

A point of stability in the life of the nation: The office of Chief Justice of New Zealand — Supreme Court judge, judicial branch leader, and constitutional guardian & statesperson

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I Introduction

What is the scope of the modern office of Chief Justice (CJ) of New Zealand? Clearly, the role extends beyond taking the central seat in the Supreme Court's Kauri kernel shaped courtroom at 85 Lambton Quay, Wellington, (the home of the Supreme Court of New Zealand).¹ Until the commencement of the Supreme Court Act 2003 — which, inter alia, replaced the Judicial Committee of the Privy Council in London as New Zealand's final court of appeal with the new Supreme Court — there was a lack of clarity as to who the nation's top judge was.² Within New Zealand there was the CJ. Chief Justices for the most part sat in the High Court (the first instance superior court). They were also eligible to sit in the first instance appellate court, the Court of Appeal. That court had its own full time leader: the President. The President presided unless the CJ was sitting. This gave rise to the potential for tension between the CJ and President, a point which is explored further below. In addition to the CJ and President, there was a third candidate. So long as cases could be appealed to the Judicial Committee of the Privy Council, the British judge chairing the Committee could be said to be New Zealand's top judge, at least for the case before the Committee. As late as July 2013 a criminal case (coming under the 2003 statute's transitional provisions) was heard by a panel which included the current CJ, Dame Sian Elias. She was not though in the central seat; Lord Hope of Craighead, a Scottish Law Lord, presided.

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** This paper will appear in pt.4, 2013 of the *New Zealand Law Review*. I am grateful to the editors for allowing this version to be made available via the SSRN

¹ On the design of the Court buildings see Warren and Mahoney "The Supreme Court of New Zealand" <www.warrenandmahoney.com>; and Courts of New Zealand "The design of the new building" <www.courtsofnz.govt.nz>.

² On the debate concerning leaving the Privy Council, the reform process and the nature of the new Supreme Court, see Richard Cornes "Appealing to history: the New Zealand Supreme Court debate" (2004) 24 LS 210 and "How to create a new Supreme Court: learning from New Zealand" [2004] PL 59.

Those rare transitional cases aside (and the *R v Lundy* appeal must be the last, if not close to it),³ the 2003 statute places the CJ permanently in the Supreme Court, and identifies her as “head of the New Zealand judiciary,” with “seniority over the other Judges of the Supreme Court”.⁴ Writing in 2004 on the possible consequences of the 2003 reform, I hypothesised that “[t]he leadership role of the Chief Justice will be emphasised — in relation to both the Supreme Court itself and to the judicial branch in general.”⁵ After almost a decade of operation of the new Court, I return to that theme.

To address it the discussion proceeds as follows. First, the two aims of the article are outlined: to describe the nature of the current office, and to argue for its role, importance and scope within New Zealand’s constitutional arrangements. Second, I comment on the concept of leadership in the judicial context. Third, I give a brief review of who has held the office since 1841. This is followed by a discussion of how the office has been understood, in particular, in official documents, together with a more detailed discussion of the issue of the 1958–2003 division of judicial leadership within New Zealand between the CJ and President of the Court of Appeal. Then comes the heart of the article: an elaboration of the three sets of functions of the modern office, Supreme Court judge, national judicial leader, and constitutional guardian and statesperson.

II The Office of Chief Justice — A Constitutional Realist’s Perspective

This article has two aims. The first is to define the modern scope of the office of CJ of New Zealand, and in doing so, to bring out its scope and importance within New Zealand’s constitutional arrangements. Providing that greater degree of clarity entails outlining in detail the complexity and range of functions which attach to the office. In that sense my endeavour is akin to an exercise in constitutional realism of the kind embarked on by Matthew Palmer in his 2007 elaboration of New Zealand’s constitutional arrangements: “A constitutional realist seeks to identify and analyse all those factors which significantly influence the generic exercise of public power.”⁶ Palmer’s project was a broad one, looking across the entire landscape of New Zealand’s constitution. My purpose here is narrower, and focused, in part, on mapping the range of functions associated with the modern office of CJ. This cartographic exercise is based on both an analysis of legal instruments concerning the office, as well as a review of academic writing and official documents concerning the office and its holders from the first CJ (Sir William Martin), to the incumbent, Dame Sian Elias.⁷

The constitutional cartography provides the context for the article’s second, and normative, aim: to advance an argument about what the role of the CJ should be, taking into account New Zealand’s contemporary constitutional culture. The heart of that argument is this proposition: New Zealand needs a strong, well resourced, well understood, and active office of CJ to help maintain balance in a constitution which is in danger of becoming dangerously skewed towards the interests and ethos of the elected branches (encompassing both the 120 seat legislature elected on a proportional representation basis, and

³ *Lundy v R* [2013] UKPC 28. Though see Television New Zealand “Teina Pora’s lawyers apply to Privy Council” (20 August 2013) <www.tvnz.co.nz>.

⁴ Supreme Court Act 2003, s 18(1).

⁵ Richard Cornes “There’s more than one song worth singing: The Supreme Court and the legal system” (2004) 15 PLR 137 at 144.

⁶ Matthew S R Palmer “New Zealand Constitutional Culture” (2007) 22 NZULR 565 at 566. See also: Matthew S R Palmer “What is New Zealand’s constitution and who interprets it? Constitutional realism and the importance of public office-holders” (2006) 17 PLR 133.

⁷ The appendix lists the 12 holders of the office to date.

the executive drawn from it). Providing it is appropriately resourced, the office has, within its current statutory parameters, and history, the potential to take on this task.

This normative goal also rests on an affirmation at the end of the purpose clause of the 2003 Act: “Nothing in this Act affects New Zealand’s continuing commitment to the rule of law and the sovereignty of Parliament.”⁸ Members of Parliament ably, and regularly, assert the extent of that body’s powers and prerogatives. And the introduction of a proportional electoral system in 1996 (the Mixed Member Proportional system (MMP), similar to that used in the Federal Republic of Germany) has made the legislature and executive far more responsive than previously to the popular will of New Zealanders. While MMP may have increased the executive’s accountability to parliament, it has also heightened MPs’ sense of primacy within the constitution, to the detriment of respect for the rule of law and the necessary independent voice of the judiciary. From a constitutional realist’s perspective New Zealand might now be said to have just two branches: the elected and the judicial. And the elected branch tends to regard itself as having an *exclusive* say in matters of public policy. Of the rule of law and the independent judicial voice in New Zealand, Matthew Palmer comments:⁹

My intuitive hesitation about the rule of law as an ultimate principle of the constitution, and the reason I put it third behind representative democracy and parliamentary sovereignty, is a concern about how well entrenched the rule of law is in popular understanding and support. To the extent that it requires valuing the role and voice of the judiciary compared to elected politicians ... it is not well entrenched in New Zealand constitutional culture.

...

[T]he rule of law [and by implication the principle of an independent judiciary] is a vulnerable constitutional norm in New Zealand.

Judicial independence is respected in New Zealand within narrow confines. The judges, while entitled to autonomy for what they do within the walls of courtrooms, tend to be seen as just another group of stakeholders in the justice sector, servicing the needs of citizen-consumers.¹⁰ Asked by a House of Lords Committee in 2004, “how do you see the independence of the judiciary protected in the New Zealand situation?”, Elias CJ replied:¹¹

Well, I think it is a real risk in our country because I think our constitutional arrangements have been very obscure and I do not think it is good enough that the initiates think they know what the system is. It is one of the reasons why I would like to see better, more formal communication with the Legislature because I think we are very vulnerable on this question of independence because it is not well understood in the community as a whole.

⁸ Supreme Court Act 2003, s 3(2).

⁹ Palmer, above n 6, at 588–589.

¹⁰ On viewing judges as “stakeholders” see discussion in Sian Elias, Chief Justice of New Zealand “Discounting Justice” (address to the Legal Research Foundation Annual General Meeting, Auckland, 25 October 2001) at 2, available at <www.courtsofnz.govt.nz>. On the concept of the “Justice Sector” see Ministry of Justice “About the justice sector” <www.justice.govt.nz>. Finally, on the “citizen-consumer” in NZ see Gordon McLauchlan *The Passionless People Revisited* (David Bateman, Auckland, 2012) at 199–201.

¹¹ Lords Select Committee on Constitutional Reform Bill *Constitutional Reform Bill — Minutes of Evidence* (25 May 2004) at Q 1091 [*Minutes of Evidence*], online at <www.publications.parliament.uk/pa/ld200304/ldselect/ldcref/125/4052501.htm>.

And Sir Thomas Gault followed on with:¹²

My anxiety is that the independence of the judiciary is most at risk through the politics of the country. In a way we have not had the checks and balances that you have had with a second chamber and the Lord Chancellor and so on. I do not feel confident that our politicians grasp the constitutional significance perhaps as they should.

Matthew Palmer's academic analysis and the views of Dame Sian and Sir Thomas also accorded with the view expressed in 2005 by the newly appointed Attorney-General, Deputy Prime Minister Michael Cullen. Dr Cullen, who before appointment as Attorney-General had had, as we shall see, a spirited public dialogue with the CJ concerning the nature of Parliament's powers, was reported by the *Herald* to be, "an ardent advocate and protector of the judiciary, particularly against political attacks on their decisions, which, he [said, had] *worsened under the populist approaches of MMP*".¹³

To maintain *both* of the commitments recorded in s 3(2) of the Supreme Court Act 2003, holders of the office of CJ need to continue to articulate assertively, in and out of court, values associated with the rule of law, in particular, the preservation of an independent judiciary, and the separation of powers.¹⁴ Further, they should continue to enter into the full range of public debate to provide a distinct constitutional perspective — distinct in particular from the perspective of the elected branch. Certainly the tone and style of CJs' extra-curial contributions should also be distinguishable from the tone and style of MPs; they should still though be heard on topics MPs often think of as the sole preserve of the legislature. This is a matter we will return to below, in particular in the section on the CJ's role as constitutional guardian and statesperson.

