



File No: H18/75

Chief Justice of New Zealand

30 August 2012

The Chairperson
Justice & Electoral Select Committee
Parliament Buildings
WELLINGTON

Dear Sir

Register of Pecuniary Interests of Judges Bill

The attached submission has the support of the judiciary and specifically the Chief Justice, President of the Court of Appeal, Chief High Court Judge, Chief District Court Judge, Chief Employment Court Judge, Chief Maori Land Court Judge and Acting Principal Environment Court Judge.

The judiciary do not wish to be heard by the Committee.

Yours faithfully

A handwritten signature in black ink, appearing to read 'McGrath'.

The Hon Justice McGrath
Acting Chief Justice

REGISTER OF PECUNIARY INTERESTS OF JUDGES BILL

SUBMISSION ON BEHALF OF THE JUDICIARY

Introduction

[1] This submission addresses the Register of Pecuniary Interests of Judges Bill. It is presented on behalf of the Judiciary as a whole.

Summary

[2] The Judiciary are opposed to the enactment of the Register of Pecuniary Interests of Judges Bill for the following reasons:

- (a) A register is unnecessary. The existing law (which can be applied through appeal processes), the Guidelines for Judicial Conduct,¹ the judicial complaints process and Bench protocols are sufficient to address any conflicts issues that may arise.
- (b) The Bill is not capable of achieving its objectives. In particular, it will not assist judges to deal with the types of conflicts issues that most generally arise and would not have assisted in the case of Wilson J.
- (c) A register would be an unwarranted intrusion into the personal affairs of judges, their partners and their families and would create opportunities for harassment by disgruntled litigants and others. This is particularly so because, to be of any use to litigants or their counsel, *detailed* disclosure of all financial interests would be required. The “high level” disclosure that applies to members of Parliament would not be sufficient to achieve the Bill’s objectives.

¹ These are publicly available on www.courtsofnz.govt.nz/business/guidelines/guidelines-for-judicial-conduct

(d) There are difficulties with the Bill from a constitutional perspective.

[3] We expand on these reasons in the discussion that follows.

Justifications for a register

[4] The explanatory note to the Bill and the purpose clause identify two principal justifications for a register of pecuniary interests for judges:

(a) To assist judges to deal with conflicts of interest.

(b) To help maintain public confidence in judges as public officials. A parallel is drawn with the disclosure regime in respect of members of Parliament and members of the Executive.

[5] We do not agree that the Bill will assist judges to deal with conflicts of interest, nor do we accept that the Bill is necessary to help to maintain public confidence in judges as public officials. Before we address these points, however, we should mention one other justification that is sometimes given for registers of this type, namely to prevent judicial corruption.

[6] In its issues paper *Towards a new Courts Act: A register of judges' pecuniary interests?* the Law Commission identified the prevention of judicial corruption as one purpose of judicial disclosure regimes internationally.² However, as the Commission went on to point out, there is simply no evidence of judicial corruption of this type in New Zealand, which presumably reflects factors such as the relatively small size of the New Zealand legal community and the nature of judicial appointment processes. Accordingly, prevention of corruption provides no justification for the establishment of a register of judges' pecuniary interests in New Zealand. We turn, then, to the two justifications noted at [4] above.

² Law Commission *Towards a new Courts Act: A register of judges' pecuniary interests* (NZLC IP21,2011) at [8.8]–[8.10].

(i) *Dealing with conflicts of interest*

[7] The explanatory note indicates that the Bill is intended to promote transparency in relation to financial interests of judges in order to help preserve public confidence in an important public institution. It does so by analogy with the system that applies to MPs. The need for this is said to be illustrated by “recent developments within New Zealand’s judicial conduct processes”, presumably a reference to the case of Wilson J. The explanatory note talks of relieving judges “from a repetitive weight of responsibility to make discretionary judgements about his or her personal affairs as each case arises”.

[8] Two points should be made about the necessity for a register to address conflicts issues:

- (a) First, there are already mechanisms for dealing with conflicts of interest on the part of judges.
- (b) Second, a register of pecuniary interests would not address the most common and difficult conflict of interest issues.

[9] Dealing first with the existing mechanisms, there are two obvious mechanisms for addressing conflicts:

- (a) The law relating to recusal, which is now largely settled in New Zealand and can be applied through the appellate process if not followed by individual judges.³
- (b) The Guidelines for Judicial Conduct, which give guidance on the situations in which judges should not sit.⁴

³ See *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 1)* [2009] NZSC 72, [2010] 1 NZLR 35. See also Grant Hammond *Judicial Recusal: Principles, Process and Problems* (Hart Publishing, Portland, 2009).

⁴ *Guidelines for Judicial Conduct* at [71]–[78].

