# 6 The Judiciary

In this chapter we look at the Judiciary, its role and structure, the appointment process and its powers.

We propose: Articles 61–69

- continuing the current structure of the senior courts of New Zealand:
- carrying over the protection of judges against removal from office and preventing the reduction of a judge's salary:
- raising the compulsory retirement age for judges to 72:
- establishing a Judicial Appointments Commission to oversee the appointment and promotion of judges:
- empowering courts to declare Acts of Parliament invalid to the extent that they are inconsistent with the Constitution.

## The role of the Judiciary

The Judiciary is the third branch of government. It consists of courts (staffed by judges) and tribunals (staffed by judges and / or tribunal members). The core purpose of courts and tribunals is to undertake the adjudication of disputes and resolve them by reference to the law. Their decisions are authoritative; they carry the sanction of the State if not respected.

While courts and tribunals hold significant power, it is very important to recall that they do not have the power of initiative—so they cannot, unlike other branches of government, initiate policy proposals. Rather they are called into action by litigating parties. So they are reactive, rather than proactive.

Why does a constitution need to recognise their role?

One answer is to say a constitution does not need to! After all, the New Zealand Constitution Act 1852—which set out parts of our constitution until it was repealed in 1986—made no reference to the Judiciary at all. But most codified constitutions overseas do make reference to the judicial branch and secure its position within the constitutional division of power. The key features of such recognition are:

- affirming the status of the principal senior courts:

- affirming the independence of the Judiciary in undertaking its work, by protecting judges against removal (other than for good cause following a defined process) and against more subtle influences such as reduction in salary, pension or other benefits:
- stating the role of the Judiciary in the adjudication of constitutional disputes:
- increasingly, providing mechanisms for the selection of judicial candidates so as to further enhance public confidence in the Judiciary.

We believe that any codified New Zealand constitution should do the same.

## How Constitution Aotearoa deals with the Judiciary

Other than some provisions explicitly recognising and regulating the power of the Judiciary to invalidate any Act of Parliament that is inconsistent with it, Constitution Aotearoa contains very little constitutional innovation. As with most provisions concerning the machinery of government, nearly all of the provisions concerning the Judiciary reflect existing practice. In particular, Constitution Aotearoa:

Articles 62 and 63
- continues the current structure of the senior courts of New Zealand (being the Supreme Court, the Court of Appeal and the High Court), and permits Parliament to organise the other courts and tribunals in the manner that it considers appropriate:

Article 65
- carries over the protection of judges against removal from office:[1]

Article 66
- prevents the reduction of a judge's salary:[2]

Article 67
- provides for a compulsory retirement age for senior court judges,[3] but permits the appointment of retiring judges as acting judges.[4]

1 Constitution Act 1986, s 23
2 Constitution Act 1986, s 24
3 We have suggested increasing the age to 72 rather than 70. Seventy-two was the retirement age until 1980; it was then reduced to 68, but increased to 70 in 2007. In our view, with much greater life expectancy, 72 is a more appropriate retirement age.
4 Judicature Act 1908, ss 11A and 13

The significant innovations are:

- The establishment of a Judicial Appointments Commission, to oversee the appointment and promotion of judges. This new institution follows the trend in overseas constitutional jurisdictions and indeed in countries like the United Kingdom that do not have a codified constitution. It recognises that, with the softening of parliamentary sovereignty under Constitution Aotearoa and the increased role of the Judiciary, it is appropriate that the appointment of judges should be more deliberate and freer of executive influence. Article 64
- Expressly authorising any court or tribunal to rule upon, and to provide an appropriate remedy in, any case before that court or tribunal in which a law is said to be inconsistent with Constitution Aotearoa. In the case of an Act of Parliament, a ruling of inconsistency will require confirmation by the Supreme Court in order to have effect. This approach is consistent with many overseas constitutional models. It will ensure that Constitution Aotearoa can be raised in all cases where it is relevant, but that a ruling on the constitutional consistency of a statute has the backing of the country's most senior judges. In our view, that level of judicial sign-off is appropriate as our constitutional system transitions from one based on parliamentary sovereignty to popular sovereignty. Article 68

## The judicial structure: constitutionalising the senior courts only

In most countries like ours, the judicial system consists of so-called senior (or superior) courts and other courts and tribunals. The senior courts in New Zealand are the Supreme Court, Court of Appeal and High Court. Like all other courts, each of these three courts is the creature of statute; but unlike all of the other courts and tribunals none of these three courts is able to be the subject of judicial review proceedings. In that sense they are senior. Their judges are the most senior in the judicial hierarchy and they regularly have to determine disputes not only between individuals, but also disputes between the State and ordinary people.