Section 3(2) was included in the Act explicitly because Parliament was concerned that the new Court could upset the constitutional balance (in which it likes to think of itself as enjoying a pure, classic, Diceyan supremacy).¹⁵ The section, while referencing that concern, may also be viewed as pointing to the live debate at the heart of the nation's constitutional arrangements, a debate which will be familiar outside of New Zealand as well: who, ultimately, has the last word as to how we are governed? In the context of New Zealand's constitutional arrangements, which are largely uncodified and almost entirely unentrenched,¹⁶ it is a debate perhaps best left unresolved. A constitutional system in which there is such a live debate is, after all, one in which no side has yet "won"; victors do not make good partners in a system premised on a separation of powers. Ensuring the debate goes on requires an active office of Chief Justice.

¹² At Q 1092.

¹³ Audrey Young "New job for Cullen will temper constitutional row" *The New Zealand Herald* (online ed, Auckland, 26 March 2005) (emphasis added).

¹⁴ See Thomas Eichelbaum on the role of judges in widening public understanding of the judicial role in his "The Inaugural Neil Williamson Memorial Lecture: Judicial Independence Revisited" [1997] 6 *Canta LR* 421 at 426.

¹⁵ We may wonder whether Parliament comprehended the extensive range of meanings of the two terms. Philip Joseph identifies *seven* distinct usages of the term 'rule of law' and devotes over 50 pages to discussion of the doctrine of Parliamentary sovereignty: Philip A Joseph *Constitutional and Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at chs 6 and 14.

¹⁶ The partial exception being the "reserved provisions" protected by s 268 of the Electoral Act 1993. The "reserved provisions" relate to the holding of regular elections, and can only be amended or repealed by either a 75 per cent majority in the House of Representatives, or a majority of votes on a poll of electors. Section 268 itself though is not similarly protected.

III On Leadership in the Judicial Context

While not the focus of this article, an article about the office of CJ requires a brief word about the concept of leadership in the judicial context. The way leadership is conceived of, and operates, in the judicial sphere must have a distinct quality and entail “leading” in a way somehow different from leadership generally. Speaking in broad terms, at the heart of the *general* conception of leadership is the notion of the leader being in charge, of being able to *command*, to say this is what we shall do and require it be done.¹⁷ The notion of leadership as *command* sits ill in the judicial context, or at least must be significantly modified, running as it does into obvious conflict with the constitutional imperatives of judicial independence and impartiality, and the requirements of collegiality. As Dame Sian put it to the House of Lords in 2004:¹⁸

I am concerned about getting the balance right between not going too far in terms of managerial justice, and I am nervous about the Chief Justice acquiring statutory powers in relation to other judges because I think independence of the judiciary to achieve impartiality depends also on independence from judicial management

In relation to purely “*managerial*” functions, (for example, matters of building maintenance, resource allocation, and management of the administrative systems), vis a vis a CJ’s court (or courts for which they are responsible), it may be that they manage in the command sense. Even in this field though, a wise CJ works collegially; the current CJ puts it this way: “the view I take is that the Chief Justice operates with the consent of the [other] judges [of the Court]”.¹⁹ A similar view is expressed by Winkelmann J, the Chief High Court Judge:²⁰

A feature of most judicial leadership is that it is based on building a consensus. Judicial leaders do not typically adopt a dictatorial style of leadership. ... I must bring others with me, to convince and persuade that the issues and solutions are as I propose.

Judicial leadership might best be thought of as a matter not just of the individual (though it certainly starts there), but also a collective endeavour (hence the link on top courts to the concept of collegiality); a delicate balance between collaboration and individual initiative (far more so than leadership in other contexts). Chief Justice John Roberts of the United States Supreme Court recounts advice he received about holding the reins of power on a top court: “don’t hold them too tightly lest you find they’re no longer attached to anything”.²¹ In the case of the CJ of New Zealand, only in relation to the constitutional guardian and statesperson role does the holder have real scope for individual initiative — though even there holders will be aware that their authority is supported by, and sits within the context of, being the one judge at the apex of a relatively small cadre of judicial officers.

¹⁷ See also discussion in Kyela Leakey “The Role of the Chief Justice in Commonwealth Africa: a comparative study of South Africa, Ghana and Kenya (Dissertation submitted for the degree of Doctor of Philosophy, Queen Mary, University of London, 2012), at 29–30.

¹⁸ *Minutes of Evidence*, above n 11, at Q 1034.

¹⁹ At Q 1060.

²⁰ Helen Winkelmann “Promoting Innovative Leadership and the Role of Leadership in Planning Innovation” (paper presented to Asia Pacific Courts Conference, Auckland, 8 March 2013) at [16].

²¹ It is a line the Roberts CJ is fond of, see for e.g., at 6’10” to 6’25” of his *2012 Centennial Lecture* at Rice University: <http://www.youtube.com/watch?v=UxaFhJ8JVq8>.

IV Chief Justices and the Office of Chief Justice — 1841–2013

The office has been, and continues to be, in part defined by the approaches of each of its holders. As Peter Fish notes in his study of the office of CJ of the United States, “Chiefs have possessed different interests and skills; they have consequently perceived their roles in various ways.”²² In the New Zealand context, Geoffrey Palmer writes, “Each Chief Justice carries out the duties of the office in a distinctive way, and few leave it without making a distinctive mark on it”.²³ And so, while this is not a work of legal history, historical writing and other documents concerning the office since 1841 provide essential context.

New Zealand’s first CJ, William Martin, arrived in New Zealand on August 9, 1841.²⁴ He travelled out with William Swainson (the colony’s second Attorney-General) and Thomas Outhwaite (who would be the first Registrar of the Supreme Court).²⁵ During the voyage the three men prepared the ordinances and initial procedures for the new Court.²⁶ A few days before the Christmas of 1841 the Legislative Council passed the ordinance establishing the Supreme Court. The new Court would be “holden before one Judge, who shall be called the Chief Justice”, and to the Court there would “belong” a registrar.²⁷ Just over a year later, in the third week of February 1842, in a court house on Queen Street, Auckland, near the southern corner of Victoria Street West, CJ Martin opened the first sitting (a murder trial) of what we now recognise as the High Court of New Zealand.²⁸

Since those events, and counting current holders, New Zealand has had 16 Governors, 20 Governors-General,²⁹ and 38 Premiers or Prime Ministers.³⁰ Dame Sian Elias, who was appointed to the office in 1999 (having joined the High Court bench in 1995) is only the twelfth person to hold the office of CJ (brief details of the holders of the office to date are contained in the appendix). Dame Sian’s eleven predecessors were in office for an average of 13 years, with Sir Robert Stout holding the unlikely to be beaten record of 27 years as the longest serving, and his immediate successor, Sir Charles Skerrett, the shortest serving at only 3 years. As of 2013 Dame Sian has been in office 14 years, and, unless the current retirement age of 70 is changed again, may serve until 2019.³¹ If she does — by then reaching 20 years in the post — she will be the third longest serving CJ in the nation’s history, (behind Sir Robert Stout (27 years), and Sir James Prendergast (24 years)).³²

²² Peter G Fish “The Office of Chief Justice of the United States: Into the Federal Judiciary’s Bicentennial Decade” in *The Office of Chief Justice* (White Burkett Miller Center of Public Affairs, Charlottesville, 1984) at 15.

²³ Geoffrey Palmer “Retirement of Rt Hon Sir Ronald Davison, GBE, CMG” [1989] NZLJ 84.

²⁴ G P Barton “Martin, William” (30 October 2012) Te Ara: the Encyclopedia of New Zealand <www.teara.govt.nz>.

²⁵ Barton, above n 24.

²⁶ Barton, above n 24.

²⁷ Ordinance for establishing a Supreme Court 1841 5 Vict 1, cls 8 and 10.

²⁸ “The Supreme Court and the Court of Appeal: Their First Beginnings” [1938] NZLJ 233 at 234.

²⁹ The Earl of Liverpool is counted under both heads, having served as Governor (1912–1917) and as Governor-General (1917–1920); prior to becoming Governor in 1841, Captain William Hobson had served as Lieutenant Governor during the Dependency during 1840–1841. Information from: “Former Governors-General” The Governor-General <www.gg.govt.nz>.

³⁰ Ministry for Culture and Heritage “Biographies — Premiers and Prime Ministers” (20 December 2012) New Zealand History Online <www.nzhistory.net.nz>.

³¹ The Judicature Amendment Act 2007 raised the retirement age from 68 to 70 years. In the UK there has been pressure to raise the age from 70 to 75.

³² A *NZ Herald* profile of Elias CJ in 2005 reported that Dame Sian had said on her appointment to the office that she “saw it as a 10-year position”. See “Elias — top judge and judicial activist” *The New Zealand Herald* (online ed, Auckland, 28 March 2005).

The office in general has always been understood as having a broad remit— one likely to bring its holder into contention with members of the legislature. On the appointment of Sir Richard Wild in 1966, the *NZ Law Journal* wrote:³³

The Chief Justice controls the administration of the superior Courts of this country, and in a broad sense, his standards become the standards of those Courts. He is responsible for the harmonious working of the judicial machine and the allocation of work. ... Both as Judge and Administrator [of the Government in the Governor General's absence] he must be completely detached from and above all political polemics. He, and the other Judges, too, may, and on occasions must, express views critical of the activities of politicians.”

The 1978 Royal Commission on the Courts described the office this way:

Traditionally, the Chief Justice has also been spokesman for the judiciary in relation to the Government; the person regarded throughout the country as head of the judiciary, able to keep in close touch with the public and the legal profession because of his wide-ranging duties both as an administrator and as a judge of first instance, especially in major criminal trials.³⁴

To fulfil the role of CJ the 1978 Commission listed these necessary qualities later in its report:

... a Chief Justice must have both legal and administrative ability, coupled with qualities of leadership. He must also have close knowledge of and contact with, the New Zealand community and the legal profession.³⁵

As noted above, between 1958 and 2003 there was a lack of clarity as to who, within New Zealand, was the nation's top jurist: the CJ? Or the President of the Court of Appeal? Lord Cooke of Thorndon described the relationship between CJ and President as “an awkward one calling for tact by the holders of the respective offices”.³⁶ At times the relationship ran smoothly; at others it descended into tension and pettiness. Speaking about the poor conditions the Court of Appeal worked under until the current building was opened in 1980, Sir Thaddeus McCarthy said that on becoming President in 1973 he:³⁷

... immediately took up issue with the Chief Justice and the Department. The Chief Justice was not prepared to help. Relations between the Court of Appeal and him (Wild CJ) had become somewhat strained. That did not help.

