Making judges in a recognition judiciary

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Abstract

Judiciaries in Commonwealth jurisdictions like New Zealand are still constituted through the "recognition" of pre-existing merit within the pool of senior lawyers. The state does not take proactive responsibility for the generation of competence to judge in advance of appointment. That is, increasingly, a pressure point for the long-term maintenance of justified public confidence. This article considers the ongoing sensitivity in discussing judicial professional competence, and the value in confronting that sensitivity prior to the moment of "recognition", when the veil of judicial independence descends. Developments in judicial appointments, oversight and post-appointment education speak to mounting pressures on the inherited model but cannot wholly relieve those pressures. To do so requires the embrace of specialised professional preparation for judging. In exploring the scope for legitimacy-enhancing change within the existing New Zealand system, the article advocates greater academic engagement with the professional lives of future judges.

Introduction

In June 2020, the author delivered a seminar to the Australian Academy of Law on judicial legitimacy and the making of judges.[1] This article is an adapted version of that seminar.[2] The article develops a concern that countries like New Zealand do not take enough responsibility for ensuring that all judges are demonstrably competent upon appointment. It is difficult to find space to express this concern within the independence-focused bounds of existing literature. This article seeks to explain why the concern has arisen; to highlight the extent of pressures on the existing system, and their implications for justified public confidence in judges; and to make a case for increased attention to pre-judicial professional careers.

Commonwealth judiciaries have generally inherited the British "recognition" model,[3] in which judges are found ready-made among senior lawyers. A fundamental element of this inheritance is that competence to judge is not formally or systematically cultivated in advance. It is, rather, assumed to emerge organically as a by-product of legal professional practice. As a result, despite the increasing articulation of judicial competence as a matter of aspirational principle,[4] its creation is not considered to be the state's responsibility. That assumption remains embedded despite mounting evidence, reflected in developments in judicial appointments and oversight and particularly in judicial education,

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1 The author is grateful to the Australian Academy of Law and all seminar attendees for their support and constructive input, and particularly to Professor Sarah Murray and Dr Tamara Tulich for their comments on drafts. All opinions and errors remain the author's own.

2 Several of the arguments developed here were initially outlined in a blog: see Jessica Kerr, 'Turning lawyers into judges is a public responsibility', *AUSPUBLAW* (Blog post, 26 August 2020) <https://auspublaw.org/2020/08/turning-lawyers-into-judges-is-a-public-responsibility>.

3 See generally Nuno Garoupa and Tom Ginsburg, 'Hybrid Judicial Career Structures' (2011) 3(2) *Journal of Legal Analysis* 411.

4 Eg National Judicial College of Australia, *Attaining Judicial Excellence – A Guide for the NJCA* (November 2019).

that legal practice, even as a barrister, is unlikely to fully prepare anyone for the complexities of modern judicial office.

The resulting pressures on the judicial system are not always directly acknowledged, partly because of the dominance of judicial independence in conversations about judges, partly because of the stickiness of professional cultural traditions. But they go to the heart of that system's claims to legitimacy. If new appointees – particularly, but not only, those from unconventional professional backgrounds – are likely, through no fault of their own, to lack relevant skills or experience at the moment of their "recognition", that has both procedural and substantive implications for their courtrooms. Meanwhile, the transition from lawyer to judge remains generally mysterious to an increasingly demanding public, with no accessible evidence of specialised preparation for a uniquely powerful and unaccountable office.

The accumulation of these pressures is distinctly unlikely to prompt a wholesale shift away from recognition, which lies at the heart of Commonwealth judicial cultures. It does, however, suggest that more attention is needed to the development and demonstration of judicial "merit", as the ostensible basis of all recognition appointments, *before* the process of recognition begins. While cultural resistance to even modest change should not be underestimated, there is scope within an established recognition system like New Zealand to do more to support the actual and perceived competence of new appointees. To that end, this article advocates extending the focus of academic attention in New Zealand back in time to the pre-appointment years, and engaging more openly with pre-judicial career paths.

Preliminary points

While this article draws on a number of Australian sources, reflecting its original audience, the author's research focus to date has been on New Zealand. It is important to acknowledge the comparative sophistication of existing judicial regulatory structures within Australia,[5] and equally important to acknowledge the diversity of domestic judicial cultures, particularly in terms of receptiveness to culture change, even between (or within) countries as close as Australia and New Zealand.

This is in addition to the sensitivity inherent in any research that engages with judiciaries themselves, as distinct from the formal outputs of the judicial process. It is not easy for outsiders to speak about what have traditionally been very closed institutions and processes, and very high-status individuals. There is a real risk that over-exposing the inner workings of a judicial system may inadvertently undermine public confidence instead of strengthening it.[6] There has been, at least historically, a more general concern that academic engagement with issues like judicial competence is by definition a threat to the independence of sitting judges. This concern is less defensible, particularly where its effect is to insulate existing, often informal, practice from any form of open discussion. As Joe McIntyre has put it, to 'make the implicit explicit'[7] is in itself an important aim of judicial scholarship, particularly in the context of debates about potential reform.

