-commission-recommendations-from-its-report-review-of-the-judicature-act-1908-towards-a-new-courts-act.

Better Public Services Advisory Group, *Better Public Services Advisory Group Report* (Wellington: State Services Commission, 2011). www.ssc.govt.nz/sites/all/files/bps-report-nov2011_0.pdf

Cabinet Office, *Cabinet Manual 2008* (Wellington: Department of the Prime Minister and Cabinet, 2008). http://cabinetmanual.cabinetoffice.govt.nz/files/manual.pdf

Cassle, Jenny, and Dean Knight, *The Scope of Judicial Review: Who and what may be reviewed,* NZLS Intensive – Administrative Law, 2008. www.vuw.ac.nz

Collins, Judith, "100 year old court legislation in for overhaul", 17 April 2013. www.beehive.govt.nz/release/100-year-old-court-legislation-overhaul

Crown Law, *Prosecution Guidelines*, January 2010. wwwcrownlaw.govt.nz/uploads/prosecution_guidelines

Dean, Miriam, and David Cochrane, *A Review of the Role and Functions of the Solicitor-General and the Crown Law Office* (Wellington: Crown Law Office, 2012). www.crownlaw.govt.nz/uploads/review_2012.pdf

Elias, Sian, "Fundamentals: A constitutional conversation", Harkness Henry Lecture, University of Waikato, 2011.

Elias, San, "Justice for one half of the human race?", address to the Canadian Chapter of the International Association of Women Judges, 2011. www.courtsofnz.govt.nz/from/speeches-and-papers

"Government response to Law Commission report on *The Public's Right to Know: Review of the official information legislation*", 4 February 2013. www.justice.govt.nz/publications/global-publications/g/government-response-to-law-commission-report-on-the-publics-right-to-know-review-of-the-official-information-legislation

Guidelines for Judicial Conduct (Courts of New Zealand, approved in 2003, reviewed last in March 2013). www.courtsofnz.govt.nz/business/guidelines/guidelines-for-judicial-conduct [accessed 1 June 2011].

Institute of Judicial Studies, *Strategic Plan 1 July 2010 – 30 June 2015*, 2011. www.ijs.govt.nz/strategic_plan

Law Commission, *Review of the Judicature Act 1908: Towards a new Courts Act*, NZLC R126 (Wellington: Law Commission, 2012).

Law Commission, *Suppressing Name and Evidence,* NZLC R109(Wellington: Law Commission, 2009).

Law Commission, *The Public's Right to Know: Review of the official information legislation*, NZLC R125 (Wellington: Law Commission, 2012).

New Zealand Law Society and Momentum Consulting Group, *Law Society/Momentum Legal Salary Survey 2012*, 2012. my.lawsociety.org.nz/in-practice/practice-management/human-resources-and-remuneration/new-zealand-law-societymomentum-legal-salary-survey-2012/Law_Society_and_Momentum_Legal_Salary_Survey_2012_Report.pdf.

Office of the Judicial Conduct Commissioner, *Annual Report for 2011/2012*, 2012. www.jcc.govt.nz/pdf/annual-report-11-12.pdf

Spencer, John, *Review of Public Prosecution Services*, 2011. www.justice.govt.nz/publications/global-publications/p/prosecution-review/review-of-public-prosecution-services

State Services Commission, Treasury, and Department of the Prime Minister and Cabinet, *Follow Up Review of the Crown Law Office* (Wellington: Crown Law Office, 2013). www.crownlaw.govt.nz/uploads/pif-crownlaw-followup.pdf

State Services Commission, Treasury, and Department of the Prime Minister and Cabinet, *Formal Review of the Ministry of Justice,* 2012. www.ssc.govt.nz/sites/all/files/pif-moj-review-july2012.pdf

Tipping, Andrew, "Final sitting", retirement speech, 2012. my.lawsociety.org.nz/news/justice-andrew-tippings-final-sitting-speech/Final_Sitting_Address_-_17_August_2012.pdf

Treasury, "Performance information for appropriation: Vote Courts 2012/13", in *Justice Sector: Information supporting the estimates 2012/13,* 2012. www.treasury.govt.nz/budget/2012/ise/v7/ise12-v7-pia-courts.pdf

Wilson, Margaret, "The reconfiguration of New Zealand's constitutional institutions: The transformation of tino rangatiratanga into political reality?", *Waikato Law Review* vol. 5, 1997, pp. 17–34.