³³ “The New Chief Justice” [1966] NZLJ 79 at 80.

³⁴ Royal Commission on the Courts *Report of Royal Commission on the Courts, 1978* (Government Printer, Wellington, 1978) at [303].

³⁵ At [672]. See also Law Commission *The Structure of the Courts* (NZLC R7, 1989) at [541].

³⁶ Interview of Sir Robin Cooke by Peter Spiller (28 May 1993) quoted in Peter Spiller “Judges at work: The New Zealand Court of Appeal (1958–1976)” (1993) *Waikato L Rev* 79 at 92. See also Peter Spiller, Jeremy Finn and Richard Boast *A New Zealand Legal History* (1st ed, Brookers, Wellington, 1995) at 222.

³⁷ Thaddeus McCarthy “Memorandum on Circumstances Surrounding the Erection of the Court of Appeal Building in Aitken Street” in Rick Bigwood (ed) *The Permanent New Zealand Court of Appeal: Essays on the First 50 Years* (Hart Publishing, Oxford, 2009) 355 at 356.

Chief Justice Wild regarded the Court of Appeal judges as coming within his beck and bailiwick. According to Peter Spiller the tension was a factor in McCarthy P's decision to retire early.³⁸

Sir Richard's successor, Sir Ronald Davidson was more emollient towards the Court of Appeal: "He believed that the Court of Appeal should not have two 'bosses', and therefore sat only when needed and otherwise left the Court to develop its own policies under its President."³⁹ And in turn, his successor, Sir Thomas Eichelbaum took the same approach; though with the advent of the Criminal Appeal Division in 1991 Sir Thomas sat at the appellate level rather more often as the practice developed that the CJ would lead at that level on criminal matters.⁴⁰ By 1994 the Appeal Division, sitting in Auckland, Christchurch, and Dunedin (in addition to Wellington), was hearing 75 per cent of criminal appeals, with the CJ frequently presiding.⁴¹

Ending Privy Council appeals and creating a New Zealand Supreme Court required addressing the CJ/President issue. The *Report of the Advisory Group, Replacing the Privy Council, a New Supreme Court* in 2002 concluded that the CJ should sit in the new Supreme Court and "continue to have the responsibilities of upholding judicial independence, managing the relationship between the judicial and other branches of government and providing leadership".⁴² The Justice and Electoral Select Committee which undertook detailed scrutiny of the Supreme Court Bill implicitly endorsed that conclusion.⁴³ The Supreme Court Act 2003 thus brought clarity by placing the CJ in the Supreme Court and declaring the CJ head of the New Zealand judiciary.⁴⁴ To relieve the CJ of her management responsibilities in relation to the High Court bench, the Act also created a new position of Chief Judge of the High Court.⁴⁵

I turn then to my first aim: mapping the extent of the office as it exists today. I divide the range of functions of the office of CJ into three areas: CJ as Supreme Court judge; CJ as judicial branch leader; and CJ as constitutional guardian and statesperson. We might think of the three sets of roles as three concentric circles, the outline of each radiating out from 85 Lambton Quay.

A *The Chief Justice as Supreme Court judge*

Before the 2003 reform CJs mainly sat in the High Court (with, as noted, occasional responsibility for appellate work); with the advent of the Supreme Court they only sit in that court. And when the Supreme Court sits they take the central seat. The CJ is the presiding judge with "seniority over the other Judges of the Supreme Court";⁴⁶ in her absence the next most senior judge stands in.⁴⁷ Acting Judges may only sit in the Supreme Court with her authorisation.⁴⁸ The Chief chairs conferences between the justices where they discuss cases; she also oversees the management of the Court (assisted by the Court's Registrar and other administrative staff). Emphasising in management matters the collegial nature of the Court, all its

³⁸ Spiller, above n 36, at 93 and 95.

³⁹ Spiller, Finn and Boast, above n 36, at 222 citing Davison CJ.

⁴⁰ "Chief Justice: Interview with Mr Justice Eichelbaum on 12 January 1989" [1989] NZLJ 47 at 56.

⁴¹ Spiller, Finn and Boast, above n 36, at 224.

⁴² *Report of the Advisory Group — Replacing the Privy Council: A New Supreme Court* (Office of the Attorney-General, Wellington, 2002) at [95]–[105]; available at <www.crownlaw.govt.nz>. See also discussion in Law Commission, above n 35, at [542] and [544].

⁴³ *Report of the Justice and Electoral Select Committee on the Supreme Court Bill* (NZ Parliament, 2003), see discussion at pp33-35.

⁴⁴ Section 18.

⁴⁵ Judicature Act 1908, s 4B.

⁴⁶ Supreme Court Act 2003, s 18(1).

⁴⁷ Sections 29 and 19.

⁴⁸ Section 23.

judges sit on the Management Committee where they are also joined by Ministry of Justice representatives. That committee “routinely considers a Registrar’s report and an update report from the Ministry on projects affecting the Court”.⁴⁹ The Registrar of the New Zealand Supreme Court, like similar officers throughout the system, is appointed under the State Services Act 1988. While there are policies in place intended to protect judicial independence, and while on a day to day basis he or she works for the Court, the Registrar is ultimately responsible to the Minister.⁵⁰ This is a significant systemic weakness.⁵¹ In contrast, the Chief Executive of the United Kingdom Supreme Court — a member of the Court’s leadership trio — is the choice of the Court’s President, and all administrative staff at the Court (judicial assistants excepted — they report to their assigned judge) are responsible to the Chief Executive and not the Minister of the Justice.⁵²

The role of presiding judge also brings with it the *potential* for a subtle, but potentially significant, degree of additional sway over the court’s work and jurisprudential direction. In his study of the Law Lords, Alan Paterson records Lord Denning’s view of the presider: “he conducts the argument”.⁵³ He is the “individual with potentially the greatest influence on the oral exchange” able to “exercise considerable influence over the course of the argument to be presented in court.” I do not propose to examine in-court jurisprudential leadership (“thought leadership” as one English appellate judge described it to me) within the confines of this article.⁵⁴ It is a complex issue requiring more detailed treatment than is possible here. First, in the New Zealand context there is the complication that between 1958 and 2003 the Presidents of the Court of Appeal, given that they sat far more frequently at the appellate level, were better placed to exercise jurisprudential leadership. Second, jurisprudential leadership is something any judge on a multi-member court may aspire too, either generally, or in relation to particular topics. It is not the exclusive purview of the lead judge by virtue of their office. Third, it may also be something which members of the court explicitly allow to move around depending on the nature of the case before the court.⁵⁵ Fourth, how (and perhaps even more importantly, when) does one measure it? Simply calculating the percentage of times the CJ leads the majority, as opposed to being in the minority, only tells us about the balance of judicial thought on the Court at discrete moments in time. Such calculations also tend to assume that a judge’s jurisprudential influence can usefully be judged in quantitative terms. Even one seminal judgment could come to be far more significant than a series of lesser remembered wins. Or it could be that a judge’s dissents come to be the lasting influence on future cases.⁵⁶ Certainly a high number of judgments in the majority must tell us *something*, but *quality* and *longevity* also need to be considered. Before even getting to the task of assessment then, measuring in-court jurisprudential leadership poses challenging, potentially article-length, questions of methodological concern.

⁴⁹ See Courts of New Zealand “Judicial Committees” <www.courtsofnz.govt.nz>.

⁵⁰ Supreme Court Act 2003, s 36.

⁵¹ I emphasise this is a criticism of the system, not in any way its current administrative staff.

⁵² See Richard Cornes “Gains (and Dangers of Losses) in Translation — The Leadership Function in the United Kingdom’s Supreme Court, Parameters and Prospects” [2011] PL 509, especially at 516–518. The position of Chief Executive was placed directly in the hands of the President of the Court by s 29(1) of the Crimes and Courts Act 2013 (UK); previously it was an appointment of the Minister of Justice in consultation with the Court’s President.

⁵³ Alan Paterson *The Law Lords* (MacMillan, London, 1982) at 66.

⁵⁴ Lady Justice Arden, Court of Appeal England & Wales, in conversation.

⁵⁵ Lord Hope, formerly Deputy President of the United Kingdom Supreme Court, and one of its Scottish jurisdiction members has said “in appeals which raise issues of Scots Law ... Lord Bingham used to say ... if the two Scots [are] agreed, who [am I] to stand in their way”: Lord Hope “Taking the case to London — maybe it’s not over after all” (Annual Lecture 2010, Edinburgh Centre for Commercial Law, Edinburgh, 12 March 2010).

⁵⁶ One famous example may suffice: Lord Atkin in *Liversidge v Anderson* [1942] AC 206 (HL).

B *The Chief Justice as judicial branch leader*

The second cluster of functions concerns the CJ's management and leadership role in relation to the judicial function beyond the Supreme Court. There are seven facets to the role.

(1) Judicial system management and interface with the Ministry of Justice

Since the 2003 reform Chief Justices no longer have day-to-day responsibilities for the management of the High Court. That task rests with the Chief High Court Judge who "is responsible to the Chief Justice for ensuring the orderly and prompt conduct of the High Court's business".⁵⁷ The Law Commission's 2012 report on a new Courts Act recommended that a similar formal line of responsibility be noted in statute in respect of the role of the President of the Court of Appeal.⁵⁸ The Commission also noted that, as "the Head of the Judiciary, the Chief Justice would have the ability to engage with the Chief District Court Judge",⁵⁹ to whom, in turn, the Principal Judges of that Court would be responsible.

In relation to the interface with the Ministry of Justice, the system of judicial committees which assist in running the courts is described on the Courts of New Zealand website.⁶⁰ The CJ will participate in Heads of Bench meetings which "are an important forum for developing positions from which the judiciary engages with the Executive".⁶¹ Heads of Bench discussions feed into the Courts Executive Committee which oversees the administration of courts throughout the country, and reports to the Minister for Courts (one of the three "justice sector" ministers; the Minister of Justice and Attorney-General being the other two). To assist the CJ in all her tasks, the office has an attachment of five staff in addition to those allocated to other members of the Supreme Court: a judicial administration officer, financial administrator, personal officer, communications advisor, two law clerks (the other judges have one each), and an associate (all judges have one associate providing general secretarial support).⁶² These arrangements have been under review during 2013. At the time of writing that review had got to the point of contemplating a new judicial office for the higher courts, which would cover the CJ, President of the Court of Appeal and Chief High Court Judge.