In that vein, this article does not and would not call into question the right of any particular judge to be on the bench. The focus is a forward-looking one, on maintaining justified public confidence in judiciaries as a whole. The starting point in this regard is that while the independence of judges from

[5] There is, for example, no equivalent in New Zealand of the National Judicial College of Australia, nor of the multi-dimensional, state-level Judicial Commission of New South Wales.
[6] See Tim Dare, 'Discipline and Modernize: Regulating New Zealand Judges' in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar, 2016) 293, 295.
[7] *The Judicial Function: Fundamental Principles of Contemporary Judging* (Springer, 2019) 75.

external pressures remains a necessary condition for public confidence, it is not the only necessary condition. Nor does reference to "accountability" complete the picture, where accountability is understood essentially in counterpoint to independence.[8] A recent address from New Zealand's Chief Justice offers a richer working definition of judicial legitimacy in this context.[9] Her Honour Justice Winkelmann emphasises the dimension of legitimacy which rests in public confidence that a judiciary is not only independent and impartial, but also skilled — that is, relevantly professionally competent, in the fullest sense of that phrase — and representative of its community.[10] There may be significant overlap between these four requirements, but each warrants separate attention. Independence, impartiality and diversity have now all been the subject of extensive analysis at a system level. It should be possible to have a similarly robust, system-level conversation about 'skill'.

"Recognition" judiciaries

Comparative judicial literature draws a 'key distinction between recognition and career judiciaries'.[11] Judges in the Commonwealth are, in general terms, found ready-made among successful career lawyers, rather than systematically prepared through a specialised bureaucratic pathway, as they are in civil law systems like France and Germany.[12] Judging is thus not a career option in its own right in the Commonwealth; judges are appointed 'in recognition of other career achievements'.[13] The job of the state in making its judiciary is limited to choosing among potential candidates, through the symbolically weighted act of appointment.

The moment of appointment is critical because that is when judicial independence, as a protected constitutional status, attaches. There is no provisional period. As has been explained in the Australian context, the system therefore 'assumes that a person appointed to the judiciary has the technical and practical skills required to perform judicial work'.[14] It is only on that basis that judicial independence, once granted, can be so ardently defended, because it is nearly impossible to revisit an appointment in hindsight. There is no general power to remove sitting judges for incompetence.[15]

The logic of recognition is not often expressly articulated, but at its heart is the assumption of a seamless transition from legal practice to judging. This means a heavy reliance on the legal profession,

[8] See Richard Devlin and Adam Dodek, 'Regulating Judges: Challenges, Controversies and Choices' in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar, 2016) 1, cited in, eg, Gabrielle Appleby and Andrew Lynch (eds), *The Judge, the Judiciary and the Court: Individual, Collegial and Institutional Judicial Dynamics in Australia* (Cambridge University Press, 2021).
[9] Dame Helen Winkelmann, 'What Right Do We Have? Securing Judicial Legitimacy in Changing Times' [2020] *New Zealand Law Review* 175. For a brief introduction to the literature on judicial legitimacy see Sarah Murray, *The Remaking of the Courts: Less-Adversarial Practice and the Constitutional Role of the Judiciary in Australia* (Federation Press, 2014) 37–39.
[10] Winkelmann (n 9) 176. See Jessica Kerr, 'Finding the New Zealand Judiciary' [2021] *New Zealand Law Review* 1, 2.
[11] Garoupa and Ginsburg (n 3) 416.
[12] See generally Giuseppe Di Federico (ed), *Recruitment, Professional Evaluation and Career of Judges and Prosecutors in Europe: Austria, France, Germany, Italy, The Netherlands and Spain* (Lo Scarabeo, 2005); John Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge University Press, 2006).
[13] Garoupa and Ginsburg (n 3) 411.
[14] Chief Justice John Doyle, 'How Do Judges Keep up to Date?' (Address to LawAsia Downunder, Queensland, 21 March 2005) 3. See also National Judicial College of Australia, *Judicial Education in Australia* (August 2012, rev ed) 2.
[15] See Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (2014) 38(1) *Melbourne University Law Review* 1, 9, citing the work of Shimon Shetreet.

particularly the independent bar, to produce practitioners ready to make that transition.[16] In the words of a senior New Zealand judge, it was traditionally assumed 'that you just came straight out of the egg, and you were perfectly able to do all this stuff'.[17] Recognition also relies heavily on the personal reputation, and professional pride, of the chosen practitioners.[18] Judicial appointment is prestigious – more so than in career judiciaries – and it needs to be, to attract lawyers at the peak of their professional careers who are willing to subject themselves to a potential baptism by fire on the bench.

The recognition model needs to be appreciated as a colonial inheritance, and a product of its time and place. A century ago, when New Zealand's emerging domestic legal profession was still essentially replicating the culture of the British superior courts,[19] that culture remained, above all, small, stable and relatively homogenous.[20] Future judges, current judges, and the lawyer-politicians who appointed the judges knew and trusted one another, and, importantly, that trust was presumed to be mirrored in broader community attitudes. The historical success of recognition appointments is thus underpinned by a strong shared foundation of experience and cultural values, by the close connection between oral courtroom advocacy and a relatively constrained judicial role, and by a deep-rooted conception of legal, and by extension judicial, skills as learned on the job.

> When asked whether she had received any training before she sat as a judge, Judge Gambrill said, "Oh, Lord no. … No, there was no training – learn by trial and error. There were people you could go and talk to because you've been lawyers at the same time."[21]

A century on, the continuance of recognition as the basis of judicial appointments in former colonies like New Zealand has never been seriously questioned. It is deeply culturally embedded, and for good reason. Substantial "real-world" experience is fundamental to the perceived legitimacy of Commonwealth judges. Yet there are elements of recognition that are immediately questionable to modern eyes. It is a significant contributor to what Sharyn Roach Anleu and Kathy Mack summarise as 'a consistent public image of the judiciary as a closed, self-reproducing entity, embedded in archaic traditions, resistant to change and disconnected from ordinary citizens and contemporary values'.[22]

Independence-based critiques

Concerns about the composition of judiciaries have been thoroughly ventilated at the point of recognition, through what is now a vast literature on judicial appointment processes. This is where the

[16] See Susan Kiefel and Cheryl Saunders, 'Concepts of Representation in Their Application to the Judiciary in Australia' in Sophie Turenne (ed), *Fair Reflection of Society in Judicial Systems – A Comparative Study* (Springer International Publishing, 2015) 41, 50–51.