I'M AFRAID I HAVE TO REPRIMAND YOU CHIEF JUSTICE, YOUR SOLUTION TO PRISON OVER-CROWDING CROSSED THE LINE INTO COMMON SENSE...
POWER
Tomlett 23/7/09

In noting the distinction between senior courts and other courts and tribunals, we do not diminish the importance or role of the other courts and tribunals. In fact, those courts and tribunals undertake the vast bulk of adjudication in New Zealand. Few people will ever have been involved in a High Court case, but very many will have participated in District Court proceedings, whether as jury members, witnesses, defendants or litigants in civil matters. That is unsurprising since that court deals with almost all crime, youth justice and family law matters, as well as a significant number of civil disputes.

The reason for drawing attention to the distinction between senior and other courts is that we have decided to follow overseas constitutional precedents by recognising the power of Parliament to organise the administration of justice by other courts and tribunals, largely as it sees fit.[5] We see no reason to "constitutionalise" the current configuration of the other courts and tribunals. Parliament should be free to adapt the organisation of those courts and tribunals over time. But it is important to note that elsewhere in Constitution Aotearoa we have constitutionalised the right of New Zealanders to a fair and impartial determination of any dispute that is determined before a judicial authority bearing the mandate of the State. That right will ensure that while Parliament retains flexibility in how it organises the other courts and tribunals, New Zealanders can have minimum expectations as to how that power will be exercised.