(2) Judicial system design

Since 1841, CJs have played a role in influencing design of New Zealand's court system. A few select examples illustrate the point. As noted above, the first CJ played a role in drafting the ordinance establishing what we now know as the High Court. Sir James Prendergast, the third holder of the office (1875–1899), oversaw significant reform of the judicial system contained in the Supreme Court Act and Court of Appeal Act, both of 1882.⁶³ Sir Robert Stout's period in office encompassed the consolidation of the earlier statutes governing the courts into the Judicature Act 1908 which,⁶⁴ pending consideration of

⁵⁷ Judicature Act, ss 4A and 4B.

⁵⁸ See recommendation 35 of Law Commission *Review of the Judicature Act 1908: Towards a New Courts Act* (NZLC R126, 2012) at 195.

⁵⁹ At [8.7].

⁶⁰ Courts of New Zealand, above n 49.

⁶¹ Courts of New Zealand, above n 49.

⁶² The Chief District Court Judge has a similar office complement and interacts with the higher courts administration via Heads of Bench meetings.

⁶³ Spiller, Finn and Boast, above n 36, at 194

⁶⁴ Dunn and Richardson record he carried out "monumental work in connection with the consolidation of the statutes of NZ in 1908": Waldo Dunn and Ivor Richardson *Sir Robert Stout: A Biography* (A H & A W Reed, Wellington, 1961) at 167.

the Law Commission's 2012 report on a new Courts Bill,⁶⁵ remains the central statute of the superior courts. Sir Michael Myers promoted the expansion of an appellate criminal jurisdiction with the Criminal Appeal Act 1945.⁶⁶ Sir Michael's successor, Sir Humphrey O'Leary, is recalled under this head for impeding reform rather than furthering it; however, the power to stop reform is just as significant an indicator of the sway of a CJ's views. Of him, Spiller, Finn and Boast write: "He was an innately conservative man, and it was partly his strong opposition to the proposals presented for the establishment of a Court of Appeal that caused this to be postponed."⁶⁷ In contrast the next CJ, Sir Humphrey Barrowclough, is credited with leading the bench to finally support the creation, in 1958, of a permanent Court of Appeal.⁶⁸

Chief Justice Wild supported the establishment in 1976 of the Beattie Royal Commission on the Courts which would lead, after its report in 1978, to a substantial revision of New Zealand's court structure (including the transformation of magistrates' courts into District Courts, and the Supreme Court into the High Court).⁶⁹ Peter Spiller records that the Commission's task "accorded with Wild CJ's views".⁷⁰ Chief Justice Eichelbaum oversaw innovations in case management in the High Court, the 1994 pilot project to televise courts, and the abolition of wigs in 1995.⁷¹ Sir Thomas was also an articulate advocate of increasing the courts' administrative autonomy, reasoning that doing so was necessary to better secure judicial independence in New Zealand.⁷² What he described as the half-way house of a Department for Courts separate from the Ministry of Justice, came into being during his term of office in 1995. His implicit characterisation of that reform as insufficient to truly insulate court administration from the wider priorities and needs of the justice sector was shown to be prescient when Trevor Mallard, then Minister for State Services announced, in 2003, that the Department for Courts would be merged back into the Ministry of Justice. This reform was announced with no serious prior consultation with the judiciary.⁷³

(3) Coordinating judicial input on bills affecting the courts and judiciary

We have seen in the previous section that CJs have played a pro-active macro-level role in court system design. Another aspect of the office is to collate and present the views of the judiciary on legislative proposals which affect the operation of the courts and the judiciary. This is frequently done in writing, but also occasionally by appearing before parliamentary committees in person. Under this head the office holder acts in a notably collegial context, as the current CJ puts it: "[t]he Chief Justice does have an

⁶⁵ Law Commission, above n 58. See also the Government's response: Office of the Minister of Justice "Government response to the Law Commission's report: Review of the Judicature Act 1908: towards a new Courts Act" (April 2013) Ministry of Justice <www.justice.govt.nz>.

⁶⁶ Spiller, Finn and Boast, above n 36, at 198.

⁶⁷ At 199.

⁶⁸ Peter Spiller *New Zealand Court of Appeal 1958–1996: A History* (Brookers, Wellington, 2002) at 3. The path to creation of the permanent Court (starting in 1907) is also recounted by Ivor Richardson in "The Permanent Court of Appeal: Surveying the 50 Years" in Rick Bigwood (ed) *The Permanent Court of Appeal* (Hart Publishing, Oxford, 2009) 297 at 298–301.

⁶⁹ Spiller, Finn and Boast, above n 36, at 203.

⁷⁰ Peter Spiller "The Courts and the Judiciary" in Peter Spiller, Jeremy Finn and Richard Boast (eds) *A New Zealand Legal History* (2nd ed, Brookers, Wellington, 2001) 187 at 216, n 190.

⁷¹ Spiller, Finn and Boast, above n 36, at 206.

⁷² Eichelbaum, above n 14.

⁷³ See Trevor Mallard, State Services Minister "Dept for Courts and Ministry of Justice to merge" (press release, 16 May 2003). And see the closure report: Belinda Clark, Chief Executive of the Department of Courts *Department for Courts Closure Report* (Ministry of Justice, 2003).

obligation to consult the judiciary and to put up the views, including all the shades of view”.⁷⁴ Some select examples, made available by the clerk of the Justice and Electoral Committee of Parliament, include: a two page submission to the Justice and Electoral Committee in 2009 on the Judicial Matters Bill 2008 (which amended the Judicial Conduct Commissioner Act 2004);⁷⁵ submissions to the same Committee on the Search and Surveillance Bill in 2009 and 2010;⁷⁶ a letter from the CJ, again to the Justice and Electoral Committee, concerning the Criminal Procedure Bill 2011 which opens noting that the Chief High Court Judge, President of the Court of Appeal and CJ had “been in correspondence with the Law Commission and the Ministry of Justice for some time concerning issues arising in the preparation” of the Bill;⁷⁷ and finally a twelve page submission on the now defunct Pecuniary Interests of Judges Bill 2010.⁷⁸ The level of engagement is notable, and represents a side of senior judicial duties which likely few members of the profession, let alone members of the public, are aware of.

(4) Rules and court procedures

At first glance the rules of court may be thought to be of subsidiary importance, not entailing an ability to affect substantive policy change in the judicial branch. That would be a mistaken view. Influencing the way courts operate, the way cases will be dealt with, has of course substantive effects on litigants. The main forum for rule-making is the Rules Committee, though scattered through legislation are other provisions that have a bearing on court operations and hearings.⁷⁹ A review of the Rules Committee’s minutes from 2002 to 2013 reveals it deals with rather more than might be expected from its title: it also serves as a policy development body for courts from the District Court up.⁸⁰

The Committee comprises at least eleven members, six of whom are judges (the CJ, the Chief High Court Judge, two High Court judges appointed by the CJ, the Chief District Court Judge, and another District Court judge recommended by the Chief District Court Judge), while from the executive there is the Attorney-General (of the three justice sector ministers the one with the most significant expectation to be able to put his or her partisan concerns to one side) and Solicitor-General, and finally from the profession two lawyers nominated by the Law Society (and approved by the CJ).⁸¹ Additional persons

⁷⁴ *Minutes of Evidence*, above n 11, at Q 1063.

⁷⁵ Letter from Elias CJ to the Clerk of the Clerk of the Justice and Electoral Committee (24 February 2009). Copy on file with the author.

⁷⁶ Letter from Acting CJ Blanchard to the Clerk of the Justice and Electoral Committee (3 September 2010). Copy on file with the author.

⁷⁷ Letter from Elias CJ to the Clerk of the Justice and Law Reform Select Committee (24 February 2011). Copy on file with the author.

⁷⁸ Letter, and submission, from Acting CJ McGrath to the Clerk of the Justice and Law Reform Select Committee (30 August 2012). Copy on file with the author.

⁷⁹ For example, the Judicature Act 1908, ss 51C, 51E and 51F (which concern conferral of jurisdiction on Registrars and Deputy Registrars — indicating their position as quasi-judicial officers, not simply administrative personnel); Criminal Records (Clean Slate) Act 2004, s 22; and Evidence Act 2006, s 30(6) (power to issue guidance as to when evidence improperly obtained may be admitted).

⁸⁰ The minutes are available at <www.courtsofnz.govt.nz>. A sense of the range of issues dealt with can be seen in for example, the minutes of the Committee’s meeting on 11 February 2013 where, *inter alia*, the concept of proportional dispute resolution was raised, at item 4; and a broad discussion of case management and hearing procedures, at item 10.

⁸¹ Judicature Act 1908, s 51B(1). A list of current members is available at <www.courtsofnz.govt.nz>, but Committee minutes show that non-members, such as Parliamentary Counsel staff, policy and operational representatives from the Ministry of Justice, and other judges often attend.

may be appointed by the CJ for special purposes to serve at her pleasure.⁸² Rules may be made by the Governor-General in Council with the concurrence of the CJ and any two or more members of the Rules Committee, at least one of whom must be a judge.⁸³ A similar composition also serves the District Courts in respect of rule making.⁸⁴

That the judiciary though, with the CJ as head, has a lead role on policy making concerning court procedures is apparent in more than just the Judicature Act provisions and the practical effect of the Rules Committee's work. Regulations made under the Criminal Procedure Act 2011 may also only be made with the concurrence of the CJ and Chief District Court Judge.⁸⁵ Three acts contain specific additional powers for the CJ in relation to proceedings in which a court may be required to receive sensitive evidence. Under the Passport Act 1992, passports or travel documents may be denied or revoked.⁸⁶ Where proceedings concerning those provisions involve classified security information a court may be required to deal with the matter *in camera*. The Act contains a back-up provision providing the CJ *and* Attorney-General to put in place "general practices and procedures" to ensure that the provisions requiring protection of classified security information are implemented (for example, dealing with how classified information is provided to the court).⁸⁷ Equivalent provisions in the Terrorism Suppression Act 2002 and the Immigration Act 2009 serve a similar purpose.⁸⁸ Also, under the United Nations Convention on the Law of the Seas Act 1996, the CJ must concur in the making of any rules concerning the enforcement of decisions made under the Convention.⁸⁹ Finally, the High Court is also available to Tokelau; the CJ may direct it sit for Tokelauan purposes either in Tokelau or elsewhere.⁹⁰

(5) Judicial appointments (including temporary appointments)

In addition to the CJ's role in relation to acting judges in the Supreme Court, she has a number of other functions concerning the appointment and placement of judges. In relation to appointments there has been a practice (not though one assiduously adhered to) of consulting the CJ on appointments to the High Court and above. The Law Commission in its 2012 report on a consolidated Courts Bill recommended that the consultation requirement should be set out in the new statute. That view has been rejected by the current Minister of Justice.⁹¹

In relation to the placement and use of superior court judges, temporary or acting judges of the High Court may only be appointed if the CJ *and* Chief High Court Judge certify the appointment is "necessary

⁸² Judicature Act, s 51B(2).

