

**ER**  
**NEW ZEALAND**  
**SOLICITOR-GENERAL**

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Attorney-General

Changes to Judicial Superannuation

Introduction

1. Ministers will shortly consider proposals for changes to the Government Superannuation Act 1956 in relation to the superannuation entitlements of the judges. I have been asked to provide an Opinion discussing the constitutional principles relevant to any such changes. The issues concerned turn on compliance with the provisions of the Constitution Act 1986 and the constitutional conventions as to proper relationships between the executive branch of Government and the Judiciary.
2. At the heart of this issue is the special role of the judges in our system of government. They are interpreters of the law under our constitutional arrangements. They are also the arbitrators of disputes between citizens and between the State and citizens. Their role protects the rights of citizens including rights in relation to executive government. It is axiomatic in constitutional terms that in the exercise of the powers of executive Government the Crown is always subject to the law. For that to be the reality as well as the theory the judges must be and must be seen to be independent in the exercise of their functions of articulation and application of the law. That in turn requires from the other branches of Government restraint from taking measures that might undermine judicial independence.
3. Reductions in the remuneration of judges have long been seen as a measure which is of a kind that can affect judicial independence. It is in this context that constitutional questions arise in respect of proposals to change entitlements of judges to superannuation.

Background to Proposed Changes

4. The material I have so far seen indicates that neither officials nor Ministers have turned their minds to the precise changes that might be made to the Judges, scheme under the Government Superannuation Act. Consideration to date seems to have focused on more general questions of public sector superannuation. Officials appear at present to contemplate that during 1992 membership of the current GSF schemes will be closed off. Future public sector schemes will be based on trust deed structures rather than those having a direct statutory basis. Employer contributions will be funded from Departmental budgets and the amounts based on negotiated Departmental decisions. No contingent or overall liability on the part of Government is contemplated in the new general schemes. The schemes will be self-funding and benefits will turn on fund performance rather than application of stipulated formulae by reference to salaries at retirement. I understand that a separate study is being made of the scheme for Members of Parliament and that a special one off cut may be applied to all benefits which ultimately will be paid to existing scheme members. No specific work has yet been done, as I understand it, on changes to the Judges, scheme.

#### Issues for Opinion

5. In this context I have limited factual material to work on in advising on the constitutional acceptability of changes as they affect judges but, in order to assist, I express views on specific potential situations. The relevant scenarios I consider are:
- (a) Any decision to reduce the benefits in future payable on their retirement to current members of the Judges' scheme.
  - (b) Any decision to introduce a new scheme of reduced superannuation benefits for judges which:
    - (a) applies to all judges appointed after the date it comes into effect; but
    - (b) does not apply to serving judges who would continue to enjoy benefits currently stipulated in the Act under the present scheme.

#### Statutory Provisions

6. The Constitution Act 1986 includes two provisions by way of protection to the judiciary namely sections 23 and 24 which provide as follows:

“23. Protection of Judges against removal from office- A Judge of the High Court shall not be removed from office except by the Sovereign or the Governor-General, acting upon an address of the House of Representatives, which address may be moved only on the grounds of that Judge's misbehaviour or of that Judge's incapacity to discharge the functions of that Judge's office.”

“24. Salaries of Judges not to be reduced- The salary of a Judge of the High Court shall not be reduced during the continuance of the Judge's commission.”

7. They are companion provisions which of Course reinforce each other in the protection they give the judicial independence. Section 24, which gives statutory form to what otherwise would solely be a constitutional convention, is the particular provision with which I am directly concerned. On its true interpretation, in my opinion, turns the nature and extent of constitutional protection in New Zealand for the remuneration of judges.
8. While the expression of protection as to salary in the Constitution Act is confined to judges of the High Court (who include the judges of the Court of Appeal) the same principle has been applied in the legislation constituting the Labour Court, District Court and Maori Land Court. The specific provisions are s.115(3) Employment Contracts Act 1991, s.6(2) District Courts Act 1947 and s.21(2) Maori Affairs Act 1953 respectively.
9. The principles in section 23 and 24 have long been embodied in the law, having their historical origin in the United Kingdom Act of Settlement of 1701 as previously mentioned. They appear in the constitutional documents of many countries including the Constitution of the United States. They were first incorporated in New Zealand statutes by s.5 of the New Zealand Constitution Act 1852. The decision to incorporate the two longstanding statutory provisions in the Constitution Act, when it was passed in 1986, reflects Parliament's recognition of the constitutional importance of the two provisions as measures providing security of tenure to judges and thereby to their independence (cf Report of Committee on Constitutional Reform, February 1986 para 3.95).