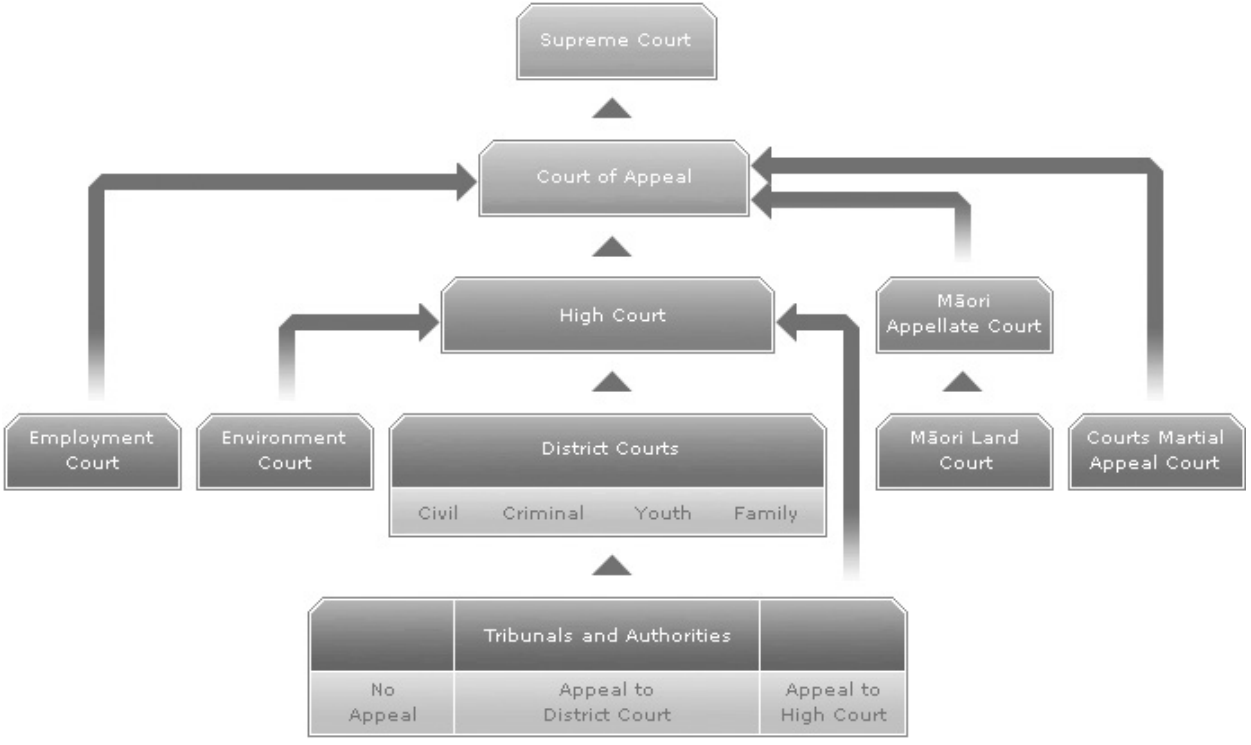
## Judicial Appointments Commission

At the moment, the appointment process for judges in New Zealand is less than ideal. To be clear, we are not saying that judges are appointed who are not fit for the job. Rather, our point is that the process around the appointment of judges is less transparent than it should be and less transparent than is the case in a number of overseas jurisdictions to which we typically compare ourselves.[6]

5 It is useful to examine the work of the Law Commission in *Law Commission Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R 126, 2012).

6 Juliet Bull "The Implications of A Supreme Law Bill of Rights for New

## The unchanged court structure




"Diagram of the Courts Structure" Courts of New Zealand/Ngā Kōti Aotearoa <https://www.courtsofnz.govt.nz/about/system/structure/diagram>

At present, senior court judges are appointed by the Governor-General upon the recommendation of the Attorney-General. The Attorney consults with the Chief Justice and the Solicitor-General is usually involved in the process as well. For an appointment to the Court of Appeal, the President of that court will be consulted as well. Judges of other courts are appointed by the Governor-General upon the recommendation of the Attorney-General, with advice provided by a range of different persons. In the case of tribunal members, appointment is often by the Governor-General upon the recommendation of the minister with responsibility for the legislation that establishes the tribunal.

In the case of senior court judges, the practice in recent years has been to periodically advertise for expressions of interest in appointment to the bench. In addition, a protocol has been issued by the Attorney-General in April 2013 concerning High Court appointments increasing transparency and emphasising the importance of security for "a judiciary that will be independent in exercising its functions".[7] This is certainly an improvement on the old days when appointments were undertaken on a "tap on the shoulder" basis, which had a tendency to lead to the perpetuation of the existing crop of judges. In light of the enhanced role which judges will be expected to play under Constitution Aotearoa, it seems to us that the time has come to constitutionally require the appointment of judges following a more transparent and robust process through an independent Judicial Appointments Commission.

Recognising that some time will be required to enact appropriate legislation to establish the Judicial Appointments Commission and set up its operations, Constitution Aotearoa gives Parliament two years from adoption of the new Constitution to pass an Act of Parliament establishing an independent Judicial Appointments Commission.

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Zealand Judicial Appointments" (2015) 46 VUWLR 495.

7 "High Court judges appointment protocol" Ministry of Justice. Available at <www.justice.govt.nz/about-the-ministry/judges-of-the-high-court-expressions-of-interest/high-court-judges-judicial-appointments-procedures>.

Constitution Aotearoa requires the Judicial Appointments Commission legislation to:

Article 64

- Provide that members of the Commission consist of persons who are members of the Judiciary, the legal profession, the House of Representatives and the general public. We believe that the Commission needs to have a mix of members on it in order for it to adequately perform its function of assisting in the selection of judicial candidates. Clearly a mix of skills and experience will be required, which Parliament will be able to more closely define in legislation. But ensuring that the Commission consists of members with a mix of backgrounds, with representatives from the Judiciary, the legal profession, the House of Representatives and from the general public, will go some way to moving away from accusations of judges being selected by way of a "tap on the shoulder".
- Set out procedures for the Commission to identify candidates for judicial office to be selected on merit, having regard to the candidate's personal qualities, legal ability and experience, and the desirability of the Judiciary reflecting gender, cultural and ethnic diversity. Affirming individual merit as the central criterion for appointment to judicial office is appropriate and necessary. The inclusion of a reference to diversity as a criterion to which the Commission must have regard reflects current judicial appointment practices.[8] The make-up of our judges has been too slow to reflect the change in our community; women still only make up 28 per cent of the Judiciary,[9] even though they constitute almost 50 per cent of the legal profession[10] and more than 50 per cent of

8 For the current criteria used to select High Court judges, see Ministry of Justice at criterion 4 "Reflection of society". Similar language is found in the criteria for the selection of District Court judges: see "Judicial appointments: Office of District Court Judge" Ministry of Justice. Available at <www.justice.govt.nz/publications/global-publications/j/judicial-appointment-processes/judicial-appointments-office-of-district-court-judge/judicial-appointments-office-of-district-court-judge-march-2010#criteria-for-appointment>.