⁸³ Section 51C.

⁸⁴ District Courts Act 1947, s 122(1) where jurisdiction is conferred by the District Courts Act 1947. See s 122(1A) where another Act confers jurisdiction. See also discussion at <http://www.courtsofnz.govt.nz/about/system/rules_committee/role_powers/#district>.

⁸⁵ Criminal Procedure Act 2011, s 387(5).

⁸⁶ Passport Act 1992, ss 29AA, 29AB and associated sections referenced therein.

⁸⁷ Section 29AC.

⁸⁸ Terrorism Suppression Act 2002, s 40. Immigration Act 2009, s 260.

⁸⁹ United Nations Convention on the Law of the Sea Act 1996, s 16.

⁹⁰ Tokelau Amendment Act 1986, s 3(3).

⁹¹ See recommendation 17 of Law Commission, above n 58, at appendix 5. The Minister responded to the Commission's proposal stating: "I do not support placing relatively detailed appointment criteria and consultation in primary legislation, as proposed by the Commission. Instead, after consultation with the Attorney-General, I propose a legislative requirement for the Attorney-General to produce public guidelines or protocols outlining the process to be followed when he or she solicits and advances judicial appointment recommendations to the Governor-General", above n 65, at [31].

for the due conduct of the court's business" (a similar provision applies to temporary associate judges);⁹² a supervisory judge (and assistants to that person) for the commercial list is named by the CJ after consultation with the Chief High Court Judge;⁹³ the CJ is empowered to make arrangements with the CJ of the Federal Court of Australia trans-Tasman cooperation in certain matters under Part 1A of the Judicature Act 1908;⁹⁴ and the CJ must certify High Court judges to sit on the Court of Appeal "except where the work of the High Court renders it impracticable" (both the President of the Court of Appeal and Chief High Court judge must be consulted, the latter of whom must also concur in the assignment).⁹⁵ Finally, the CJ, or her nominee must be consulted in relation to rules made concerning the operation of juries.⁹⁶

(6) The profession and bench: development, appointments and discipline

Asked "Would you think that the office carries with it some degree of responsibility for being the liaison between the Judiciary as a whole and the organised profession?" Sir Thomas Eichelbaum in 1989 responded: "That's exactly the way I would see it."⁹⁷ In a range of ways CJs have been a fulcrum between the profession and the bench, with an auxiliary role, alongside others (the Presidents of the Law and Bar Societies, for example) as leaders of the legal profession (practitioners *and* judges). The removal of the CJ to the Supreme Court and introduction of the post of Chief High Court Judge did have the potential to reduce the CJ's abilities here. That risk has been substantially addressed by the CJ regularly speaking out of court, and seeking out ways to engage with the profession and wider community (as discussed below in relation to the office's constitutional guardian and statesperson role).

The CJ nominates two judges to serve on the New Zealand Council of Legal Education, which amongst its other roles, sets the requirements for qualifying law degrees (a pre-requisite for admission to the bar in New Zealand).⁹⁸ If the CJ chooses to take one of the judicial seats she also becomes the Council's Chair.⁹⁹ The CJ and Attorney-General have the power to issue guidelines as to the necessary qualifications and experience to become a QC, and the process by which QCs are appointed. Appointment as a QC requires the CJ's concurrence with the Attorney-General, implicitly giving the CJ some influence over who might go on to be appointed to the bench;¹⁰⁰ and 16 of the 37 High Court judges listed on the Courts of New Zealand website were QCs (or SCs) before appointment to the bench.¹⁰¹ The CJ's statutory role in the appointment of QCs contrasts with the current lack of a formal consultation requirement in respect of appointments to the High Court, Court of Appeal, and Supreme Court.

Turning to the CJ's role in relation to judicial discipline we have two recent examples. One occurred prior to the reform introduced by the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, and the other after. The first was the case of Justice Robert Fisher. In early 2001 it came to light

⁹² Judicature Act, ss 11, 11A, 11B and 26H(6)–26H(7).

⁹³ Sections 24C(1) and 24C(2).

⁹⁴ Section 56P.

⁹⁵ Sections 58A–58C.

⁹⁶ Juries Act 1981, s 35(2)(a).

⁹⁷ "Chief Justice: Interview with Mr Justice Eichelbaum on 12 January 1989", above n 40, at 56.

⁹⁸ Lawyers and Conveyancers Act 2006, s 282 sets out the Council's membership. See <www.nzcle.org.nz> for the current make-up.

⁹⁹ Lawyers and Conveyancers Act, s 286(2).

¹⁰⁰ Section 119 and Lawyers and Conveyancers Act (Lawyers: Queen's Counsel) Regulations 2012, cls 4 and 5. For the guidelines see Crown Law Office "Queen's Counsel — Guidelines for Candidates" (1 February 2013) <www.crownlaw.govt.nz>.

¹⁰¹ Courts of New Zealand "The Judges of the High Court" <www.courtsofnz.govt.nz>.

that the judge had accessed pornographic websites from a computer provided to him by the Department for Courts. The matter had been dealt with by the CJ, who had not at the time informed the Attorney-General. There had been no illegality, though it was reported that the judge had apologised to the CJ for what she described as a “lapse”.¹⁰² Television New Zealand reported that “when routine court checks on staff [in the Department for Courts, *including judges*] picked [up Fisher’s porn viewing] the chief justice was told.”¹⁰³ The Fisher revelation prompted a further, “scan of court computers”, which “found that three more judges [had] logged onto sex sites.”¹⁰⁴ The embarrassment of the conduct involved should not obscure the remarkable fact that agents of the Crown, a frequent litigant, were routinely monitoring IT equipment used by judicial officers and staff working directly for them.

Without referencing the incident, Dame Sian alluded to this concern before the House of Lords in 2004.¹⁰⁵

... I think we are at a position now in New Zealand where things are almost intolerable in terms of our direct judicial support and that it is time for us at least to take responsibility for our secretarial arrangements, our IT arrangements, the security of our officers and matters such as that because at the moment we are totally dependent on a Ministry of Justice.

In the absence of criminal behaviour the constitutionally proper approach was clearly the path taken by Elias CJ. As to why she had not informed the Attorney-General, she is reported as saying: “I formed the view that it wasn’t a matter that needed to be relayed to her because it had been dealt with”.¹⁰⁶ After 15 years on the bench, Justice Fisher retired in 2004 to practise as an arbitrator.¹⁰⁷

Judicial discipline in New Zealand is now for the most part dealt with under the Judicial Conduct Commissioner and Judicial Conduct Act 2004.¹⁰⁸ The position of Judicial Conduct Commissioner has obvious significance for the preservation of confidence in the judiciary and protection of judicial independence (by ensuring appropriate investigation only of complaints warranting investigation). The CJ must be consulted by the Attorney-General on the choice of Commissioner and Deputy Commissioner.¹⁰⁹ After an initial investigation, complaints of sufficient seriousness (that is, complaints which if proven could justify removal of a judge from office) may give rise to a recommendation by the Commissioner to the Attorney-General to set up a judicial conduct panel.¹¹⁰ The Attorney-General must consult the CJ on the membership of any panel (though *not* as to whether a panel will be formed).¹¹¹ Complaints of lesser seriousness against a member of the Supreme Court would be referred to the CJ.¹¹²

¹⁰² Vernon Small, “Porn inquiry clears judge” *The New Zealand Herald* (online ed, Auckland, 20 February 2002).

¹⁰³ Television New Zealand “Top judge knew of porn viewing” (18 February 2002) <www.tvnz.co.nz>.

¹⁰⁴ Vernon Small “Four judges logged on to sex sites” *The New Zealand Herald* (online ed, Auckland, 19 February 2002). See also “Summary of reports to the AG etc 22/2/2002” (obtained through requests under the Official Information Act 1982). Copy on file with the author.

¹⁰⁵ *Minutes of Evidence*, above n 11, at Q1034.

¹⁰⁶ Television New Zealand, above n 103.

¹⁰⁷ See <www.robertfisher.co.nz>.

¹⁰⁸ See Judicial Conduct Commissioner and Judicial Conduct Committee Act 2004 and Office of the Judicial Conduct Commissioner <www.jcc.govt.nz>.

¹⁰⁹ Judicial Conduct Commissioner and Judicial Conduct Committee Act, ss 7(3) and 8A(3).

¹¹⁰ Section 18.

¹¹¹ Section 21(2). If the complaint concerned the CJ herself the consultation is with the next most senior judge of the Court, s 21(3).

¹¹² Section 17.

The Act was tested at the very highest level when misconduct complaints were laid against then Justice William Wilson of the Supreme Court in 2008 and 2009. One of the complainants was a former acting judge on the Court: Sir Edmund Thomas.¹¹³ As the CJ had recused herself, the functions under the Act of her office were carried out by the next most senior judge on the Court, Justice Peter Blanchard. And as the matter was deemed serious enough to warrant recommendation of a judicial conduct panel investigation, Justice Blanchard's formal involvement (aside from presiding in the crucial *Saxmere 1* and *Saxmere 2* cases)¹¹⁴ will have been restricted to being consulted on the membership of the panel.¹¹⁵ We may only speculate as to the nature of the CJ, and Acting CJ's actions behind the scenes to protect the integrity of the Court, and to provide appropriate support to their colleague.