[10] In addition to these mechanisms, some Benches have developed, or are developing, more robust internal mechanisms to address potential conflict problems.⁵ These involve techniques for identifying potential conflict issues as early as possible and mechanisms for addressing them (for example, if a potential conflict issue is to be raised with the parties in advance, that should be done formally by way of a minute).⁶ This has the attraction that it is a remedy developed by the judiciary itself, rather than being imposed upon it. Such an approach would be consistent that taken in respect of the other branches of Government: in relation to the Executive, Cabinet Ministers are given guidance about managing conflicts of interests, including pecuniary conflicts, in the Cabinet Manual;⁷ in relation to Parliament, the disclosure requirements of MPs are set out in the Standing Orders of the House⁸. It could be enhanced through the publication of formal protocols if that was thought necessary.

[11] Finally, the judicial complaints process could be invoked to deal with egregious conflict of interest breaches by judges.

[12] Turning to the second point (that the Bill attempts to address only financial interests), the proposed register's limited scope is a significant deficiency in terms of dealing with conflicts of interest. As the Law Commission notes, it is "association" issues that tend to cause most difficulty in a small society such as New Zealand – personal friendships between judges and counsel, judges' previous connections with firms of solicitors, judges having acted for parties to litigation in the past and such like.⁹ By contrast, cases involving pecuniary interests arise much less frequently. . . . Because of its limited scope a pecuniary interests register will not in fact relieve judges from the "repetitive weight of responsibility" to make discretionary judgments on a case by case basis as stated in the explanatory note, nor will it "avoid any conflict of interest in the judicial role" as stated in the purpose clause (cl 3).

⁵ This is a solution favoured by the Law Commission: see above n 2 at [2.30].

⁶ The Court of Appeal, for example, has gone some way to taking these steps. See also Council of Chief Justices of Australia *Guide to Judicial Conduct* (2nd ed, Australian Institute of Judicial Administration Inc, Victoria 2007) at cl 3.5, where a disqualification process for single judge courts is set out.

⁷ Cabinet Manual 2008 at [2.55]–[2.77].

⁸ Standing Orders of the House of Representatives 2011, SOs 160–163 and appendix B.

⁹ Law Commission, above n 2, at [8.20]. These issues are addressed in the *Guidelines for Judicial Conduct*.

[13] There is another reason why a pecuniary interests register will not relieve judges from the responsibility for making decisions about whether or not they should sit on particular cases. Even in relation to pecuniary interests, a judge must still raise the matter with counsel in the particular case to see whether there is any objection to him or her sitting and, if objection is taken, must make a decision about recusal. Giving general notice to the world at large in a register will not meet a judge's obligations in particular cases, nor make the task of deciding whether to stand down any easier. The most a register could achieve would be to assist with the identification of potential pecuniary interest conflicts (assuming very detailed financial disclosure). It would provide no help to judges in making the decision whether or not they should sit.

[14] This raises the question of the level of disclosure that would be required of judges. To be of any value to the litigating parties and their legal advisers, the level of disclosure would have to be very detailed. For example, a statement to the effect that a judge is a beneficiary under a superannuation trust would be too general. To make a decision about whether a judge may be conflicted, a litigant would need to know the detail of the investments held by the superannuation trust. As a consequence, the level of disclosure would have to be much greater than applies to Cabinet Ministers or MPs to be of any use to litigants or their counsel. We return to this aspect below.

(iii) Accountability of public officials - analogy with MPs

[15] Supporters of a register for judges emphasise the importance of accountability for public officials. They see judges as being in an analogous position to Cabinet Ministers and MPs. Just as Ministers and MPs must declare their financial interests, so should judges. The Law Commission describes this as “the argument from governance”.¹⁰

[16] We make two comments about this justification:

¹⁰ Law Commission, above n 2, at [8.14].

- (a) First, there are not uniform requirements for disclosure of financial interests among public officials in New Zealand. While Cabinet Ministers make disclosure, other senior personnel within the Executive do not and there is no suggestion that they should (departmental heads are an obvious example).
- (b) Second, there are fundamental differences in the positions of politicians and judges that justify differences in approach to public financial disclosure. These relate particularly to modes of selection and the nature of their respective tasks.

[17] To expand the second point, there are different modes of selection for politicians and judges, which raise distinct considerations. For example, one feature that flows from the fact that politicians are elected is that they need to raise funds for party political purposes. Election funding has been a source of many problems both internationally and in New Zealand. There is often a perception that substantial contributors can unduly influence government decisions. Disclosure of financial interests by MPs is justified in part by the need to maintain checks on the provision of funds for political purposes.

