JUDICIAL APPOINTMENTS

NZ BAR ASSOCIATION CONFERENCE: AUGUST 2003

Terence Arnold

My task is to outline the current judicial appointments process and to indicate what the Government has decided to do following the report from Chen Palmer & Partners dated 1 November 2002 to the Attorney-General on various judicial administration issues. I will focus on the position in relation to Judges of the High Court, although I will mention the position in relation to District Court judges also.

Over the last decade various Law Officers have published material about the judicial appointments process:

- In August 1993 Sir Geoffrey Palmer delivered a paper "Judicial Selection and Accountability: Can the New Zealand System Survive?" at a Legal Research Foundation Conference, in which he dealt with the appointment of Judges and with his experience of the process as Attorney-General. This was published in Gray & McClintock, *Courts and Policy: Checking the Balance* (Brookers, 1995) (see especially pp 40-52);

- In March 1995 Paul East, then Attorney-General, presented a paper to a Bar Association conference, which was published as an article entitled "A Judicial Commission" in 1995 NZLJ 189. In that he described the appointments process which he followed;

- In 1998, McGrath J, then Solicitor-General, participated in a seminar held by the Wellington District Law Society on the topic of Judicial Appointments. He outlined the process then being followed and commented on suggestions for change. This, and the papers presented by other speakers at the Seminar, was published in [1998] NZLJ 314.

- In March 1999, Sir Douglas Graham, as Attorney-General, published a booklet on High Court Appointments, which set out a revised process.

It is fair to say that since 1993 the appointment process has evolved. It has become more formalised, more consultative and a little more transparent, although some argue that it has not yet gone far enough. In terms of consultation, the evolution has occurred at two stages. The first is the point at which suggestions for possible appointees are gathered.

The process developed by Sir Douglas Graham involved a very wide gathering of suggestions and nominations. The second is where detailed consultations are carried out about the suitability of particular candidates, where a more structured process has been developed over time.

The process outlined by Sir Douglas Graham in the 1999 booklet contains four essential steps:

- There is a process for generating an extensive list of possible candidates for appointment. This has two elements. First, expressions of interest are called for by way of public advertisement. Second, there is very wide consultation to obtain nominations of people thought to be worthy of consideration for appointment. Sir Douglas envisaged that this process would be carried out annually.

- There is then a sifting through of the names produced by this process to create a "long list" of candidates. This "sifting" process is carried out by the Chief Justice and the President of the Court of Appeal, with some supplementary consultation carried out by the Solicitor-General if necessary.

- When a vacancy occurs, a short-list is prepared from those on the long list. The Chief Justice and the Solicitor-General undertake further consultation about those on the short list, the Chief Justice with the judiciary and the Solicitor-General with the profession.

- Finally several names are put to the Attorney-General. Once the Attorney-General has settled on her preferred candidate, and that person has agreed to accept appointment, the Attorney-General will mention the name in Cabinet and then make a formal recommendation to the Governor-General for his or her appointment.

The 1999 booklet also set out the criteria for appointment. Those criteria are:

1. **Legal ability**. Ability as a lawyer is critical. Legal experience is obviously relevant but, as the booklet makes clear, that is not confined to experience in litigation, or even in the private practice of law.

2. **Quality of character**. This refers to personal qualities such as integrity, open mindedness, patience, good judgment and so on.

3. **Personal technical skills**. This refers to qualities such as the ability to absorb and analyse complex factual and legal material, mental agility and effective oral communication skills.

4. **Reflection of society**. This means that those appointed must be aware of and sensitive to the diversity of modern New Zealand society. The person must have "a good knowledge, acquired by experience, of New Zealand life, customs and values."

As I have said, this process was developed in respect of appointments to the High Court. The Judicial Appointments Unit in the Department of Justice keeps a running list of those who express interest in appointment, with brief biographical data, but otherwise the process is co-ordinated by the Solicitor-General, although, as I will shortly mention, it has been modified a little in its application over the last two years or so.

In relation to District Court Judges, the whole appointment process is run through the Judicial Appointments Unit and the Department of Justice. There are some differences in the process, perhaps the most significant being that a panel interviews those on the short list for appointment to particular District Court vacancies.

I make four comments about the process applying to High Court judges.