[17] Justice Susan Glazebrook, quoted in Elizabeth Chan, *New Zealand Women Judges Oral History Project: Part Two* (New Zealand Law Foundation, June 2017) 38, 22.

[18] See Lord Sumption, 'Home Truths About Diversity: Bar Council Law Reform Lecture' (15 November 2012) 23–24.

[19] See generally RB Cooke (ed), *Portrait of a Profession* (Reed, 1969) 47.

[20] See Graham Gee, 'Judicial Policy in England and Wales: A New Regulatory Space' in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar, 2016) 145; Bell (n 12) 6; Kate Malleson and Peter H Russell (eds), *Appointing Judges in an Age of Judicial Power: Critical Perspectives from Around the World* (Toronto University Press, 2014); Graham Gee and Erika Rackley (eds), *Debating Judicial Appointments in an Age of Diversity* (Routledge, 2017).

[21] Chan (n 17) 22–23. See Justice RD Nicholson, 'Judicial Education and the Means of Funding It in the Asian Region: A Judge's View' 1997(7) *Journal of Judicial Administration* 83, 85, discussing the view that the relevant skills 'may be learnt privately'.

[22] 'The Work of the Australian Judiciary: Public and Judicial Attitudes' (2010) 20 *Journal of Judicial Administration* 15.

concept of judicial "merit" has been articulated, and developed, and robustly critiqued,[23] in the course of reform efforts prioritising transparency and diversity in appointments. In New Zealand, as elsewhere, there has been particular emphasis on countering the mythology of the "shoulder tap",[24] for example by advertising judicial vacancies, and demonstrating receptiveness to meritorious candidates from unconventional backgrounds.

Judicial merit is not a straightforward synonym for judicial competence, or skill, because merit is so inextricably bound up with the politics of judicial selection and associated threats to judicial independence. Merit is also assessed exclusively at a particular point in time, immediately prior to appointment. It is arguably, in that sense, concerned primarily with judicial *potential*, which may explain why it rarely carries over to discussions of post-appointment judicial performance.

That said, the articulation of 'clearly defined, transparent and publicly announced criteria'[25] for merit-based appointments, which began for the purpose of demonstrating the independence of those appointments, has also served to clarify the competencies thought essential to modern judging. In this regard, the degree of international consensus around basic criteria of 'legal ability', 'qualities of character', and 'personal and technical skills'[26] (to take the New Zealand wording as an example) is unsurprising.[27] Commenting on a similar list of 'requisite qualities for appointment' that was briefly endorsed at the federal level in Australia from 2008-2013, Elizabeth Handsley and Andrew Lynch note that '[t]hey are all clearly things we would expect, or at least aspire to have, in persons holding judicial office.'[28] This consensus is reflected in an extended list of suggested criteria published by the Australasian Institute of Judicial Administration (AIJA) in 2015, following substantial comparative Commonwealth research.[29]

More controversially, merit criteria have expanded over time to confront what the final criterion in New Zealand's judicial appointments protocol describes as a candidate's 'reflection of society'.[30] There is potential for blurring here between the 'skill' and 'community representation' aspects of legitimacy, unless such criteria can be met through training and experience alone. Despite its reference to 'reflection', which might imply a focus on demographic characteristics, the relevant New Zealand criterion is, like its AIJA equivalent,[31] carefully drafted to preserve that possibility.[32] Demographic

[23] For a classic critique see Margaret Thornton, 'Affirmative Action, Merit and the Liberal State' (1985) 2(2) *Australian Journal of Law and Society* 28. For recent examples see, eg, Elizabeth Handsley and Andrew Lynch, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13' (2015) 37(2) *Sydney Law Review* 187; Nicole Ashby, 'Absent from the Top: A Critical Analysis of Women's Underrepresentation in New Zealand's Legal Profession' (2017) 1 *New Zealand Women's Law Journal* 80.

[24] For the 'decisive' rejection of this mythology at Commonwealth level, see Jan van Zyl Smit, '"Opening up" Commonwealth judicial appointments to diversity? The growing role of commissions in judicial selection' in Gee and Rackley (eds) (n 20) 60, 72.

[25] New Zealand Attorney-General, *Judicial Appointments Protocol* (2019) 3.

[26] *Judicial Appointments Protocol* (n 25) 3.

[27] See Rachel Davis and George Williams, 'Reform of the Judicial Appointments Process: Gender and the Bench of the High Court of Australia' (2003) 27 *Melbourne University Law Review* 819, 835–844, adopting broadly corresponding categories of 'legal knowledge and experience', 'personal qualities' and 'professional qualities'.

[28] Handsley and Lynch (n 23) 201.

[29] Kathy Mack and Australasian Institute of Judicial Administration, *Suggested Criteria for Judicial Appointments* (2015).

[30] *Judicial Appointments Protocol* (n 25) 4. See Davis and Williams (n 27) 844–847.

[31] 'Awareness of and respect for the diverse communities which the courts serve and an understanding of differing needs': *Suggested Criteria for Judicial Appointments* (n 29) 4.

