



## 2023 Questionnaire of the 4<sup>th</sup> Study Commission

### 1. APPOINTMENT TO JUDICIAL OFFICE

**A. Please describe the process by which a person is appointed to judicial office in lower courts, intermediate courts and superior courts pointing out any relevant differences between appointment in criminal civil or appellate courts.**

[1] Appointments to most judicial positions are made by the Governor-General on the recommendation of the Attorney-General. Appointments to the Māori Land Court and the Māori Appellate Court are made by the Governor-General on the recommendation of the Minister of Māori Affairs. Community Magistrates are appointed on the recommendation of the Minister of Justice.

The Attorney-General places great importance on maintaining the quality and integrity of the judiciary. Appointments are made on the basis of merit. There is a commitment to actively promoting diversity in the judiciary, taking into account all appropriate attributes. Putting the responsibility for all these appointments in the hands of the Attorney-General is intended to help to ensure a consistent and principled approach to these important decisions.

[2] With the objective of ensuring a greater transparency in the process, advertising for expressions of interest in judicial positions is to be carried out at all levels except the Court of Appeal, and Supreme Court.

### *District Court and Employment Court Judges*

[3] The District Court has a number of specialist jurisdictions, including the Family Court, Environment Court and Coroner's Court. For appointments to the District Court (including judges and community magistrates), Coroners' Court, Family Court, Environment Court and Employment Court, the process is carried out under the direction of the Secretary for Justice. When recommending the appointment of a District Court, Youth Court or Family Court Judge, the Attorney-General consults with the Chief District Court Judge or Principal Judges of the Youth Court and Family Court. The Attorney-General consults with the Chief Employment Court Judge when recommending the appointment of an Employment Court Judge. The Chief Coroner is consulted for an appointment of Coroners.

[4] Applicants interested in being appointed to the District Court judiciary may fill out an expression of interest form at any time. Expressions of interest will also be sought by way of advertisement within the profession when judicial vacancies arise. Candidates may also be invited to apply. The expression of interest form records personal details, qualifications and work history. A curriculum vitae is also required. A prospective applicant will also be required to indicate which courts or jurisdictions their skills will be best suited (eg; Family Court Warrant, Jury Warrant). All prospective candidates are given an application form for completion.

[5] A proposed shortlist will be submitted to the Attorney-General for approval. The Attorney-General, after such consultation as he or she believes necessary, will decide who to further shortlist for interview. Candidates selected for interview are asked to provide information on their health status and financial security.

[6] Those approved are interviewed by a panel consisting generally of the Chief District Court Judge, the Head of Bench (where relevant), the Executive Judge for the relevant region, and a representative of the Ministry of Justice. Following the interviews, the President of the Law Society and the Solicitor-General are consulted.

[7] The interview panel will report on the results of the interview and other assessments and checks to the Attorney-General. The Attorney-General may choose to further interview

candidates. The Attorney-General will then select the candidate(s) for appointment, and tender formal advice to the Governor-General.

[8] The District Court Act 2016 provides that no person may be appointed as a District Court Judge unless he or she has held a practicing certificate as a barrister or solicitor for at least seven years.

[9] The suitability of prospective candidates is assessed by reference to a range of clearly defined, transparent and publicly announced core competencies. These cover legal ability, qualities of character, personal technical skills and reflection of society.

### *Senior Courts*

[10] In the case of appointments to the Supreme Court, Court of Appeal and the High Court (Judges and Associate Judges), the administrative process is carried out under the direction of the Solicitor-General.

[11] Approximately every three years (or more frequently if necessary), expressions of interest are called for by public advertisement. The expression of interest form records personal details, qualifications and work history. A curriculum vitae is also required. Expressions of interests are required for applications to be appointed to the High Court. They are not required for vacancies on the Court of Appeal or Supreme Court as they are almost always filled by Judges from the Court below. It is unusual, but not unheard of, for an appointment to be made directly to the Court of Appeal.

[12] Prospective candidates respond to the request for expressions of interest. Alternatively, as a result of consultation, prospective candidates may be nominated, invited to express their interest and to enter the process. All prospective candidates are provided with an Expression of Interest form for completion.

[13] The appointment criteria are assessed by reference to a range of clearly defined, transparent and publicly announced core competencies. These cover legal ability, qualities of character, personal technical skills and reflection of society. Further, the Senior Courts Act 2016

provides that no person may be appointed as a High Court Judge unless he or she has held a practicing certificate as a barrister or solicitor for at least seven years.

[14] Names of those who meet the statutory criteria for appointment are held on a confidential register maintained by the Attorney-General's Appointments Unit (the Appointments Unit). Information remains on the register for five years, unless candidates request for their names to be removed. Candidates will be contacted at regular intervals and requested to update their information.

