

CROWN LAW

# JUDICIAL PROTOCOL

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*As at April 2013 (updated April 2014)*

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## FOREWORD BY THE ATTORNEY-GENERAL

Making recommendations to the Governor-General for the appointment of Judges is a most important responsibility in a democracy such as New Zealand, operating under the rule of law. I see that responsibility as requiring the selection of a judiciary that will be independent in exercising its functions, which will decide issues according to the law, and which will be aware of, and sensitive to, the broad dimensions of our society. Recognising the importance of this task and the public interest in the appointments processes, the procedures for judicial appointments have been formalised.

The guiding principles for the procedures are as follows:

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

These principles are intended to ensure that New Zealand continues to be well-served by the judiciary and to ensure transparency in the processes.

This booklet explains the process which will now apply to judicial appointments to High Court, the Court of Appeal and the Supreme Court.

**Hon Christopher Finlayson**  
**Attorney-General**

April 2013 (updated April 2014)

## INTRODUCTION

This booklet sets out the process for making appointments of Judges of the higher courts. It is intended, principally, to provide information and guidance to those interested in appointment.

To provide some context for the process brief reference is made to New Zealand's constitutional arrangements as they affect the role of the judiciary and to aspects of judicial appointment processes in general.

## NEW ZEALAND'S CONSTITUTION

The separation of powers between the legislature, executive, and judiciary is a fundamental principle of democratic governments such as that of New Zealand. Each branch of government has a role in balancing the power of the other two branches. For instance, the judiciary examine the actions of the executive through the process of judicial review. Conversely, the executive is principally involved in the selection of Judges, and both the executive and Parliament would be involved in the dismissal of Judges in the event of misconduct.

### The role of the judiciary

The constitutional importance of appointments to the judiciary reflects the two essential functions of the Supreme Court, the Court of Appeal and the High Court, namely, to settle disputes between citizens and the state, and in doing so, to clarify and declare the law of New Zealand.

The independence of the judiciary is a fundamental element of New Zealand's constitutional arrangements. The essential element of the principle of judicial independence is that Judges should be able to decide matters according to law free of all inappropriate pressures. This constitutional principle is reflected for Supreme Court, Court of Appeal and High Court Judges in the Constitution Act 1986, and has general application in other laws and conventions.

### The structure of the courts

New Zealand has a hierarchy of courts. The Supreme Court is the highest court, followed by the Court of Appeal, the High Court, and finally the District Court which has some specialist divisions. The Employment Court is a separate, specialist court.

### The Supreme Court

The Supreme Court consists of the Chief Justice and four to five other Judges. Judges of the Supreme Court are also Judges of the High Court. Retired judges of the Court of Appeal and Supreme Court who have not yet reached the age of 75 years may be appointed as acting judges. Appointments to the Supreme Court are made under the Supreme Court Act 2003.

### The Court of Appeal

The Court of Appeal consists of a President and five to nine other Judges. Judges of the Court of Appeal are also Judges of the High Court. Additional High Court Judges may be nominated to sit on divisions of the Court of Appeal. Appointments to the Court of Appeal are made under the Judicature Act 1908.

## THE HIGH COURT

The High Court consists of the Chief Justice and up to 55 other Judges. (This number includes the Judges of the Court of Appeal and Supreme Court). The Chief High Court Judge is responsible for the conduct of the High Court's business. Former High Court Judges may be appointed as Acting Judges if necessary to cover vacancies or periods of absence on the part of any Judge. There are up to nine Associate Judges who can exercise certain powers specified in the High Court Rules. High Court Judges and Associate Judges are appointed under the Judicature Act 1908.

## APPOINTMENT PROCESS

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. 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. For appointments to the District Court, Family Court, Environment Court and Employment Court, the process is carried out under the direction of the Secretary for Justice.

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.

## THE APPOINTMENT PROCESS FOR HIGH COURT JUDGES

### Criteria for appointment

Section 6 of the Judicature Act 1908 specifies that no person shall be appointed a High Court Judge unless he or she has held a practising certificate as a barrister or solicitor for at least seven years.