First, when I became Solicitor-General in October 2000 the annual process for identifying a large pool of candidates by way of calling for expressions of interest and nominations from consultees had just been completed. Letters seeking nominations had been sent to the New Zealand Law Society, the NZ Bar Association, the Criminal Bar Association, the Women's Consultative Group of the NZLS and the Women's Lawyers Associations from Auckland, Wellington and Canterbury, the Maori Law Society, the President of the Law Commission, the Minister of Maori Affairs, the Minister of Justice, the Minister for Courts, the Minister for Women's Affairs, the Secretary for Justice, the Chair of the Law and Order Select Committee and the Opposition Spokesperson for the Attorney-General portfolio. Most replied with suggestions. Accordingly, a large group of lawyers had been identified as worthy of consideration for appointment. This list, with the addition of others who had expressed interest or been mentioned as possible candidates, has been the basis of

the consideration of candidates for vacancies over the past 2 years or so. The reason that I have not undertaken further broad based consultation to develop a new list is that I considered that there was little point in conducting that type of initial consultation annually given the small number of vacancies that occur in any year at the High Court level and the fact that new candidates are unlikely to emerge "overnight". I thought it more sensible to conduct that wide-ranging consultation on a less frequent basis, say every third year.

Second, there are dangers in a process that involves wide consultation at various stages. Rumours spread. There is scope for embarrassment of people whose names are mentioned. Sometimes (thankfully, rarely) campaigns are mounted for or against particular candidates. So, while consultation is undoubtedly necessary, it does impose important disciplines on those who are consulted.

Third, the fact that a particular organisation is consulted does not give it a power of veto. Where there is a vacancy organisations may be consulted about one or about several candidates, depending upon the point that the Attorney-General has reached in her thinking. Sometimes organisations raise concerns about a particular candidate, or rank candidates in order of preference. Where a concern is raised, or an order of preference indicated, I convey that to the Chief Justice and to the Attorney-General. Generally I undertake further inquiries to explore the concern or understand the preference. The Chief Justice may also make her own inquiries among the judiciary on that aspect. Ultimately, however, once the Attorney-General has heard the full range of views developed from the consultation, she will make up her own mind, and may decide that, on balance, a concern that has been raised about a particular candidate is not sufficient to outweigh other factors which support the person's appointment. Or she may decide that she does not agree with the ranking that has been suggested and prefers another ranking. This does not mean, of course, that the consultation has been pointless or was a waste of time; it simply means that the Attorney-General, who has the benefit of a wider range of views than any individual consultee, has reached a different assessment.

Fourth, consultation is a progressive or cumulative process. Over time, through a variety of mechanisms, the Attorney-General acquires a good deal of information and feedback about lawyers. For example, the annual round for the appointment of Silks provides the Attorney with much information about members of the Bar, both through the (generally) detailed applications which they submit and the extensive consultation that is undertaken. Similarly, the consultation processes surrounding judicial appointments build on previous

consultations. As a result, the Attorney-General may have two or three people in mind for appointment before vacancies occur. In those circumstances, the consultation that occurs before an individual appointment is made may be little more than checking to ensure that nothing new has arisen which may cast doubt on the candidate's suitability for appointment.

The New Process

In November 2002, Chen Palmer & Partners reported to the Attorney-General on a number of issues relating to judicial administration. One of the issues discussed was judicial appointments.

The report considered not simply the appointment process for Judges of the High Court and Court of Appeal but also the appointment process for Judges of the District and other Courts. The report concluded that:

> "… the functions of search, database management, short-listing, interview, referee checking, etc. are fragmented, incoherent, poorly resourced and out of line with best practice in both the private and public sector. What is needed is a properly designed and resourced method of managing the appointments process."

The report ultimately recommended that a new Judicial Appointments and Liaison Office (JALO) be established and be located in the Crown Law Office under the overall responsibility of the Solicitor-General. JALO would be headed by a Deputy Solicitor-General and would have a greater level of resources than is currently available. The report recommended that JALO have responsibility for the appointment of all judicial officers including Justices of the Peace, Community Magistrates and Coroners, as well as responsibility for quasi-judicial appointments.