[32] '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': *Judicial Appointments Protocol* (n 25) 4.

diversity is generally dealt with separately, through a free-standing policy (or, as in the United Kingdom, a statutory obligation[33]) of pursuing increased diversity 'without compromising the principle of merit selection'.[34]

Critical attention and reform efforts have extended, but with considerably more caution, to issues of judicial competence emerging after appointment. Accelerating demands for transparency and responsiveness must, in this context, be tempered by the risk of independence-eroding pressures on sitting judges. The balance remains a sensitive one to strike. New Zealand, for example, has had relatively open statutory processes for complaining about judges for more than 15 years,[35] although opinion is divided on whether those processes are fit for purpose.[36] In Australia, by contrast, complaints regulation remains 'in a period of transition'.[37] The prospect of proactive performance review is also attracting renewed attention in New Zealand, although it remains very controversial.[38] The National Judicial College of Australia has recently published an aspirational set of 'elements of judicial excellence',[39] but the relationship of these elements to existing proposals for merit-based appointments criteria,[40] or for that matter the existing thresholds for judicial misconduct/incapacity, remains unclear.

Throughout this important work, judicial independence, or more recently the idea of a spectrum between independence and accountability, has remained the ultimate point of reference. Most discussions of judges will, understandably, 'begin at the beginning'[41] by situating themselves in relation to judicial independence as a constitutional imperative. It is however important, as more critical scholarship is increasingly emphasising,[42] to appreciate the limiting effect of this framing on the scope of the discussion. There has always been a risk that independence will be invoked defensively, as a 'protective shield for the judiciary',[43] when existing practices are questioned. More specifically, in

[33] *Constitutional Reform Act 2005* (UK) s 63.
[34] *Judicial Appointments Protocol* (n 25) 1. On the persistently contentious relationship between merit and diversity see, eg, Gee and Rackley (eds) (n 20).
[35] *Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004* (NZ).
[36] See, eg, Grant Illingworth, 'The Judicial Conduct Commissioner' [2011] *New Zealand Law Journal* 35; BV Harris, 'The Resignation of Wilson J: A Consequent Critique of the Operation of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004' [2011] *New Zealand Law Review* 625; Justice John McGrath, 'Accountability of the Judiciary' (2014) 25 *Public Law Review* 134. See further Anusha Bradley, 'Judges, bullying and a "broken" complaints system', *Is This Justice?* (Radio New Zealand, 23 September 2021) <https://www.rnz.co.nz/news/is-this-justice/452026/judges-bullying-and-a-broken-complaints-system>.
[37] Gabrielle Appleby et al, 'Contemporary Challenges Facing the Australian Judiciary: An Empirical Interruption' [2019] *Melbourne University Law Review* 357. See further Appleby and Le Mire (n 15).
[38] See Anusha Bradley, 'No performance reviews and 20% pay hikes for some judges', *Is This Justice?* (Radio New Zealand, 23 September 2021) <https://www.rnz.co.nz/news/is-this-justice/452097/no-performance-reviews-and-20-percent-pay-hikes-for-some-judges>. Cf, eg, Dame Sian Elias, 'The Next Revisit: Judicial Independence Seven Years On' (2004) 10 *Canterbury Law Review* 217, 224. On the delicate balance between 'extrinsic' and 'intrinsic' motivations for judges to perform, see Sarah Murray, Ian Murray and Tamara Tulich, 'Court Delay and Judicial Wellbeing: Lessons from Self-Determination Theory to Enhance Court Timeliness in Australia' (2020) 29 *Journal of Judicial Administration* 101.
[39] 'Australian Elements of Judicial Excellence' (June 2019) <https://njca.com.au/wp-content/uploads/2019/08/Australian-Elements-of-Judicial-Excellence-Final.pdf>.
[40] *Suggested Criteria for Judicial Appointments* (n 29).
[41] Winkelmann (n 9) 177.
[42] See Devlin and Dodek (n 8); Gabrielle Appleby and Suzanne Le Mire, 'Ethical Infrastructure for a Modern Judiciary' (2019) 47(3) *Federal Law Review* 335, 335–336.
[43] Rosemary Cairns-Way, 'Contradictory or Complementary? Reconciling Judicial Independence with Judicial Social Context Education' in Adam Dodek and Lorne Sossin (eds), *Judicial Independence in Context* (Irwin Law, 2010) 220, 243.

jurisdictions like New Zealand there has arguably been a tendency to treat independence as effectively synonymous with legitimacy. It is not easy to find space in the existing literature for direct engagement with elements of legitimacy 'beyond independence and accountability',[44] such as competence. It is taken as read that judges should be fully equipped for the job; but it also seems to be essentially taken as read that, if they have been appointed on "merit" and possess the 'individual virtue'[45] of independence, they are.[46]

The minefield of judicial education

That invites consideration of the role of judicial education, which has become indispensable to judiciaries throughout the Commonwealth in the last 30 years, but remains hardly visible in academic and broader public discussions in New Zealand. Instinctive resistance to judicial education is understandable, if not inevitable, in a tradition in which lawyers conceptualise judicial appointment as the 'ultimate accolade of a successful career'.[47] It was until quite recently respectable to say that any attempt to educate a Commonwealth judge, who is by definition a highly experienced legal professional, would 'put at peril not only the independence of the judiciary but also the very rule of law itself. Indeed, any attempt to educate a judge would surely cause the sky to fall in.'[48] Successive Chief Justices of both Australia and New Zealand have, of course, confirmed that this is no longer a sustainable position.

> The times are long gone when persons appointed to judicial office in the common law world were thought to ascend to the Bench on the date of their appointment, fully equipped with all the knowledge and skills necessary to the judicial task.[49]

Yet while the value of specialised professional education is now generally accepted by judges themselves, the status of educational programmes for sitting judges remains highly and uniquely sensitive. They are still, for example, characterised as voluntary rather than mandatory. And in New Zealand their confidentiality as internal judicial initiatives remains closely guarded. No New Zealand academic has written at length about judicial education.[50] It is barely on the public's radar.