The constitutional importance of the judicial role, and the fact that Judges have to make decisions which significantly affect the liberties and rights of citizens, make it vital that those who become Judges are suitable to hold that office. The suitability of prospective candidates is assessed by reference to a range of clearly defined, transparent and publicly announced criteria. The criteria cover legal ability, qualities of character, personal and technical skills and reflection of society.

- *Legal Ability:* Legal ability includes a sound knowledge of the law and experience of its application. Legal knowledge, in particular, is indicative of intellectual capacity and intelligence. Requisite applied experience is often derived from practice of law before the courts which is experience of direct relevance to being a Judge. But application of

legal knowledge in other branches of legal practice, such as in an academic environment, public service or as a member of a legal tribunal may all qualify. At appellate level, legal ability includes the capacity to discern general principles of law and in doing so to weigh competing policies and values. More important than where legal knowledge and experience in application is serviced from, is the overall excellence of a person as a lawyer demonstrated in a relevant legal occupation.

- *Qualities of character:* Personal qualities of character include personal honesty and integrity, open mindedness and impartiality, courtesy, patience and social sensitivity, good judgment and common sense, the ability to work hard, to listen and concentrate, collegiality, breadth of vision, independence, and acceptance of public scrutiny.
- *Personal technical skills:* There are certain personal skills that are important, including skills of effective oral communication with lay people as well as lawyers. The ability to absorb and analyse complex and competing factual and legal material is necessary. Mental agility, administrative and organisational skills are valuable as is the capacity to be forceful when necessary and to maintain charge and control of a court. Judges often have to work at speed and under pressure. Accordingly, the ability to organise time effectively and produce clear reasoned judgments expeditiously is necessary.
- *Reflection of society:* This is the quality of being a person who is aware of, and sensitive to, the diversity of modern New Zealand society. It is very important that the judiciary comprise those with experience of the community of which the court is part and who clearly demonstrate their social awareness. The Report of the Royal Commission on the Courts in 1978 put the point as the need for “a good knowledge, acquired by experience, of New Zealand’s life, customs and values”. (p 199).