(7) Miscellaneous administrative roles

The CJ nominates a judge to the New Zealand Council of Law Reporting (which is responsible for the *New Zealand Law Reports*).¹¹⁶ One useful innovation a CJ could promote, via their nominee, would be a separate set of reports of Supreme Court decisions (both for decisions to refuse leave applications and substantive decisions). This would allow wider dissemination of the New Zealand Supreme Court's decisions; such a series would be taken up by top court libraries elsewhere. Finally, if the Sentencing Council Act 2007 were given effect to the CJ would appoint four judges as part of the ten member Sentencing Council.¹¹⁷

C *The Chief Justice as constitutional guardian & statesperson*

Finally we come to the heading under which CJs enjoy the most extensive and personal scope of operation. Under the previous two heads CJs operate within relatively significant levels of collegial constraint. The constitutional guardian and statesperson role offers the incumbent, accentuated by the 2003 reform, the most personal latitude for leadership on both the national and international stage. The constitutional guardian and statesperson role requires, inter alia, that the holder of the office speak publically not only on matters to do with the judiciary, but also more widely. Those elected to Parliament speak for New Zealanders' three yearly, majoritarian passions. One responsibility of the CJ is to articulate the interests of our longer term constitutional selves — the people we like to (or at least should) imagine

¹¹³ See: Judicial Conduct Commissioner *Decision of the Judicial Conduct Commissioner as to Three Complaints Concerning Justice Wilson* (7 May 2010), available at <www.jcc.govt.nz>.

¹¹⁴ *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35 [*Saxmere No 1*]; and *Saxmere Co Ltd v Wool Board Disestablishment Company Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 [*Saxmere No 2*].

¹¹⁵ After Justice Wilson's only partially successful challenge to the decisions to recommend and establish the panel before a Full Court of the High Court (*Wilson v Attorney-General* [2011] 1 NZLR 399) he resigned bringing the matter to an end (if not a conclusion). For a critique of the scheme's performance see B V Harris, "The Resignation of Wilson J: A Consequent Critique of the Operation of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004" [2011] NZ L Rev 625. And see also Deborah Coddington's post-resignation coverage "Exclusive: Justice Wilson speaks out" *The New Zealand Herald* (online ed, Auckland, 24 October 2010).

¹¹⁶ New Zealand Council of Law Reporting Act 1938, s 7.

¹¹⁷ The Council's role, purposes, and functions are set out in ss 7, 8 and 9 of the Sentencing Council Act 2007 respectively. The National Party has previously signalled it would scrap the Council: "National to scrap sentencing council" (2 August 2008) Stuff <www.stuff.co.nz>. While the Act has been brought into effect (see Sentencing Council Act 2007 Commencement Order 2007, which provides a commencement date of 1 November 2007) no further action appears to have been taken to either repeal it or give effect to its provisions.

ourselves to be in our “most elevated and critical hour”.¹¹⁸ There are four components to this role. The first two relatively formally outlined; the last two rather more open to moulding by CJs from time to time.

(1) Constitutional responsibilities

Like her counterpart in Canada (though not Australia, where the role is taken by the most senior state governor), in the absence or incapacity of the Governor-General, the CJ stands in as Administrator of the Government, empowered by Letters Patent to carry out all the functions of the office of Governor-General.¹¹⁹ This involves both ceremonial matters as well as presiding over the Executive Council. The distinction between her role as judge and administrator is even provided for by the keeping of an office in the Old Supreme Court building (attached to the modern Supreme Court building), separate from her judicial office. Also included under this sub-heading is the CJ’s role under the Electoral Act 1993, touching as it does on a matter of constitutional significance: the integrity of the electoral process. Under that Act the CJ chooses the three judges to hear electoral petitions.¹²⁰

(2) Trans-Tasman cooperation in judicial system governance

Sir Thomas Eichelbaum played a role in the New Zealand CJ becoming a participating member of the Australia, New Zealand Council of CJs.¹²¹ In addition to this connection with Australia, the CJ also has the functions outlined above concerning trans-Tasman judicial cooperation.¹²²

(3) Constitutional player and statesperson

Since the 1840s, CJs have played a role in relation to governance of the nation beyond the judicial sphere, providing a judicial perspective on matters beyond the operation of the judicial branch. In addition to setting up the Supreme Court, Sir William Martin “gave invaluable aid in preparing the first legislation of the colony”.¹²³ Of such importance was the CJ’s wider role in governance of the new colony that on Martin CJ’s resignation, Henry Sewell “told the Colonial Office that a willingness to analyse draft legislation was a more important qualification for the new CJ than the ability to decide cases”. The second

¹¹⁸ From Henry David Thoreau: “Every man is tasked to make his life, even in its details, worthy of the contemplation of his most elevated and critical hour.” Henry David Thoreau *A week on the Concord and Merrimack rivers; Walden, or Life in the Woods; The Maine woods; Cape Cod* (Viking Press, New York, 1985) at 394. On the concept of our “constitutional selves” see also Christopher Eisgruber *Constitutional Self-Government* (Harvard University Press, Cambridge (MA), 2001) especially at 49–52.

¹¹⁹ Letters Patent Constituting the Office of Governor-General of New Zealand 2006, cl 12. While acting as Administrator the Chief Justice (or where applicable next most senior judge acting) continues to receive their judicial salary: Governor-General Act 2010, s 15.

¹²⁰ Electoral Act 1993, s 235(1)–235(2).

¹²¹ See the warmth of Michael Kirby’s tribute to Eichelbaum CJ, in which Kirby touched on the growing trans-Tasman cooperation in judicial matters: Justice Michael Kirby “An Australian Tribute to Chief Justice Eichelbaum” (speech given at Government House, Wellington, 15 May, 1999) available at <www.hcourt.gov.au>.

¹²² See above n 94.

¹²³ Robin Cooke QC (ed) *Portrait of a Profession* (A H & A W Reed, Wellington, 1969) at 37.

CJ, George Arney (1857–1875), held a seat in the colony’s upper house, being appointed on his arrival.¹²⁴ Of his work in the Legislative Council, Ronald Jones writes:¹²⁵

In the Council he identified himself closely with the movement in the sixties for the fusion of law and equity, and it was largely as a result of his quiet but firm suasion that the Council in 1861 reaffirmed the resolution of 1856 whereby Judges held their commissions during the pleasure of Her Majesty or on an address from both Houses of Parliament.

In his examination of the politics of the colonial constitution between 1840 and 1858, Ward suggests that “[i]n the absence of representative institutions, courtrooms could become arenas for political disputes over the way the colonial constitution did, and ought to, operate.”¹²⁶ Establishing the institutions of the colony also engaged the judges in communicating their functions to the indigenous population. In the early 1840s the settler population was estimated to be 9,600, with Māori numbering approximately 60,000.¹²⁷ McKenzie notes that:¹²⁸

Martin considered that in the early years of the colony the court had a pivotal role in demonstrating that there were real benefits in administering justice in an orderly and public way by an impartial judge and a jury in a society governed by the rule of law, over self-help forms of justice otherwise available to a frontier society.

Chief Justice Martin framed his goals in part as a matter of persuading the “natives” of the benefit of the introduction of the new systems. He was, as McKenzie acknowledges, a mid-Victorian in outlook with assimilationist tendencies.¹²⁹

The first CJ was not *just* engaged in a colonisation project though, but also starting the cultivation of a distinctly New Zealand model of justice. The New Zealand historian Michael King might have encouraged us to view Martin and his early judicial colleagues as not just colonisers, but also as significant first pakeha (i.e., non- Māori New Zealanders) working to blend New Zealand’s newly imported British judicial traditions with South Pacific ones, and laying the basis for New Zealand’s “bi-cultural reality”.¹³⁰ The court system Martin helped create is the one which would go on to develop the distinct common law of New Zealand we acknowledge today.¹³¹ His efforts to explain the new system led to one of New Zealand’s first efforts at judicial public relations, with the preparation of a booklet explaining the new court system, in Maori and English.¹³² Sir William Martin was also an advocate, extra-curially, for Māori interests and respect for the Treaty of Waitangi, to the extent, according to

¹²⁴ Damen Ward “Civil Jurisdiction, Settler Politics, and the Colonial Constitution, Circa 1840–58” (2008) 39 VUWLR 497 at 502 and n 17.

¹²⁵ Ronald Jones “Arney, Sir George Alfred” (22 April 2009) Te Ara: the Encyclopedia of New Zealand <www.teara.govt.nz>.

¹²⁶ Ward, above n 124, at 498.

¹²⁷ “The Supreme Court and the Court of Appeal: Their First Beginnings” [1938] NZLJ 233 at 234, citing *Terry’s NZ* (1842) at 68.

¹²⁸ Peter McKenzie “New Zealand’s First Chief Justice: The Rule of Law and the Treaty” (2012) 43 VUWLR 207 at 215.

¹²⁹ *ibid.*.

¹³⁰ Michael King *The Penguin History of New Zealand* (Penguin, Auckland, 2003) at ch 30. See especially at 514–520.

¹³¹ See for example Sian Elias, Chief Justice of New Zealand “‘Sailing in a new direction’: the laws of England in New Zealand” (speech at Lincoln’s Inn, England, 12 November 2002), available at <www.courtsofnz.govt.nz>.

¹³² McKenzie, above n 128, at 219.

Barton, of “placing his judicial status in question” with his public criticism of Crown policy towards Māori.¹³³

Sir Robert Stout — the office’s fourth holder — was New Zealand’s first entirely home-grown CJ, having learnt the law in New Zealand and being first admitted to practice here. According to Dunn and Richardson (the latter a Court of Appeal judge from 1977 to 2002, and its President from 1996), he became “the embodiment of the law in its ideal form”.¹³⁴ When appointed in 1899 he was already a national figure — “almost legendary” — having previously been Attorney-General, Minister of Education, Premier, and contender for leadership of the Liberal Party.¹³⁵ While CJ, aside from being Administrator of the Government, he was Chairman of the Prisons Board from its inception in 1911 until his retirement in 1926. In 1907 and 1908, he served with Sir Apirana Ngata on the Native Lands and Native Land Tenure Commission (which became known as the Stout-Ngata Commission). Its work formed the basis for the Native Lands Act of 1909.¹³⁶

On matters of constitutional concern he was an early advocate of leaving the Privy Council:¹³⁷

The present system is often a denial of justice to many litigants on account of delay, cost, and the ignorance of the external Judges of what our laws have been, and are, and of want of acquaintance with our environment. The psychological effect of dependence on some external power for the performance of our highest duties as citizens of these new nations should also not be lost sight of.