To help unpack this continuing sensitivity, it assists to reiterate a core distinction within the field of judicial education.[51] First, there is what is essentially continuing professional development (CPD) for judges, including for example regular bench updates and periodic enrichment or expansion opportunities. All modern professionals now undertake lifelong CPD. It is hard to see why that should stop when a lawyer moves to the bench, as long as it is carefully managed. Its presence can hardly be taken by the public as indicative of a competence deficit, though its absence might reasonably be. Secondly, however, there are initiatives directed to building foundational judicial competence

[44] The subtitle of *Regulating Judges* (n 6). Competence is, interestingly, not included in the expanded list of core judicial values proposed by the editors of this text. Arguably, it should be. Contrast, eg, International Consortium on Court Excellence, *International Framework for Court Excellence* (3rd ed, 2020).
[45] Elias (n 38) 224.
[46] See, eg, John McGrath, 'Appointing the Judiciary' [1998] *New Zealand Law Journal* 314.
[47] Sumption (n 18) 23. See also McGrath (n 46) 316.
[48] Chief Justice Peter Underwood, 'Educating Judges: What Do We Need?' (2006) 7(4) *The Judicial Review* 423, describing Tasmania in the 1980s.
[49] Robert French, 'Judicial Education – A Global Phenomenon' (Address to IOJT Fourth International Conference on the Training of the Judiciary, Sydney, 26 October 2009) 4.
[50] BV Harris, 'A Judicial Commission for New Zealand: A Good Idea That Must Not Be Allowed to Go Away' [2014] *New Zealand Law Review* 383, 415–420 contains the most substantial recent discussion. Compare Gabrielle Appleby et al, *Judicial Education in Australia: A Contemporary Overview* (Australasian Institute of Judicial Administration, December 2021).
[51] See, eg, Nicholson (n 21).

(including what has come to be known as social context competence): to delivering training in core aspects of the judicial role, in particular through intensive sessions characterised as induction or orientation for new judges. As recognised in the 2017 *Declaration of Judicial Training Principles*, to which the peak bodies in both Australia and New Zealand are signatories, this is a fundamentally different matter from "judicial CPD".

> [J]udges must master *specific professional skills* … Whatever the professional background of newly appointed judges or future judges, it is *necessary to train them on those essential skills*, which cannot all have been acquired during their academic studies or previous work.
>
> … Despite the experience and qualifications of newly appointed judges in common law countries, those skills have to be acquired *before or upon appointment* ...[52]

The distinction between CPD and on- (or pre-)appointment education may seem obvious to an international organisation whose membership spans "career" and "recognition" systems, but it is scarcely recognised in New Zealand commentary, perhaps because its implications are so significant. Acknowledging that it is necessary to train new judges may be seen as tantamount to conceding that the premise of "recognising" pre-existing judicial merit is flawed.[53] This, then, risks undermining the general justification for judges' protected status, which in a recognition system kicks in immediately upon appointment. Judicial education, in this sense, *is* potentially perceived as a threat to independence, as conventionally understood. Little wonder that it has been sternly resisted by some judicial leaders in Australia,[54] and that it remains so sensitive for Commonwealth academics to discuss. It will be suggested below that this sensitivity might be reduced if some of the excellent work happening in New Zealand in post-appointment judicial education could be exported to the pre-appointment years.

The purpose in highlighting developments in appointments, post-appointment oversight and education is to suggest that they all reflect mounting pressures on the underlying recognition model. These pressures need to be understood as extending beyond what one might call the optics of the model – the 'institutional mystique' of Commonwealth judiciaries[55] – to the core substantive assumption that the legal profession produces ready-made candidates for judicial appointment.

Recognising pressures on the system

The relevant pressures arise under (at least) three broad headings. First, there are pressures arising from much-discussed changes in general societal attitudes to power and legitimacy. What Graham Gee refers to as the era of 'club government'[56] has been swept away. The increasing prominence of diversity and pluralism has been mirrored by a decreasing willingness to place unquestioning trust in elites, including the legal elite. Why should the modern public accept that success as a lawyer suffices to equip anyone to sit in judgement upon them, especially when there is nothing visible that future

[52] International Organisation for Judicial Training (IOJT), *Declaration of Judicial Training Principles* (2017) art 7 (emphasis added).
[53] See Justice GJ Samuels, 'Judicial Competency: How It Can Be Maintained' (1980) 54 *Australian Law Journal* 581. Cf Sir Thomas Eichelbaum, 'Judicial Independence Revisited' (1997) 6(3) *Canterbury Law Review* 421, 424.
[54] See particularly Doyle (n 14) 3: 'The term "judicial education" would imply to some that we provide basic training of a type without which a person is not equipped to function as a judicial officer. That is not the case in Australia.' Contrast, eg, Justice James Douglas, 'Judicial Education for Judges: Presentation for the International Bar Association's Judges' Forum and the Academic and Professional Development Committee Tokyo (QSC)' [2014] *Recent Queensland Judicial Scholarship* 51.
[55] Philip A Joseph, 'Appointment, Discipline and Removal of Judges in New Zealand' in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 66, 71.
[56] Gee (n 20) 148. Cf Appleby and Le Mire, 'Ethical Infrastructure for a Modern Judiciary' (n 42).

judges do differently from other lawyers? Articulating and explaining the merit criteria for appointment is one thing; demonstrating the fulfilment of these criteria is another.