9 Human Rights Commission *New Zealand Census of Women's Participation* (Human Rights Commission, Wellington, 2012) at 72.

10 Geoff Adlam "Snapshot of the Profession" *Law Talk* (New Zealand,

the population; similarly, the number of judges of Māori and Pasifika heritage has been the subject of criticism.[11] We think it is important for the Judicial Appointments Commission to be empowered to have regard for the desire that our Judiciary more closely reflects our community. Legislation can expand on these particular elements by, for example, requiring a minimum number of years' experience as a lawyer as a prerequisite to judicial appointment;[12] the constitution does not need to be so prescriptive.

- Require the Commission to produce a shortlist of candidates that it considers suitable for appointment to a judicial vacancy and provide that no person can be appointed as a judge of any court unless that person's name appears upon the shortlist for that vacancy produced by the Commission. In our view this is a significant protection against the politicisation of the Judiciary, and the use of judicial appointment for political patronage. We pause to make it clear that we do not believe that this occurs in New Zealand; but with the enhanced role of the judges under Constitution Aotearoa, we believe it is prudent to reinforce the current apolitical approach by ensuring that the Government cannot appoint someone to the bench who does not command the respect of the Judiciary, legal profession, MPs and the general public. Recognising that a transition period must inevitably follow the adoption of Constitution Aotearoa, and that some time will be needed to bed in the new Judicial Appointments Commission, we propose that the new "shortlist" process only apply to judicial appointments made after the expiry of three years from the adoption of Constitution Aotearoa.

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Issue 883, 11 March 2016) at 18.

11 See for example Laura Bootham "Call for more Māori judges" *Radio NZ* (online edition, New Zealand, 3 February 2015).

12 See the Judicature Act 1908, s 6 and the Employment Relations Act 2000, s 200(2) each of which requires a person to have held a practising certificate as a barrister or solicitor of the High Court of New Zealand for at least seven years in order to be eligible for appointment to the High Court and the Employment Court respectively.

## Power to invalidate legislation

Article 68

As noted earlier, one of the innovations of Constitution Aotearoa is the conferral of jurisdiction on the courts and tribunals to consider the consistency of Acts of Parliament with the Constitution. It proposes to empower the courts to declare Acts of Parliament to be invalid to the extent that they are inconsistent with Constitution Aotearoa. A general power to invalidate Acts of Parliament for unconstitutionality is a change from the law under the Constitution Act 1986. In our view, it is appropriate for a number of reasons.

Conferring the power of invalidation on judges gives Constitution Aotearoa real bite. Judicial invalidation will encourage all constitutional actors to act within the bounds of their powers. There is no reason why—in a constitutional system that is built on democratic control—Parliament should be exempt from the requirement to act in accordance with the highest law of the land, being the Constitution.

In New Zealand constitutional history such a power is not unusual. Although it does not appear to be well known, for much of New Zealand's life the courts were entitled to, and did, invalidate New Zealand legislation that was inconsistent with the terms of the New Zealand Constitution Act 1852. Examples of that include *In re Gleich* (1879)[13] and *R v Lander* (1919),[14] in which the Foreign Offenders Apprehension Act 1863 and the Crimes Act 1908, s 224 were found to exceed the then General Assembly's constitutional powers under the New Zealand Constitution Act 1852. The simple point is that, while the grounds upon which legislation can be invalidated will be more numerous under Constitution Aotearoa than under the New Zealand Constitution Act 1852, the power of invalidation that we are conferring on judges under Constitution Aotearoa is not new. It is consistent with our constitutional traditions.

The power of judicial invalidation is present in the constitutional systems of many countries with which we normally compare ourselves. The constitutions of Australia,

13 (1879) OB&F (SC) 39 (SC, Full Bench).
14 [1919] NZLR 305 (CA).

Canada, South Africa, the vast majority of Commonwealth countries, Ireland, Germany and almost all of our Pacific Island neighbours confer this power on their judges.

Contemporary New Zealand judges have significant experience in exercising the power of judicial invalidation. Many of the courts in the Pacific Islands are staffed by New Zealand judges. In almost all of those jurisdictions, the courts have the power of judicial invalidation. If our judges are sufficiently competent to invalidate statutes in our Pacific Island neighbours, why should we think that they would be incompetent to do the same in New Zealand?