Grant Morris calls Stout “one of the great New Zealanders”.¹³⁸ Similarly, David Hamer writes that Stout’s various achievements made him “one of the most influential architects of a democratic New Zealand”.¹³⁹ Sir John Findlay, writing on the CJ’s retirement, and in prose which now reads as rather ebullient, but which captures a sense of the fourth CJ’s impact, compared Sir Robert to an 11th century crusader, or one of the passengers of the Mayflower — the theme being of a man who came to New Zealand in search of “wider liberty”.¹⁴⁰

Sir Michael Myers (1929–1946), who was close to Prime Minister Fraser, staked out a role for the CJ as international statesperson. In 1936, he was the first New Zealand born judge to sit on the Judicial Committee of the Privy Council.¹⁴¹ He participated in the post-World War Two conferences which led to the creation of the United Nations and International Court of Justice,¹⁴² for which on his retirement he was thanked effusively by Prime Minister Fraser:¹⁴³

¹³³ Barton, above n 24. See also comment in McKenzie, above n 128, at 223.

¹³⁴ Dunn and Richardson, above n 64, at 173.

¹³⁵ At 173.

¹³⁶ At 174. Though according to Dunn and Richardson in the decade or so following the Act’s passage its policy of stopping Crown purchases of Māori land was apparently ignored.

¹³⁷ Sir Robert Stout “Appellate Tribunals for the Colonies” (1904) 2 CL Rev 3 at 13. See also discussion in Dunn and Richardson, above n 64, at 175–176.

¹³⁸ Grant Morris “‘Salmond’s Bench’: The New Zealand Supreme Court Judiciary 1920–1924” (2007) 38 VUWLR 813 at 819.

¹³⁹ David Hamer “Stout, Robert” (30 October 2012) Te Ara: the Encyclopedia of New Zealand <www.teara.govt.nz>.

¹⁴⁰ John Findlay “The Right Hon Sir Robert Stout PC, KCMG, DCL, LLD — an Appreciation” (1925) Butterworths Fortnightly Notes 248.

¹⁴¹ Peter Spiller “Myers, Michael” (30 October 2012) Te Ara: the Encyclopedia of New Zealand <www.teara.govt.nz>.

¹⁴² The International Committee of Jurists in Washington DC, which drafted the statute of the International Court of Justice, and the San Francisco Conference, which drafted the United Nations’ Charter, both in 1945: Spiller, above n 141. See also, Spiller, above n 70, at 211.

¹⁴³ “Rt Hon Sir Micheal Myers: The Prime Minister’s Tribute to His Services” [1946] NZLJ 202.

I feel impelled to refer also to the most valuable contribution made by you as the representative of New Zealand at the United Nations Committee of Jurists held in Washington during 1945, and subsequently at the San Francisco conference.

Sir Richard Wild (1966–1978), the first Solicitor General to take the office of CJ, is recalled, inter alia, for the constitutionally significant decision in *Fitzgerald v Muldoon*, a decision resting in part on provisions of the Bill of Rights 1688.¹⁴⁴ Spiller writes of him, “He was variously described as a larger-than-life figure, the thirteenth man in the Cabinet, the best trade union representative for the judges, and a man with the gift of keeping a finger on the pulse of legal business throughout the country.”¹⁴⁵

(4) Speaking out of Court — extra-curial jurisprudential leadership

As we have seen in a range of contexts, previous CJs have provided jurisprudential leadership by speaking outside their court. Chief Justice Elias has been active in the same vein, speaking to both domestic and international audiences. Since appointment a non-exhaustive list of topics she has spoken on (other than parliamentary sovereignty and sentencing policy, discussed in more detail below) includes: how law adapts to the needs of changing societies;¹⁴⁶ the fragile understanding of civics and judicial independence in New Zealand;¹⁴⁷ the evolution of distinct New Zealand legal principles;¹⁴⁸ judicial independence and administration;¹⁴⁹ women’s rights in international and domestic contexts;¹⁵⁰ gender issues in legal systems;¹⁵¹ the developing grounds of review in administrative law;¹⁵² and the rights of indigenous peoples.¹⁵³ My focus though is on two areas that have caused notable friction in New Zealand’s hyper-partisan, highly democratically efficient system. The first involved an exchange between Dame Sian and Michael Cullen on the nature of parliamentary sovereignty; the second involved an exchange between Dame Sian and Simon Power as Minister of Justice on sentencing policy.

First, in the spirit of explaining the constitution, the CJ has spoken a number of times, and from a range of perspectives, about the relationship between the branches of government, and in particular the respective limits of authority of the legislature and courts. In March 2003 she spoke on the theme of “sovereignty” at the Institute for Comparative and International Law at the University of Melbourne.¹⁵⁴ In

¹⁴⁴ *Fitzgerald v Muldoon* [1976] 2 NZLR 615 (SC).

¹⁴⁵ Spiller, above n 68, at 24.

¹⁴⁶ Sian Elias, Chief Justice of New Zealand “Address to the Australian Law Teachers’ Association Annual Conference” (Vanuatu, 3 July 2001) available at <www.courtsofnz.govt.nz>.

¹⁴⁷ Elias CJ, above n 10.

¹⁴⁸ Elias CJ, above n 131.

¹⁴⁹ Sian Elias, Chief Justice of New Zealand “‘The Next Revisit’: Judicial Independence 7 years on” (8th Neil Williamson Lecture, Christchurch, 30 July, 2004), available at <www.courtsofnz.govt.nz>.

¹⁵⁰ Sian Elias, Chief Justice of New Zealand “Vindicating the Rights of Women” (address to the South Pacific Judicial Conference, Vanuatu, 26 July 2005), available at <www.courtsofnz.govt.nz>.

¹⁵¹ Sian Elias, Chief Justice of New Zealand “Changing our World” (opening Address to the International Association of Women Judges’ Conference, Sydney, 4 May 2006); and “Address to the Australasian Women Lawyers’ Conference” (Melbourne, 13 June 2008); both available at <www.courtsofnz.govt.nz>.

¹⁵² Sian Elias, Chief Justice of New Zealand “Administrative Law for ‘Living People’” (Sir David Williams Lecture, Pembroke College, Cambridge, 16 May 2008), published in [2009] Cambridge Law Journal 47.

¹⁵³ Sian Elias, Chief Justice of New Zealand “First Peoples and Human Rights, a South Seas Perspective” (Ramo Lecture 2008, University of New Mexico School of Law, Albuquerque, 23 October 2008) available at <www.courtsofnz.govt.nz>.

¹⁵⁴ Sian Elias, Chief Justice of New Zealand “Another spin on the merry-go-round” (speech at the University of Melbourne, 19 March 2003), available at <www.courtsofnz.govt.nz>.

July 2003, she spoken on related matters in her FW Guest Memorial Lecture at Otago University,¹⁵⁵ which was followed by her December Robin Cooke Lecture, “Something Old, Something New: Constitutional Stirrings and the Supreme Court”.¹⁵⁶ Running through these pieces is a theme familiar to constitutional lawyers: the balance of responsibilities between legislatures and courts, with the specific New Zealand/United Kingdom leitmotif of the Diceyan notion of Parliamentary Sovereignty. The CJ’s take on that doctrine in the modern New Zealand context resonates with the writings of eminent jurists elsewhere, including the judicial and extra-judicial writings of the late Lord Cooke.¹⁵⁷ While acknowledging that “Parliament is supreme as legislator”, she also notes that it “legislates under the law of the constitution”, and that saying what the constitution *is*, is “ultimately for the courts. ... Parliamentary sovereignty is an inadequate theory of our constitutions. An untrammelled freedom of Parliament does not exist.”¹⁵⁸

The following May, in a special sitting of the House of Representatives on the 150th anniversary of the sitting of a New Zealand legislature, the Deputy Prime Minister (and soon to be Attorney-General), Michael Cullen, responded:¹⁵⁹

There is an increasing tendency to challenge the exercise of [Parliament’s] sovereignty. ... [The challenge] also comes from within the heart of New Zealand’s judiciary. Our own Chief Justice has put it in three key statements. Firstly, we have assumed the application of the doctrine of parliamentary sovereignty in New Zealand — why, is not clear. Secondly, whether there are limits to the lawmaking power of the New Zealand Parliament has not been authoritatively determined, which raises the interesting question of who has the authority to determine that. Thirdly, an untrammelled freedom of Parliament does not exist. ... [This] is not a view that I accept.

Speaking in 2011 of s 3(2) of the Supreme Court Act 2003’s reference to a continuing commitment to the rule of law and sovereignty of parliament the CJ implicitly returned to the issue, saying: “The sovereignty of Parliament is shadowed by the rule of law.”¹⁶⁰

The exchange between the CJ and Michael Cullen was a healthy example of two constitutional officers, each speaking respectfully from the perspective of their own branch, articulating two distinct constitutional perspectives. Recall the setting of Michael Cullen’s response: the 150th anniversary of a legislature. This was a setting for deep politics, beyond the surface froth of partisan debate. A leading member of the legislature was speaking for the constitutional interests of the *legislative branch* (*irrespective of the current partisan balance*) challenging the perspective of the lead member of the *judicial branch*. This is, I suggest, an entirely beneficial exchange of views (of such do we draw the elements of our unwritten constitution), and to be contrasted to the testy reaction of a Minister of Justice, Simon Power, to the CJ, considered next. While there was clearly some consternation within the elected

¹⁵⁵ Sian Elias, Chief Justice of New Zealand “Transition, Stability, and the New Zealand Legal System” (FW Guest Memorial Lecture, Otago Law School, Dunedin, 23 July 2003), available at <www.courtsofnz.govt.nz>.

¹⁵⁶ Sian Elias, Chief Justice of New Zealand “Something Old, Something New: Constitutional Stirrings and the Supreme Court” (Robin Cooke Lecture 2003, Victoria University of Wellington Law School, 11 December 2003), published in (2004) NZJPL 121.

¹⁵⁷ For comprehensive discussion and references see, Philip A Joseph, *Constitutional and Administrative Law in New Zealand* 3ed (Brookers, Wellington, 2007) at 14.5.2 and 14.7.2.