A second set of pressures comes from changes in the profession which produces the candidates for recognition. In the last half-century the New Zealand legal profession has massively expanded, diversified, and specialised. Along with these changes has come a shift away from conceptions of law as learnt on the job, and of the profession as informally, opaquely self-regulating.[57] The traditionally assumed professional socialisation among the small, close-knit group of barristers from whom judges are appointed has played an important role in the maintenance of stable, high-performing judiciaries.[58] But that foundation is increasingly difficult for governments to take for granted. As Chief Justices on both sides of the Tasman pointed out decades ago,[59] the growing and welcome emphasis on diversity on the bench adds to the pressure in this regard. The comparatively slow pace of demographic diversification at the senior bar has accelerated efforts to find candidates for appointment elsewhere in the profession. These candidates are, by definition, not generalist advocates, and not socialised at the bar. It is not unknown in New Zealand now for highly specialised practitioners in, say, tax law, to be appointed as generalist judges without ever having participated in a criminal trial.

Finally, and perhaps most importantly, there are pressures arising from changes to the judicial role itself. Peter Spiller observed in 2001 that the 'English view that experience and standing at the bar were the standard assurance of competence as a judge took hold in New Zealand and has largely remained in place'.[60] Yet, writing in the United Kingdom a decade later, Kate Malleson stressed that the assumption that thirty years as an advocate is the best possible preparation for judging was increasingly being called into question.[61] The pace of change has not slowed since then. Growing complexity can be seen in all aspects of the modern judicial task, with judges increasingly expected to demonstrate technological, communication, cultural, political, management, leadership and broader dispute resolution skills in addition to the core tasks of hearing argument and delivering rulings, and all under greater scrutiny and time pressure. As the Courts of New Zealand website now proclaims, candidates for judicial appointment 'require much more than experience in practice'.[62]

It is telling in this context that the modern New Zealand appointment criteria, consistently with those proposed by the AIJA,[63] mention barristerial experience only once, and only in the context of technical legal skill:[64]

> *Legal Ability*: … 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

[57] See generally Sir Ian Barker (ed), *Law Stories: Essays on the New Zealand Legal Profession 1969–2003* (LexisNexis, 2003).
[58] See Appleby and Le Mire, 'Ethical Infrastructure for a Modern Judiciary' (n 42) 339–340.
[59] Murray Gleeson, 'Judicial Selection and Training: Two Sides of the One Coin' (2003) 77 *Australian Law Journal* 591; Eichelbaum (n 53) 424.
[60] 'The Courts and the Judiciary' in Peter Spiller, Jeremy Finn and Richard Boast, *A New Zealand Legal History* (Brookers, 2nd ed, 2001) 187, 204.
[61] 'Introduction' in Malleson and Russell (eds) (n 20) 3, 9. Cf Barbara Hamilton, 'Criteria for Judicial Appointment and "Merit"' 15 *Queensland University of Technology Law Journal* 10; Davis and Williams (n 27) 841.
[62] 'Appointments', *Ngā Kōti o Aotearoa (Courts of New Zealand)* (Web Page) <https://www.courtsofnz.govt.nz/about-the-judiciary/role-judges/appointments/>.
[63] See *Suggested Criteria for Judicial Appointments* (n 29) 4. 'Litigation experience' is mentioned once, under the heading of 'Intellectual Capacity', with 'familiarity with court processes, including alternative dispute resolution' identified as a legitimate alternative to that experience.
[64] *Judicial Appointments Protocol* (n 25) 3. See Davis and Williams (n 27) 838–841.

> 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. … 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.

The explanations of the three other core New Zealand criteria, of 'qualities of character', 'personal technical skills' and 'reflection of society', do not on their face assume any comparative advantage for barristers, or even necessarily for lawyers.

Shifting the conversation

The accumulation of these pressures would appear to raise an obvious question. Why is the state not held responsible for ensuring that lawyers are prepared, and seen to be prepared, for the transition to judicial office? The ongoing reluctance to confront this question in academic discussions, at least in New Zealand,[65] is arguably related to the persistent focus of those discussions on "championing" judicial independence.[66] The question may feel, at the same time, too much like an unseemly challenge to judicial independence (lest it be inferred that any particular judge is actually under-prepared) and yet, paradoxically, not closely enough related to judicial independence to be of immediate academic interest (because it concerns people who are not yet judges). But even in a context in which judicial legitimacy has been associated above all with independence, it should be clear that public support for independence is only sustainable when accompanied by persuasive guarantees of competence.[67] Locating and testing those guarantees should therefore, arguably, be understood as integral to any project of championing judicial independence, as well as a legitimacy-enhancing project in its own right.

The proposal made here is that discussions of judging in recognition systems like New Zealand can and should extend their focus back down the timeline, before the veil of independence descends, to engage more closely with pre-judicial professional life. This should in principle be less sensitive in independence terms than confronting performance concerns that arise after appointment, although it does require an open discussion of the challenges inherent in moving to the bench. There is however a deeper sensitivity rooted in legal professional culture itself, which should not be underestimated. New Zealand lawyers still do not, in general, speak openly about aspiring to judicial appointment. Even modest shifts, such as the introduction of advertisements for judicial vacancies, can encounter significant cultural resistance.[68] Discussions about career choices which might be more conducive to appointment certainly *happen*, but they continue to happen informally and behind closed doors. Further, those choices are for obvious reasons filtered significantly by criteria of prestige and success as a lawyer, which, increasingly, do not necessarily align with criteria of excellence as a judge.

It may be readily accepted that to the extent that the idea of a seamless (and ostensibly unplanned) transition from lawyer to judge remains culturally embedded in the legal profession, it is that culture

[65] Chief Justice Gleeson did pose the question explicitly in extra-judicial addresses in Australia around the turn of the century: see particularly Gleeson (n 59). It was also foreshadowed decades earlier, again extra-judicially, in Samuels (n 53).

[66] See Justice John Priestley, 'Chipping Away at the Judicial Arm: The Harkness Henry Lecture' (2009) 17 *Waikato Law Review* 1, 1. Cf Matthew SR Palmer, 'New Zealand Constitutional Culture' (2007) 22 *New Zealand Universities Law Review* 565, 589.