Even in the United Kingdom, which is said to be the home of parliamentary sovereignty and to whose example opponents of change regularly point as a reason to stick with our status quo, things have changed dramatically. Parliamentary sovereignty is a chimera. In the United Kingdom, the courts have the power to invalidate the legislation of the Scottish, Welsh and Northern Irish parliaments. And even an Act of Parliament passed at Westminster (the supreme form of legislation in the United Kingdom) is not exempt from judicial invalidation; where it is inconsistent with European Union law (as matters now stand, although it may change when the United Kingdom leaves the European Union), British courts are required not to apply Westminster legislation. Furthermore, British courts have the power to consider the consistency of Westminster legislation with the European Convention on Human Rights and to declare it to be incompatible with the Convention.[15] When that happens the British Government is permitted to (and almost always does) repeal or amend the legislation to remove the compatibility by means of a quick-fix ministerial power with approval by means of a parliamentary resolution.[16]

A consistent criticism of New Zealand's constitutional arrangements by United Nations human rights bodies is the absence of a power of judicial invalidation where Acts of Parliament are inconsistent with human rights norms. That criticism was repeated as recently as April this year by the UN

15 Human Rights Act 1998 (UK), s 4.
16 Human Rights Act 1998 (UK), s 10 and Schedule 2.

Human Rights Committee.[17] Conferring a power of judicial invalidation on our judges would strengthen New Zealand's claim to be in the top class of human rights best practice.

The power of judicial invalidation is itself subject to a number of checks and balances. First, where the people or a significant majority of parliamentarians disagree with an interpretation of Constitution Aotearoa reached by the courts, the power to amend Constitution Aotearoa will be available in order to reverse the effect of that decision. This, for example, has occurred in countries such as Ireland, where decisions of the Irish Supreme Court on the vexed question of bail were reversed by constitutional amendment, supported by the people. By permitting Constitution Aotearoa to be amended, we believe we have provided a pressure release valve that avoids the sorts of confrontational issues arising under the Constitution of the United States. There the United States Constitution can, in theory, be amended to override a decision of the United States Supreme Court. But the amendment decision is so difficult it rarely occurs. Second, we have proposed a more specific power for Parliament to override a specific court ruling; this parliamentary override power is a unique creation but requires a significant majority in favour before it can be used. The power would be used by Parliament where Parliament does not wish to amend the terms of Constitution Aotearoa as such, but rather wishes to shield an Act of Parliament from a specific Supreme Court ruling. This could be where, for example, the Supreme Court finds that an Act of Parliament is an unjustified limit on a right guaranteed by the Bill of Rights, but Parliament considers that the limit is justified. In those circumstances there would be no need to amend the terms of the constitution as such; it is simply that a significant majority of Parliament disagrees with the Supreme Court's evaluation. Although we expect its use to be rare, we believe it is a useful innovation that strikes a sensible balance.

To provide additional deliberation into the system of judicial

17 United Nations Human Rights Committee *Concluding observations on the sixth periodic report of New Zealand* CCPR/C/NZL/CO/6 (28 April 2016) at [9]–[10].

invalidation, we propose to adopt the mechanism found in South Africa,[18] under which a court decision to declare an Act of Parliament to be inconsistent with the constitution only has effect if confirmed by the Supreme Court. This means that in the particular case of the supreme act of our democratic legislature, an Act of Parliament, the country's top judges must be convinced before any adverse judgment can be made.

## Other conduct

Under our current constitutional arrangements, the courts are able to invalidate Government conduct that is contrary to the law (including the Bill of Rights Act, the Human Rights Act, the Constitution Act, and so on); that includes forms of delegated legislation made by the Government acting under parliamentary authority. Nothing that Constitution Aotearoa proposes changes that legal position. So the courts will remain free to declare government policies to be unlawful where they unjustifiably limit the right to be free from discrimination, just like the Court of Appeal did in *Ministry of Health v Atkinson*[19] (the "parents-as-caregivers" case), or where rates are made without proper authority.

18 Constitution of the Republic of South Africa 1996, s 172(2)(a).
19 *Ministry of Health v Atkinson* [2012] 3 NZLR 456 [*Family Carers Case*].