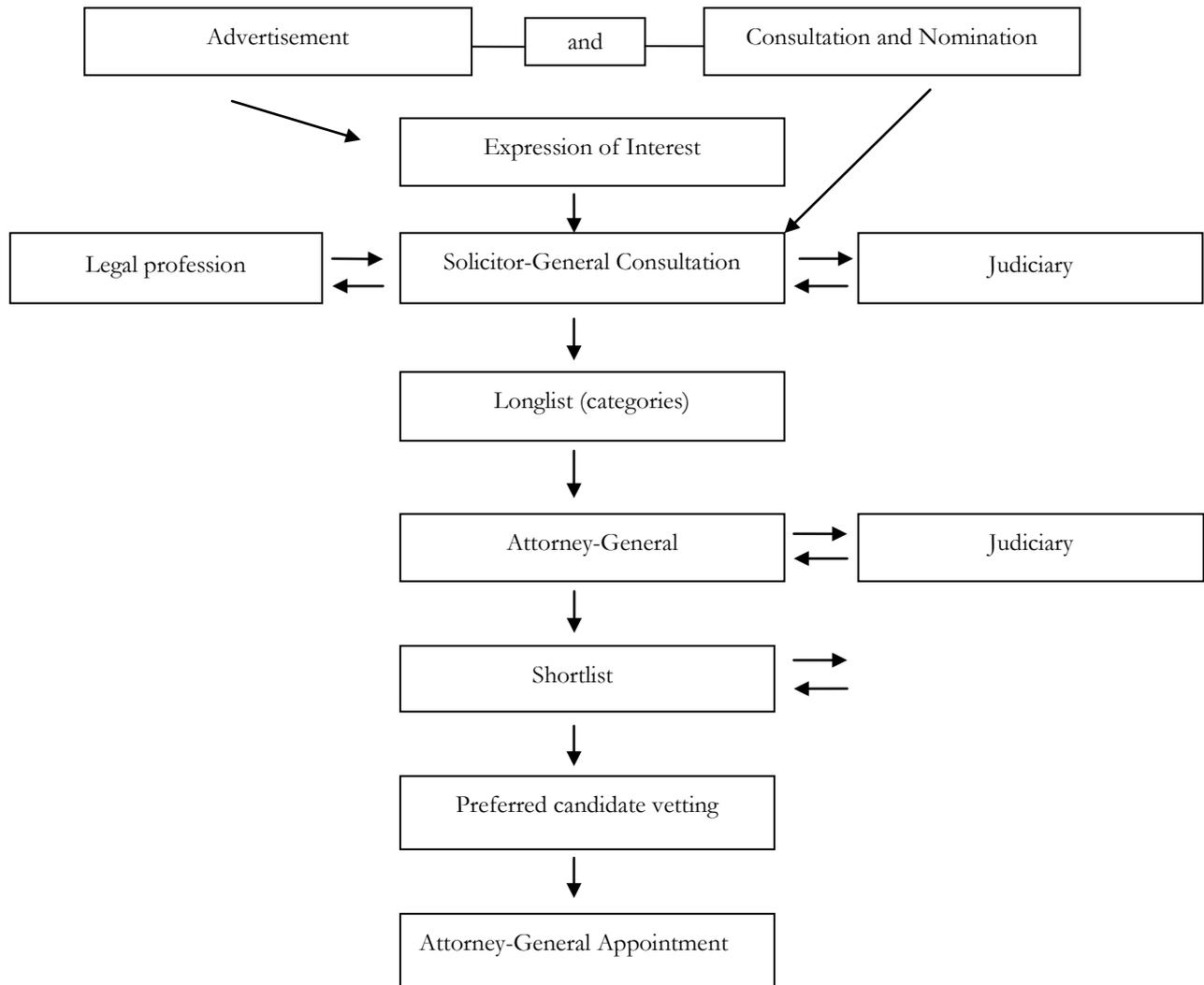
## The steps in the process

The steps in the appointment process for a High Court Judge are as follows:

1. Approximately every three years (or more frequently if necessary), expressions of interest are called for by public advertisement.
2. Prospective candidates respond to the request for expressions of interest. Prospective candidates are provided with an Expression of Interest form for completion. Alternatively, as a result of the consultation process described below, prospective candidates may be nominated, invited to express their interest and to enter the process.
3. The 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). Persons expressing interest are advised when their names have been registered.
4. 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. The purpose of this consultation is to ascertain whether additional names should be considered and added to the list.

5. The Solicitor-General seeks comments about those on the list from a range of key people and organisations. Those consulted are listed below.
6. The Solicitor-General asks the Chief Justice, the President of the Court of Appeal, and the Chief High Court Judge to give 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 longlist).
7. The Solicitor-General presents the longlist to the Attorney-General. The Solicitor-General's advice includes the results of his or her consultation process.
8. In respect of the long list, 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 long list remains current and relevant.
9. 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.
10. 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.
11. The Solicitor-General undertakes checks on the personal reputation of those on the shortlist.
12. The Attorney-General will select from the shortlist the preferred candidate whom he or she wishes to recommend to the Governor-General for appointment. The Solicitor-General also asks the preferred candidate 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 preferred candidate will not resume practice before the courts on retirement or earlier termination of his or her appointment.
13. 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.
14. The short-listing process is repeated in respect of each upcoming High Court vacancy or appointment.
15. The process is described in the following diagram:

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### Consultation

A range of groups and people are contacted at various stages in the appointment process. Consultation is strictly confidential and all persons consulted are expected to observe this confidence. The Attorney-General regards the knowledge, experience and judgment of the professional legal community as a very good source of informed opinion on the relative merits of prospective candidates. They are prominent among those consulted accordingly. The intention is to ensure a sufficiently broad perspective is obtained as to prospective candidates.

At the nomination stage, the list of parties who may be contacted includes the Chief Justice, the President of the Court of Appeal, the Chief High Court Judge, the Secretary for Justice, the President of the Law Commission, the President of the New Zealand Bar Association, the President of the New Zealand Law Society and other organisations or groups representative of lawyers who the Attorney-General believes can contribute names of suitable persons. Such groups may include the Criminal Bar Association, the Māori Law Society, and women lawyers' associations. Nominations are sought from the Minister of Justice, the Minister of Women's Affairs and the Minister of Māori Affairs. Nominations may also be sought from the Chair of the Justice and Electoral Select Committee and the Opposition Spokesperson for the Attorney-General portfolio.