[67] See above n 10 and accompanying text. Cf, eg, LAWASIA, *Beijing Statement of Principles of the Independence of the Judiciary in the LawAsia Region* (1995, amended 1997) art 11.

[68] See, eg, McGrath, 'Appointing the Judiciary' (n 41) 316; Sir Thomas Eichelbaum, 'The Courts: An Era of Change' in Ian Barker (ed), *Law Stories: Essays on the New Zealand Legal Profession 1969-2003* (LexisNexis, 2003) 1, 18.

which needs to shift, and that will not happen through regulatory intervention alone. That said, without underestimating resistance to change within an established recognition system,[69] it should be possible for authorities to prioritise the proactive creation of judicial competence as supporting the demonstration of "merit" at the point of appointment. There are precedents in this regard in recent international work on judicial diversity.[70] Under the aegis of the United Kingdom's Judicial Diversity Forum, for example, there is work being undertaken to identify promising lawyers from diverse backgrounds at an earlier point in their careers, and to support those lawyers in developing relevant skills and experience, including through a 'Pre-Application Judicial Education Programme'.[71] Without denying their particular value in supporting diversity, there is no reason in principle why such competence-enhancing initiatives should not be generalizable to all prospective judges. A modest step in this direction can be seen in an unprecedented 2019 seminar series by the New Zealand District Court, targeting any practitioner interested in a future transition to the bench.[72] While the media statement for these seminars cites the need for a 'diverse mix' of judges, the focus is kept on skills and experience attainable by any candidate, and lawyers are specifically invited to consider whether their 'current career settings are right'.[73]

There is no need and indeed no justification to advocate for any rigid or one-size-fits-all approach to the creation of judicial competence, particularly given the very different demands of different judicial roles.[74] As Handsley and Lynch observe,[75] merit may be demonstrated in diverse ways, through diverse experiences. That is one of the great potential strengths of a recognition judiciary. What is important is, it is suggested, to make the process of acquiring relevant competence less hidden and more supported. This is where legal academics have a particular opportunity, and arguably a responsibility, for stimulating the conversation: for directly confronting the historical reluctance to openly prepare for judging, and in particular for helping young students and graduates to see judging as a long-term career possibility that can be worked towards over time.

Opportunities for engagement

There are two broad streams into which such academic work might be focused. The first is strengthened support for professional judicial education; the second and more novel is a focus on the conscious accumulation of broad-based professional experience. The development of skills in adjudication as distinct from advocacy is clearly fundamental here, but there is also the dimension of building general 'richness of thought and experience',[76] as Chief Justice Winkelmann has described it, to counterbalance the increasingly narrow focus of modern legal practice and reflect the increasing breadth of modern merit criteria. It bears emphasis in this regard that demographic diversity in

[69] See, eg, Samuels (n 53) 585–586.
[70] See, eg, Hugh Corder, 'Struggling to Adapt: Regulating Judges in South Africa' in Richard Devlin and Adam Dodek (eds), *Regulating Judges: Beyond Independence and Accountability* (Edward Elgar, 2016) 372, 377–379.
[71] Courts and Tribunals Judiciary, 'Pre-Application Judicial Education Programme (PAJE)' (Web Page) <https://www.judiciary.uk/diversity/pre-application-judicial-education-programme-paje/>. See Winkelmann (n 9) 182–183.
[72] Chief District Court Judge and Principal Family Court Judge, 'A window into life on the bench', *District Court of New Zealand* (Web Page) < https://www.districtcourts.govt.nz/media-information/information-for-legal-practitioners/a-window-into-life-on-the-bench/>.
[73] 'A window into life on the bench' (n 72). Seminars of this kind have been operating in the United Kingdom for many years: see, eg, Judge Frances Kirkham, 'Encouraging and Supporting Those Aspiring to be Judges', in Jeffrey Jowell et al, *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (Sweet & Maxwell, 2010) 77, 78–79.
[74] See Steven Rares, 'What Is a Quality Judiciary?' (2011) 20(3) *Journal of Judicial Administration* 133, 144.
[75] Handsley and Lynch (n 23) 215.
[76] Winkelmann (n 9) 181.

appointments, while remaining a vitally important regulatory goal,[77] is not the only way to increase the judiciary's community representativeness, nor its cultural competence. The recent amendment of criteria for Queen's Counsel appointments in New Zealand to include a commitment to improving access to justice[78] is a promising step in this regard.

In New Zealand, several particular opportunities for engagement stand out. As regards judicial education, the sole domestic provider at present is Te Kura Kaiwhakawā (Te Kura), the 'education arm of the judiciary'.[79] There is potential for some of the current Te Kura offerings, particularly those delivered by non-judges as 'subject-area experts',[80] to be developed into programmes for lawyers, whether through existing CPD mechanisms or in a separate dedicated context. There is a conversation to be had about formalising the role of university law faculties in supporting such programmes, and even possibly in integrating them into the undergraduate law curriculum. In this way, the unique insights currently developed within the confidential post-appointment environment might be exportable, as appropriate, to benefit potential future judges and other adjudicators, including those not at the independent bar. Academics could be more openly and systematically involved in the development and evaluation of these programmes than is currently possible, and public awareness could be significantly enhanced.

There is also, arguably, value in considering whether existing intensive programmes for new judges should become a prerequisite to commencing judicial duties. It is significant in this regard that the *Declaration of Judicial Training Principles* emphasises the need for on-appointment training 'before the judge first sits'.[81] The New Zealand intensive programme for new court judges is currently offered only once per year,[82] meaning that those appointed on a rolling basis throughout the year may be hearing and deciding cases for close to a year before having access to it.[83] That must be regarded as a point of vulnerability for public perceptions of competence, regardless of how successfully less formal induction mechanisms may be operating behind the scenes.