The Government accepted these recommendations, but limited the JALO's responsibility to appointments of judicial officers. JALO will not at this stage have responsibility for the appointment of quasi-judicial officers or of Justices of the Peace, Community Magistrates or Coroners. Further, JALO will not have responsibility for administering the appointment process for the Chief Justice or members of the Maori Land Court. The Judicial Matters Bill, which has just been introduced into the House, will make the legislative changes necessary to ensure that the Attorney-General is responsible for recommending all judicial appointments to the Governor- General except those just mentioned. An officials group is presently undertaking preliminary planning for JALO, with a view to reporting to Government by the end of the year. JALO should be established and operating by mid-

2004. The Department of Justice will remain responsible for appointments to Tribunals and other quasi-judicial and administrative bodies.

Concluding Observations

I make three concluding observations.

First, it is apparent from the Government's broad acceptance of the recommendations made by Chen Palmer & Partners in their report, the judicial appointments process continues to evolve. Given the decision to establish JALO and appoint a further Deputy Solicitor-General to run it, there seems little likelihood that there will be further significant evolution in the short to medium term, although developments in England may have some influence.

Second, the appointments process faces significant challenges. For example, successive Attorneys-General have sought to bring greater diversity to the High Court and Court of Appeal Benches. As in other comparable jurisdictions, there remains pressure to ensure that the Bench reflects the diversity of New Zealand society. Diversity does not, of course, mean sectional representation or quotas. It simply means that the picture of the judiciary that Jack Hodder revealed in his 1974 study is no longer acceptable – upper-middle class, middle-aged pakeha males from a relatively narrow educational background. The issue is really one of balance. But while diversity is a goal, no one argues seriously that merit should be sacrificed to achieve it. Diversity can be achieved within a merit-based appointments system – it simply requires some flexibility of approach.

There is also a more immediate short-term challenge. The debate about the Supreme Court has, I believe, been unnecessarily destructive of public confidence in judicial institutions and in the conventions surrounding judicial appointments, and has undermined judicial morale. The profession bears some responsibility for this. In the course of the Supreme Court debate the profession has, either through professional bodies or individually, made arguments such as the following:

- It stands to reason that a large society such as England, with almost 60 million inhabitants, will produce better Judges (and, I assume, better lawyers generally) than a small society like New Zealand with 4 million inhabitants.

- New Zealand Judges "are simply not up to it". Recent High Court appointments have been made from the "second eleven", the "first eleven" being unwilling to accept appointment.

- The Judges of the Court of Appeal, being based in Wellington alongside Parliament and the Executive, lack independence (or appear to lack independence) and the Judges of the Supreme Court, if it is established in Wellington, will likewise lack independence.

- New Zealand's process for the appointment of Judges is open to political abuse, so that the Supreme Court will or may be "stacked" by the Attorney-General.

The proposal to abolish appeals to the Judicial Committee of the Privy Council and establish a Supreme Court in New Zealand does, of course, raise important issues, on which there is room for difference of opinion. We undoubtedly need to consider issues such as whether our relatively small size as a nation does constrain our ability to operate a two-tier appellate structure domestically and whether our judicial appointment processes remain satisfactory. Those are legitimate questions. But arguments of the type noted above are without foundation and have, in my view, done considerable harm. Rather than elevating and illuminating the debate they have lowered and personalised it. I fear that we may have done lasting damage in the process and that this may affect the willingness of some to accept judicial appointment, at least in the short term. Of course, I very much hope my fear proves unfounded.

Third, I should reiterate an observation that I made in a speech to the Legal Research Foundation several weeks ago. In my time as Solicitor-General I have developed a much deeper appreciation of how robust, yet at the same time how fragile, important parts of our constitutional arrangements are. Powerful conventions operate in relation to the appointment of Judges. These conventions are robust, essentially as a result of the scrupulous way in which they have been understood and observed by the relevant actors over many years. The Attorney-General, the Chief Justice and the Solicitor-General all have distinct roles to play, and there are effective checks which maintain the relevant conventions. Yet those conventions are also fragile because they can easily be misrepresented and misunderstood, with a resulting loss of public confidence. Once lost, public confidence is difficult to regain. It seems to me that, as a profession, we have an obligation to ensure that public confidence in the process is not unjustifiably sacrificed.