[15] The Appointments Unit uses the register to identify all those who have indicated an interest in appointment to the High Court. The Solicitor-General reviews the names and consults the Attorney-General, the Chief Justice, the President of the Court of Appeal, the Chief High Court Judge and the Secretary for Justice to ascertain whether additional names should be considered and added to the list.

[16] The Solicitor-General seeks comments about those on the list from a range of key people and organisations. The Solicitor-General then asks the Chief Justice, the President of the Court of Appeal, and the Chief High Court Judge to give all prospective candidates a rating. The outcome of this process is an indication of those considered suitable for immediate appointment, those possibly suitable in two to three years, and those in neither category. The Solicitor-General presents this list to the Attorney-General as well as the results of the consultation process.

[17] The Solicitor-General confers annually with the Chief Justice, Chief High Court Judge, President of the Court of Appeal and Presidents of the Law Society and Bar Association, to ensure the list remains current and relevant.

[18] In respect of any upcoming vacancy in, or appointment to, the High Court, the Attorney-General, after such consultation as he or she believes necessary, and with the agreement of the Chief Justice (who will consult as appropriate with other judges), will determine a shortlist of possible appointees. The shortlist will contain no more than three names.

[19] The Attorney-General may decide to seek an interview with, or arrange for an interview by the Solicitor-General of, a person interested in appointment to the High Court.

[20] The Solicitor-General undertakes checks on the personal reputation of those on the shortlist. The Solicitor-General also asks shortlisted candidates to complete a declaration intended to confirm there are no matters in their background of a sort that might cause difficulties after appointment. The response to the declaration is signed, along with an undertaking that, if appointed, the prospective candidate will not resume practice before the courts on retirement or earlier termination of his or her appointment.

[21] The Attorney-General will select from the shortlist the candidate whom he or she wishes to recommend to the Governor-General for appointment. Once the Attorney-General is satisfied as to the suitability of the preferred candidate, and his or her willingness to accept the appointment, the Attorney-General mentions the appointment in Cabinet. Finally, the Attorney tenders formal advice to the Governor-General to make the appointment.

[22] The short-listing process is repeated in respect of each upcoming High Court vacancy or appointment.

**B. If applicable, please identify whether political influences of any description bear upon in any way the appointment of a particular person to judicial office.**

[23] Political influences have no bearing on the appointment of any judicial officers.

**C. Is ethnic or gender diversity in any way relevant to appointment to judicial office, and if so, please describe why and in what respect each may be relevant.**

[24] One of the criteria for appointment is reflection of society. This requires that a prospective candidate for appointment be aware of, and sensitive to, the diversity of the modern New Zealand society. It is increasingly important for the judiciary to comprise those with experience of the community of which the court is part and who it serves. Prospective candidates are required to demonstrate this social awareness.

[25] However, this criterion remains one of many, and as with all judicial appointments in New Zealand, the decision is merit based.

**D. Describe whether and if so in what way the process of appointment to judicial office is independent of government.**

[26] Judges and judicial officers are appointed by the Governor-General, acting on the advice of the Attorney-General.

[27] The Attorney-General is a member of the Executive (Government). When recommending an appointment there is a constitutional convention in that the Attorney-General acts independently of the Government and is not influenced by party politics.

**2. PROMOTION WITHIN THE JUDICIARY**

**A. Does scope exist for promotion within the judiciary and if so, please describe how and in what circumstances a magistrate or judge may be promoted.**

[28] There is scope for promotion within the judiciary, consequent on vacancy arising due to retirement, resignation or increasing workload of a higher court.

[29] As appointments to the appellate courts are usually made from the serving judiciary potential candidates will be known to the Attorney-General. The Appointments Unit does not therefore place public notices calling for expressions of interest. Rather, the Attorney-General consults with interested persons and bodies seeking their views on suitable candidates. The Attorney-General will then, with the agreement of the Chief Justice, who, in the case of appointments to the Court of Appeal, will confer with the President and, in the case of appointments to the Supreme Court, will confer with the other Judges of that Court, settle a shortlist of not more than three possible appointees.

[30] The Attorney-General may ask the Solicitor-General to confidentially consult relevant persons or bodies on his or her behalf. The Attorney-General then considers those on the shortlist. In addition to the criteria by which all 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.

Once the Attorney-General has chosen the most suitable candidate from the shortlist, he or she will notify Cabinet of his decision and recommend the appointment to the Governor-General.

[31] It is possible, but unusual, for a person to be appointed directly to an appellate court or without having sat as a High Court Judge.