#### Earlier Opinions: 1989 and 1990

10. Issues arising in relation to Judicial superannuation have been addressed by me in opinions given to Ministers on 27 September 1989 and on 6 March 1990 in the context of the changes proposed, and in the latter case enacted, in respect of superannuation entitlements. The conclusions I then reached in summary were:
  - (a) "Salary" in terms of s.24 of the Constitution Act 1986 includes an entitlement to superannuation or other form of allowance payable on or from retirement. Stipulated superannuation benefits are simply deferred remuneration.
  - (b) Reduction in an entitlement to superannuation during a judge's term of office would constitute a reduction in the judge's salary even though prospective in its effect on the judge concerned.
  - (c) Section 24 and the constitutional convention it expresses are not concerned with every reduction in the amount that a judge receives as salary but rather with reductions made in circumstances where judicial independence might be affected.
  - (d) There is no effect on judicial independence where a reduction is the result of a taxation measure of general application which is not discriminatory in its nature.

- (e) Reductions in other circumstances are to be measured against the test of their effect or potential effect on judicial independence to determine whether they are contrary to s.24.
11. My earlier opinions addressed two differing factual situations. The background was that in its 17 December 1987 economic statement the then Government had signalled its policy of removal of tax subsidies for superannuation. The consequential fiscal savings would allow significant cuts in personal tax rates. G.S.F. scheme benefits would be adjusted to reflect the effects on private sector schemes of the proposed changes.
  12. The first factual situation, put to me and addressed in my opinion of 27 September 1989, was that benefits received by members of all G.S.F. schemes, including the judges, would be cut by the amount of tax previously payable (according to PAYE table rates) by recipients. Such payments were to be received tax free under the new regime. My view in relation to such a scheme for reduction in judges' entitlements was that plainly it would have no effect on judicial independence. There would be no breach of section 24 of the Constitution Act 1986.
  13. For my opinion of 6 March 1990 two assumptions were made to the then current position. The first was that the schemes under the Government Superannuation Fund Act, and specifically the Judges' scheme, were funded by Government contributions to the extent necessary (in addition to members' own contributions) to support current benefits. The second assumption was that tax subsidies notionally benefiting the Government as such a contributor were calculated. Actuarial calculations were then made of the effect on the benefits that could be paid under the Judges' scheme as a consequence of a reduced level of contribution possible if the tax benefits were withdrawn. In brief an actuarial model sought to replicate in GSF schemes the fiscal effects on private schemes of the tax regime changes. The effect was that the reduced contributions would sustain reduced benefits. My opinion was that if the actuarial model discussed were to be applied to the Judges' scheme, the Government would simply be applying a principle that had already been applied to private sector schemes and doing so as part of an overall universal fiscal reform. The total policy incorporated a common approach to changes in both the private and the public sectors, insofar as taxation of superannuation was concerned. Furthermore, there was a quid pro quo for superannuation changes in the form of the income tax reductions again enjoyed by all citizens. Viewed in that overall context, one which had been foreshadowed at the outset on 17 December 1987, the changes to superannuation were not, in my opinion, discriminatory against the judges but rather part of a universal tax reform in their application. No threat to judicial independence accordingly was involved. This was my conclusion in the Opinion I gave on 6 March 1990. It was accepted by Ministers and the changes considered thereafter enacted.

#### Opinion on Present Issues

14. On the first scenario, identified in para 5(a) above, reductions would be made to the entitlements of the present judges payable on their retirement, under the Judges' scheme. In my opinion such a reduction in prospective benefit entitlements would be a reduction in the salary of all serving judges. The measure would be one directed

against the judges specifically and would not be the impact on them of a measure of universal application. Such reductions would in effect diminish the security of judges in their office, which turns not only on their secure tenure as such but on undiminished remuneration during that tenure. As such the changes would be a measure detrimental to the independence of the judiciary, contrary to s.24 of the Constitution Act and in breach of the constitutional convention it articulates. While that would no doubt not be the intention of the proponents of any such change, in my opinion it would unavoidably be the effect.

15. I turn now to the scenario outlined in para 5(b) above. If there were to be no alteration to the position of existing judges, including no alteration in the position whereby it were the Government (rather than for example an independent trust) which that carries the statutory obligation to pay their retirement benefits, no problem of a constitutional character, in my opinion, will arise. The Constitution Act provisions are not intended to secure remuneration of future members of the judiciary not yet appointed. Obviously regard should be had to the effect on recruitment of a reduction in judicial superannuation benefits but that is very much a policy issue and not one relevant to an opinion on the legal questions I address. It should of course also be borne in mind also that whatever the terms of any new remuneration package that might be settled for judges appointed in the future they will thereafter represent a minimum in that in broad terms section 24 will not permit a reduction in the entitlement of a judge subsequent to his or her appointment.
16. A new scheme applicable to judges appointed after the changes plainly presents less in the way of potential constitutional objections. Nevertheless there are potential pitfalls and the possibility of a Trust structure is one of them. In this regard however I do not feel able to make any further comment without more information on what is proposed.

J.J. McGrath  
Solicitor-General