[18] Another reason given in the United States for requiring financial disclosure by politicians is that it tends to deter people who should not be entering public service from doing so. The argument is that individuals whose finances might cause concern as a result of either questionable sources of income or doubtful business practices will be unwilling to stand for public office if they know that their financial position will be exposed to public scrutiny.¹¹

[19] By contrast, judges are appointed through a process in which party politics should play no part. The relatively small size of the New Zealand legal community and the consultative process by which judges have generally been appointed means that concerns about personal character and such like can be, and are, addressed without the need for a public register of financial interests.

¹¹ See *Duplantier v United States* 606 F 2d 654 (5th Cir 1979) at fn 30.

[20] Turning to roles, plainly the roles of Ministers/MPs and judges differ. Ministers/MPs make policy decisions about the allocation of scarce resources and must make choices between competing demands, in ways that may have profound social and economic impacts. As a consequence, they are subject to lobbying and other efforts to influence their decision-making. Financial disclosure needs to be seen against that background.

[21] By contrast, judges in New Zealand's constitutional structure are concerned to determine the cases of individual litigants who come before them in accordance with law. While particular cases may raise significant policy issues, judges do not determine broader issues of public or social policy on the basis of political philosophy or an assessment of what is in the best interests of the country in the way that politicians do; nor are they subject to the type of lobbying and special interest pressures that characterise the political process. Moreover the judicial process is a high visibility process: hearings are conducted in public and judges must give reasons for their decisions, which will be subject to appeal. These features of the judicial process impose an important discipline on judges and provide an effective protection against arbitrary or biased decisions.

[22] Finally, in New Zealand Ministers and MPs are required to disclose their financial interests at a high level of generality. For example, they must disclose beneficial interests in trusts but not the assets owned by the relevant trusts. However, as has already been noted, if the object of a disclosure regime for judges is to assist with the identification of conflicts, detailed financial disclosure would be required and that raises further problems, as we discuss in the next section of this submission.

Drawbacks with a register of financial interests for judges

[23] We will discuss the drawbacks under three headings – unwarranted intrusion on privacy interests, potential for harassment and constitutional implications.

(i) *Unwarranted intrusion on privacy interests*

[24] As the introduction of a register would require judges to disclose their financial situation publicly and, to be effective, in detail, it would be a significant intrusion on their personal privacy interests and, inevitably, on the privacy interests of members of their families. We consider that such an intrusion is justifiable only on clear and compelling grounds. In our view, none has been demonstrated.

[25] Inevitably any disclosure regime will impact on the privacy interests of judges' family members. Clause 5 of the Bill defines "pecuniary interest" to include "any interest in anything which reasonably gives rise to an expectation of a gain or loss of money for a judge, *or their spouse or partner, or child or step-child or foster child or grandchild*" (emphasis added). Clause 6 requires judges to "make returns of pecuniary interests". Accordingly, it appears that judges are expected to obtain financial information from, for example, their adult children and provide it even though they have no right to obtain the information or any means of verifying it. Even if that is not the intention, the wide definition of pecuniary interests means that litigants will be able to say that they have a legitimate interest in knowing what financial interests the specified family members have. Claims for detailed disclosure of the financial interests of family members will be difficult to resist, so that their privacy interests will be impacted as well. While existing judicial codes of conduct typically provide that judges should not sit in cases where the members of their immediate family have a financial interest in the outcome of a case,¹² judges are presently able to address any issues in this area in a relatively private and low-key way by standing aside or raising the matter with the parties.

[26] A further difficulty with the proposed disclosure regime is that its effect will be to require judges to declare financial interests even if they are not, as a matter of law, "material" and so would not be disqualifying. As noted earlier, a pecuniary interest under the Bill is an interest in anything "that reasonably gives rise to an expectation of a gain or loss of money" on the part of judges and the other specified individuals. Accordingly, a judge holding, say, a small parcel of Telecom shares might feel obliged to declare them even though, in a particular case involving

¹² See for example *The Bangalore Principles of Judicial Conduct 2002* at [2.5.3] and Judicial Integrity Group *Commentary on the Bangalore Principles of Judicial Conduct* (March 2007) at [98].

Telecom, a shareholding of that order would not be regarded as “material” for recusal purposes. This is particularly relevant to District Court judges who exercise civil jurisdiction because the limit of their jurisdiction is \$200,000 and it seems improbable that any litigation of that order could have an impact on Telecom’s share price.¹³

[27] Finally, the requirement to disclose financial information in this public way and to this extent may well have a negative impact on recruitment. It is often difficult to persuade senior practitioners to accept judicial appointment. Some such practitioners are willing to accept appointment only after they are sufficiently well-off financially to accept the significant reduction in income that appointment to the Bench will mean for them. Public disclosure of financial interests is likely to create a further disincentive to such people accepting appointment.