[32] It is not unheard of for Judges of the District Court to become Judges of the High Court, however it is not typical either. This process requires a District Court Judge to apply in the same way as any other applicant, following the process outlined above. In this way appointment to the High Court bench from the District Court bench is not necessarily a promotion.

**B. To what extent is political affiliation of political partisanship relevant to promotion within the judiciary.**

[33] As with appointment, political affiliation or partisanship is not a relevant or appropriate consideration in regard to promotion within the judiciary.

**C. Describe the transparency involved in the process of promotion within the judiciary.**

[34] The criteria for appointment and promotion are clearly defined and publicly available. The actual information gathered in the process is confidential to those involved. All appointments are based on merit.

### **3. WORKLOAD WITHIN THE JUDICIARY**

**A. In broad terms, what are the requirements for magistrates and judges in relation to the number of sitting days per year or other measurement of judicial workload requirements?**

[35] There is no set number of sitting days per year as such. Judicial officers are expected to be available to conduct judicial business during all business days, when they are not on leave, on weekends or on statutory holidays. Workdays include sitting days, preparation and judgment writing time, administrative work and continuing education. When preparing for hearings or completing judgments it is common for judicial officers to work evenings and on weekends.

**B. If a judge is encountering trouble keeping up with the workload, describe the regime that applies by which –**

**(i) that judge's workload is allocated to other judges;**

**[36]**

**(ii) the overloaded judge can recover from workload arrears and from any other disabling factor that led to overload.**

**(iii) there are other mechanisms to address judicial delinquency.**

**C. Are judges expected or required to assist other judges who may be adversely affected from overload so as to ensure that the business of the court is discharged in a timely manner.**



#### **4. REMOVAL FROM JUDICIAL OFFICE**

**A. Does a regime currently exist in your country pursuant to which a sitting judge may be removed from office. If so, please describe any such regime, giving all relevant details including-**

**(i) who decides that the judge is to be removed from office;**

The Governor-General on advice of the Attorney-General for the District Court. The Governor-General on the advice of Parliament for the High Court, Court of Appeal and Supreme Court. Those steps can be initiated by the Attorney-General independently where a judge is convicted of an offence punishable by 2 years or more. Otherwise, a recommendation from a panel set up by the Judicial Conduct Commissioner is required to initiate removal from office. The Judicial Conduct Commissioner is an independent person appointed to investigate complaints about judicial officers.

**(ii) does the judge have a right of audience on any such motion or otherwise possess a right to be heard against the removal and is there an appeal process if removed;**

There is a right to be heard before a panel set up by the Judicial Conduct Commissioner. That includes a right to legal representation. It is unknown if there are grounds to appeal as there is no precedent for this happening. It is likely that a panel's decision could be judicially reviewed in the High Court.

**(iii) what are the grounds for seeking the removal of a sitting judge;**

The grounds include unfitness due to mental or physical incapacity. The grounds also include "misbehaviour". This is not confined to conduct that is so culpable that it has been proved in a court and which would be appropriately the subject of a criminal conviction, it can include conduct that is so morally wrong and improper that it demonstrates a judge lacks the integrity to continue to hold judicial office. It is behaviour that would undermine the public confidence in the judiciary.

**(iv) what is the relationship between violation of the ethics code/principles and removal; and**

The misbehaviour must be of a sufficient magnitude to undermine public confidence in the judiciary.

**(v) describe the transparency in the process.**

The processes referred to above provide transparency. These include the convening of a panel set up by the Judicial Conduct Commissioner before whom there is a hearing at which the judge has the right of representation in the rules of natural justice apply. It also includes the requirement for District Court judges that the Attorney-General recommend to the Governor-General removal and for senior court judges that removal is determined by Parliament.

**B. If removed from office, describe the adverse consequences that may affect the removed judge including –**

**(a) financial (especially pension) consequences;**

On removal all pay ceases. The right to funds already paid into the judge's pension scheme are not affected.

**(b) future employment consequences following removal;**

A judge who has been removed from office is not statute barred from particular occupations. However, where certain professions or occupations require a "fit and proper person test" to be passed, the circumstances behind the removal may have a bearing on an assessment of the individual's fitness for other roles.

**(c) societal consequences including loss of title or civic decorations; and**

The fact that a judge has been removed from office would not of itself mean that titles would be revoked. However, the underlying circumstances, e.g. committing a serious crime or behaving in a way that undermine the independence of the judiciary such as taking bribes, might lead to such action.

**(d) disciplinary steps that may be taken against the removed judge.**

The removal of the judge is the appropriate disciplinary step. In the event that the conduct that amounted to “misbehaviour” was such as to attract criminal sanction the judge could still be subject to prosecution. However, that is the result of the underlying action not of the judge’s removal.