Secondly, it might surprise some New Zealand observers that adjudicative experience on statutory tribunals is, as set out above, formally recognised in the current merit criteria as an alternative to adversarial experience in court.[84] There has not, despite this recognition, been any sustained critical attention to the benefits (or otherwise) of such experience, nor any effort to promote or support it in a systematic sense. Tribunal work is not well-paid or prestigious and that alone is sufficient to deter many lawyers, perhaps particularly successful barristers.[85] Yet it has the potential to generate not only

[77] See Brian Opeskin, 'Dismantling the Diversity Deficit: Towards a More Inclusive Australian Judiciary' in Appleby and Lynch (eds) (n 8) 83.
[78] Sol Dolor, 'New standard added in latest selection of eight new Queen's Counsel', *NZ Lawyer* (online, 7 December 2019) <https://www.thelawyermag.com/nz/news/general/new-standard-added-in-latest-selection-of-eight-new-queens-counsel/208488>. See Winkelmann (n 9) 183.
[79] Te Kura Kaiwhakawā (Institute of Judicial Studies), *Prospectus 2021* <https://www.ijs.govt.nz/prospectus/2021_Prospectus_for_Internet.pdf> 2.
[80] *Prospectus 2021* (n 79) 3.
[81] *Declaration of Judicial Training Principles* (n 52) art 7. Cf Sumption (n 18) 8, describing the 'number one defect' in the current United Kingdom context as there being 'virtually no facilities for the training of those appointed to full-time judicial positions before they take them up'.
[82] See *Prospectus 2021* (n 79) 6.
[83] In Australia, that period may stretch to 18 months: see Christopher Roper, *Review of the National Standard for Professional Development for Australian Judicial Officers* (Report to National Judicial College of Australia, December 2010) 1.
[84] *Judicial Appointments Protocol* (n 25) 3.
[85] In Australia there has been comparatively greater concern about the politicisation of modern tribunal appointments, which may be sufficient in itself to deter those interested in future judicial office: see, eg,

expertise in impartial adjudication,[86] but also, depending on the subject matter, the kind of broadening and community-focused experience that may be elusive in commercial private practice. The author's research to date suggests that the New Zealand government does not even hold collated data on foundational questions like how many lawyers are serving on tribunals, or how many of those lawyers go on to become judges. That bears out the importance (and arguably the urgency) of independent research into tribunal appointments, and their interrelationship with pre-judicial careers.[87]

Conclusion

The ultimate benchmark, and the ultimate test, for judicial legitimacy is the maintenance of justified public confidence in the essential work that judges do. Neither uncritical acceptance nor generalised scepticism of that work is conducive to this form of legitimacy. As public expectations of transparency and responsiveness continue to mount, the historical reliance of notoriously opaque institutions like judiciaries on the former (uncritical acceptance) is increasing their vulnerability to the latter (generalised scepticism). The academy has, or should have, an important role to play in contributing both sufficient unvarnished information and sufficient independent reassurance to help reinforce public trust in judicial institutions. Yet in countries like New Zealand, judges and judiciaries remain persistently under-studied.[88] In many respects, the inner workings of judicial institutions remain largely off limits to those not speaking from within the institutions themselves.

The resulting gaps in the domestic literature, which might be described colloquially as what we don't talk about when we don't talk about judges, reflect a deep-rooted concern with preserving judicial independence. But their depth and extent suggest that this concern can be taken too far. More could, and should, be done, within government, the academy and the legal profession itself, to support judiciaries to identify and redress evolving pressure points for legitimacy.

This article has highlighted one such evolving pressure point: the prospect that new appointees to judicial office may not possess, or (just as importantly) may not be understood by the public to possess, the full set of judicial competencies on appointment. This is not to suggest any deficiency on the part of the individuals appointed, but rather a failure of the system to support those individuals in preparing for a profound professional shift. The relevant gap in the literature is ultimately attributable to an inherited, and outdated, assumption that private legal practice is a sufficient proxy for specialised professional preparation for judicial office. Ensuring and demonstrating the competence of modern judges is properly the responsibility of the state, although it is an enterprise in which all parts of the legal profession have a significant stake. The current systems in Commonwealth judiciaries like New Zealand, it is argued, have not squarely shouldered this responsibility. How they might be encouraged and supported to do so is a worthwhile subject for academic engagement.

Gabriel Fleming, 'Tribunals in Australia: How to Achieve Independence' in Robin Creyke (ed), *Tribunals in the Common Law World* (Federation Press, 2008) 86, 95–97.

[86] Such experience has been for decades an effective precondition to permanent judicial appointment in the United Kingdom, which offers a wide variety of fee-paid "entry-level" positions: see Lord Mackay, 'Selection of Judges Prior to the Establishment of the Judicial Appointments Commission in 2006' in Jeffrey Jowell et al, *Judicial Appointments: Balancing Independence, Accountability and Legitimacy* (Sweet & Maxwell, 2010) 11. For the current position see Courts and Tribunals Judiciary, 'Judicial Progression Charts (Courts and Tribunals)' (Web Page) <https://www.judiciary.uk/about-the-judiciary/judges-career-paths/judicial-career-progression-chart/>. There is, by contrast, little scope to gain fee-paid court experience under New Zealand's current institutional arrangements.

[87] For the generally uncertain place of tribunals in the New Zealand judicial system, see Kerr (n 10).

[88] See Sir Geoffrey Palmer, 'The Judiciary as an Institution' (2015) 46 *Victoria University of Wellington Law Review* 257, 257.