In seeking comment on prospective candidates, the Solicitor-General will consult the Chief Justice, the President of the Court of Appeal, the Chief High Court Judge, the New Zealand Law Society, the New Zealand Bar Association and others as appropriate.

In selecting the candidate from the short-list whom he or she intends to recommend for appointment, the Attorney-General will make up his or her own mind in light of the range of views that have been made available to him or her through the consultation process. This does not mean, however, that consultation is meritless; it simply means the Attorney-General, who has the benefit of a wider range of views than any individual consultee, has reached a different assessment.

## Information sought

Persons interested in appointment as a High Court Judge, whether or not currently holding judicial office, are asked to complete an Expression of Interest form and to provide curriculum vitae. At the short listing stage, prospective candidates are also asked to complete a declaration.

### *Expression of Interest form*

The Expression of Interest form is a formal document. It must be completed by all persons wishing to be considered for appointment as a High Court Judge, whether or not they currently hold judicial office. It seeks a variety of personal and professional information such as a brief description of the person's legal experience, career highlights and any publications. It also seeks the person's consent to the information being conveyed as necessary to those consulted during the appointment process. Information contained in the Expression of Interest form is intended to supplement material in the curriculum vitae. The form is also intended to provide an opportunity to highlight experience which is considered to be of particular relevance to the criteria on which appointments will be made. The substance of the form is contained in Appendix 1 to this booklet.

### *Curriculum vitae*

Persons interested in appointment are also asked to provide a curriculum vitae so that more details about their legal career, including a full work history, is available together with any relevant experience outside the law.

### *Applicant's declaration*

Prospective candidates who are selected for the shortlist (as set out in the process above) are asked to complete a separate declaration intended to confirm that there are no matters in their background of a sort that might cause difficulties after appointment. They are asked to sign the declaration and to undertake that if appointed, they will not resume practice before the courts on retirement or earlier termination of their appointment. The substance of the declaration is contained in Appendix 2 to this booklet.

## THE APPOINTMENT PROCESS FOR HIGH COURT JUDGES

Appointments to the Supreme Court and Court of Appeal require a different appointment process to that followed in respect of the High Court. Appointments to the appellate courts are usually made from the serving judiciary and, as such, 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. 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 will notify Cabinet of his decision and recommend the appointment to the Governor-General.

## STORAGE OF INFORMATION

### Storage of information: prior to appointment

Details of all prospective candidates who meet the statutory requirement for appointment are placed on the register.

Information is held on the register for five years, unless prospective candidates request otherwise. Prospective candidates can ask for their names to be removed from the register at any time. At regular intervals prospective candidates will be contacted and asked to update their personal information. If there is no response to this request, the relevant records will be removed from the register.

All information is treated confidentially and held securely in the Appointments Unit. Every attempt is made to ensure any data held is complete and correct. In accordance with information privacy principles, the purposes for which the information is collected and used is made clear to prospective candidates at the time the information is collected.

The information held on the register is kept confidential and access is available only to those directly involved in the relevant appointment process. Prospective candidates may request to see the information held about them on the register at any time. However, comments made by other people on the prospective candidate's suitability may not be available, if the comments were subject to an obligation of confidentiality as will often be the case. Information on the register may be available under the Official Information Act 1982 but only if special public interest considerations apply.

## Storage of information: after an appointment is made

When an appointment is made, the information on the register is deleted. The appointee's name remains but no other details. Such papers as are required for judicial administrative purposes are transferred to the Chief Justice. All other paper records are transferred to the Solicitor-General, who is personally responsible for the safe keeping of the files.

## THE ATTORNEY-GENERAL'S JUDICIAL APPOINTMENTS UNIT

The Appointments Unit was set up specifically to handle expressions of interest in judicial appointments with the highest degree of confidentiality and security. The Appointments Unit is attached to the Ministry of Justice, but its records are held separately from those of the Ministry. The Appointments Unit has its own telephone and facsimile numbers and postal address.

The role of the Appointments Unit is to provide administrative assistance throughout the appointments process.

*Contact details for the Unit are:*

The Judicial Appointments Officer  
The Attorney-General's Judicial Appointments Unit  
DX SX10088  
WELLINGTON  
Telephone: 04-473-3890 or 0800-473-389  
Facsimile: 04-473-3891