[28] Some draw an analogy with judges in the United States, where all Federal and many State judges are required to provide detailed disclosure of their financial position. But three points need to be noted. First, many State judges are elected, so that some of the same issues concerning election funding of politicians arise. Second, under the US Constitution, Federal judges are appointed by the President subject to Senate approval. This is a public process in which a candidate’s personal financial information could legitimately be raised given the nature of the judicial function in the US constitutional system, in particular the ability to strike down legislation as unconstitutional. Moreover, unlike judges in New Zealand, Federal judges are appointed for life and, if they decide to retire, receive a pension, which gives them a measure of financial security. This is not the case in New Zealand where there is a fixed retirement age and a defined contribution superannuation scheme, which subjects judges to market risks. Third, the US disclosure system has widespread coverage of public officials and was introduced in response to particular problems that had arisen in the United States. That context does not exist in New Zealand.

¹³ Further, District Court judges frequently determine what are essentially debt collection actions by banks. Judges will be required to disclose on the register any indebtedness over \$50,000, which will include mortgage indebtedness to banks. In all but very unusual cases, however, mortgage indebtedness to a particular bank does not raise recusal issues as the indebtedness is not material.

[29] Finally under this heading, we note that judges will be required to disclose the location of any properties they own. If this means that judges must disclose their residential addresses, it is inconsistent with arrangements that judges can presently make to keep their residential addresses private. Such arrangements are available to judges who wish to take them up for good security reasons.

(ii) *Potential for harassment*

[30] Judges are increasingly subjected to unwarranted and improper attack, particularly through internet sites, without effective intervention or protection. Moreover, processes that appear in principle to be appropriate have frequently been used essentially to harass judges. A notable example of this is the judicial complaints process, which has been used largely by disgruntled litigants who are disappointed in the outcome of their cases.

[31] What this suggests is that, before new accountability or similar mechanisms are established, care must be taken to (a) ensure that they are justified and (b) minimise the potential for abuse. It seems likely that the establishment of a register of pecuniary interests for judges will simply lead to disaffected litigants trawling through it to see whether there is some basis for a bias argument on appeal. This will inevitably lead to questions being put to judges about the precise nature of particular disclosed interests. The likelihood is that judges will have to provide detailed explanations of their pecuniary interests, even in cases where there is no reasonable basis for a bias argument.

[32] We have already noted that, inevitably, a disclosure regime will require disclosure of the financial positions of immediate family members. As a consequence, such a regime will not only affect the privacy interests of judges' family members, but will also draw them into the range of people who might suffer harassment at the hands of disgruntled litigants.

(iii) *Constitutional implications*

[33] There are two constitutional aspects that require discussion. First, as has already been mentioned, the requirements applying to Cabinet Ministers in respect of conflicts of interests are set out in the Cabinet Manual and are administered by the Cabinet Office; the financial disclosure requirements for MPs are set out in Standing Orders and are administered by a registrar, currently Dame Margaret Bazley. In respect of these two groups, then, the requirement for disclosure is essentially self-imposed. It is only in respect of judges that disclosure requirements will be imposed by Parliament through statute. This raises a question as to the reasons for the difference in treatment and means that the justification for Parliamentary intervention must be clear and well-grounded.

[34] Second, the introduction of the proposed register would impose an obligation on existing judges that exceeds any obligation they agreed to undertake on appointment. The obligation would be an onerous one and would infringe upon their privacy interests and those of their families. It is likely that some judges will not be prepared to continue their service as judges if such an unheralded obligation is imposed upon them. There is a real question as to whether introducing a disclosure regime in this way is constitutionally appropriate. This is because there is a well established constitutional principle that the basis of a judge's appointment should not be altered to his or her disadvantage during office.¹⁴

Conclusion

[35] By way of conclusion, we submit that the justifications for public financial disclosure by judges in New Zealand are weak. Further, there are very significant drawbacks associated with a public disclosure regime. Existing processes – recusal law, guidelines for judicial conduct, the judicial complaints process and robust

¹⁴ (15 March 2011) 726 GBPD HL GC 29 (per Lord Mackay), GC 33 (per Baroness Murphy) and GC 36 (per Lord Falconer); International Bar Association *Minimum Standards of Judicial Independence* (1982), arts 15(b) and 20(a). This is subject to the exception that economic measures that apply to all citizens or all public servants (e.g. general tax increases) can be justified even if they result in a reduction of remuneration as they are not targeted at judges alone.

appointment processes – are sufficient to meet the problems that judges are likely to face or create. These processes could be supplemented, perhaps, by greater development of internal protocols within individual Benches for identifying and dealing with conflicts if it is thought that something more is required. But a regime of the type proposed in the Bill is not justified.