¹⁵⁸ Elias CJ, above n 154, at 25.

¹⁵⁹ (24 May 2004) 617 NZPD 13192.

¹⁶⁰ Sian Elias, Chief Justice of New Zealand “Fundamentals: a constitutional conversation” (Harkness Henry Lecture 2011, University of Waikato, 12 September 2011) at 5–6.

branch over the CJ's views on parliamentary sovereignty, there was no message sent to the CJ to *not even speak* on matters of constitutional concern.

My second example comes from 2009 on the topic of sentencing policy. Delivering the annual Shirley Smith Address (for the Women in the Law Committee of the Wellington Branch of the Law Society), the CJ addressed the problem of managing the prison population. She opened that part of her address by noting that other countries used executive amnesties to release prisoners early in order to avoid overcrowding. Specifically acknowledging that she was not in a position to assess such a policy's feasibility, she raised executive amnesties as an issue which warranted consideration. The Minister of Justice (backed up by the Prime Minister) responded with the line that the CJ had exceeded the scope of her role. Simon Power was reported as saying, "This is not government policy. The Government was elected to set sentencing policy, judges are appointed to apply it."¹⁶¹

Aside from the fact that it has been understood in Britain and New Zealand since at least the 1970s that the courts *do make law* when deciding cases, the Minister's reaction (while understandable) failed to respect one of the functions of the office of CJ. His reaction also raised the danger of the CJ's speech becoming the subject of narrative hijack — where the story is taken up not to cover the policy exchange, but (and of more interest to the media) to play into an easily understood narrative of "elected politicians v unelected judges".¹⁶² The CJ was simply putting forward one view to be taken into account with others on a matter of significant public policy concern. Lead judges elsewhere do this regularly. Consider, for example the President of the United Kingdom's Supreme Court in 2013 speaking critically of government cuts to legal aid, an area of high and live current partisan debate. The executive may have been chagrined, but it did not react by suggesting the *very act of the President speaking on the matter was somehow improper*.¹⁶³

V Conclusions — Stability, Scope, Prominence

A *Chief Justices as a point of stability in the nation's life*

Of all the lead constitution positions, Monarchs aside, CJs have to date spent the longest time in post. The longest serving premier, Sir Richard Seddon (who defeated Sir Robert Stout to become leader of the Liberal Party, and then Premier in 1893) only managed 13 years in the post.¹⁶⁴ Thirteen years, it will be recalled, is the *average* term of office of the 11 CJs to date. Dame Sian is now in her 15th year. New Zealand's constitutional arrangements include few embedded checks or fetters on the elected branch. There is no entrenched constitution, no second chamber, no federal system, and no recourse to a court like

¹⁶¹ Reported in Andrew Geddis's analysis of the exchange, "'Stick to your knitting' principle a knotty one to apply" *The New Zealand Herald* (online ed, Auckland, 22 July 2009). See also discussion in Grant Hammond "Judges and free speech in New Zealand" in H P Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, Cambridge, 2011) 195 at 200–205.

¹⁶² On narrative hijack and top courts see Richard Cornes "A Constitutional Disaster in the Making? The Communications Challenge Facing the United Kingdom's Supreme Court" [2013] PL 266 at 284–287.

¹⁶³ See Terri Judd "UK's top judge Lord Neuberger, the Supreme Court President, attacks Government on legal aid cuts, secret courts, and human rights threats" *The Independent* (online ed, London, 5 May 2013). Or see his predecessor, Lord Phillips' reported criticisms of the former Labour government's plans for reform of the law of homicide, Joshua Rozenberg "Homicide reforms would be 'nightmare' for juries, says top law lord" *The Daily Telegraph* (online ed, London, 7 November 2008).

¹⁶⁴ Just behind him is Sir Keith Holyoake with 12 years, then Sir Peter Fraser, Sir Robert Muldoon and Helen Clark, all of whom served for 9 years.

the European Court of Human Rights.¹⁶⁵ The New Zealand political system, with its three yearly election cycle, and a fairly lacklustre media (with a handful of honourable exceptions which it would be invidious to name), lives life fast. Chief Justices provide an important point of stability and continuity in the nation's public life.

B *Scope of the office — complexity and range*

This article has not provided a quantitative or qualitative analysis of CJs' performance as in-court jurisprudential leaders. That is not meant to indicate that in-court jurisprudential leadership is not a topic worth considering. I have not considered it in depth in this article for two reasons. As already noted, it clearly requires the space of a separate article (or for that matter, monograph). But second, and more substantively, the first of my two aims was to bring out the *complexity and range* of the functions of the CJ. Certainly, deciding cases is one of a CJ's central responsibilities; but an accurate view of the office requires that we see that as just one of a wide range of functions attaching to the role. Only from that wider view could we embark on a fair evaluation of the relative performance of CJs over time. Finally, as a very practical matter, failing to comprehend the wide range of calls on a CJ's time could lead to under-resourcing of the office. And that would be to the detriment of maintaining a healthy balance within New Zealand's constitutional arrangements.

C *A role of enhanced prominence and importance post-2003*

I opened recalling my 2004 hypothesis that “[t]he leadership role of the Chief Justice will be emphasised — in relation to both the Supreme Court itself and to the judicial branch in general.”¹⁶⁶ The above review of the CJs functions, especially the relatively high profile engagements between the current holder and members of the elected branch, bear out that hypothesis. Placing the head of the judiciary in her own court, and making that court the final court of appeal for the country has enhanced the prestige of the office.

To a significant extent comment about the office over the last decade or so has focused on the character of its current holder. While that is understandable — after all, as noted, the office will be moulded by its holders from time to time — we should not lose sight of the fact that Dame Sian, her predecessors, and successors, are performing a constitutional role. They are bound to carry out all of the functions of the office as outlined above; MPs especially need to realise that CJs do not have agendas of the partisan kind that enliven the world of politicians. When CJs speak on matters of policy, even contradicting the view of the MPs or ministers, they do so because it is their role to provide that distinct, *judicial* perspective, not because they are providing yet another party political view.

Finally, particularly in relation to the constitutional guardian and statesperson role, CJs can play a role in helping to build broader public understanding of the judicial role and the benefits to the community of judicial independence. Regarding that role, the current CJ said this to the House of Lords in 2004:¹⁶⁷

One of the things that I hope we will achieve with our Supreme Court is better visibility of the place occupied by the courts in the system ... It is interesting to look at the extent to which the High Court of

¹⁶⁵ Pace the limited exception of the ability to individually petition the UN Human Rights Committee, though that is not really on a par with a European's ability to access the European Court of Human Rights.

¹⁶⁶ Cornes, above n 5, at 144.

¹⁶⁷ *Minutes of Evidence*, above n 11, at Q 1091.

Australia is appreciated even when its decisions are disagreed with. There is a sense that the community is proud of their constitution. I hope that the visibility of the final Court will aid a public understanding of the balances in the constitution, but at the moment I think there is a lot of ignorance in New Zealand.

A more clearly identifiable single head of the judicial branch may well not be a comfortable addition to public debate for ministers from time to time, but it is one which all New Zealanders should welcome.

*Appendix — Chief Justices of New Zealand*¹⁶⁸

	Holder	Term	Place of birth	Education	Select professional background
1	Sir William Martin	1842–1857	Birmingham, England	King Edward VI Grammar, Birmingham; BA, MA, Cambridge	Called (Lincoln’s Inn) 1836; drafting and conveyancing practice before being appointed New Zealand’s first CJ.
2	Sir George Arney	1857–1875	Salisbury, England	Classics, Oxford	Called (Lincoln’s Inn) 1829; practicing barrister.
3	Sir James Prendergast	1875–1899	London, England	Cambridge	Schoolmaster after graduation, then travelled to the Australian goldfields before returning to England to study law and gaining admission to the bar; 1862 arrived New Zealand to practice law in Dunedin; Crown Solicitor Otago, 1865; Attorney-General 1865–1876; first President of the Law Society when formed in 1870.
4	Rt Hon Sir Robert Stout	1899–1926	Shetland Islands, Scotland	Shetlands	Having arrived aged 19 in Dunedin initially worked as a surveyor before becoming a school teacher, then articulated clerk in 1867, admitted to the Bar, 1871. Otago University’s first law lecturer. 1878 Attorney-General. 1884–1887 Premier. Remained in national politics until appointment as CJ.
5	Sir Charles Skerrett	1926–1929, though ill	India, family emigrated to New	Wellington College.	Post Office, Treasury, clerk Wellington Magistrates Court, then admitted to the Bar in 1884.

¹⁶⁸ Principal source: Courts of New Zealand “Former Chief Justices” <www.courtsofnz.govt.nz>.

		for much of at least 1928, dying in office in Feb., 1929.	Zealand when he was 12.		
6	Rt Hon Sir Michael Myers	1929–1946	Motueka	Wellington College, Canterbury College (LLB)	Clerk, Bell Gully and Izard. Barrister
7	Rt Hon Sir Humphrey O’Leary	1946–dying in office in 1953.	Wairau Valley	Wellington College, Victoria University (LLB)	Clerk, Phineas Levi, partner Bell Gully, Bell and Myers 1922
8	Rt Hon Sir Harold Barrowclough	1953–1966	Masterton	Palmerston North Boys High, Otago University	NZ expeditionary Force WWI, legal practice in Dunedin, then partner Russell McVeagh Bagnall and Macky, and service in WWII.
9	Rt Hon Sir Richard Wild	1966–1978	Blenheim	Fielding Agricultural High School, Victoria University (LLB, LLM)	Secretary to Sir Humphrey O’Leary when he took silk in 1935; then legal practice on his own accord followed by service in WWII. Post-war, partner, Bell Gully and Co, Judge Advocate General (1955); Solicitor-General (1957).
10	Rt Hon Sir Ronald Davison	1978–1989	Kaponga	Auckland University (LLB)	Served WWII, legal practice in Auckland, mainly as a barrister.
11	Rt Hon Sir Thomas Eichelbaum	1989–1999	Königsberg, Germany, family escaped Nazi	Victoria University (LLB)	Legal practice, Wellington. High Court judge in 1982. Additional Court of Appeal judge 1989. First CJ to be appointed from the bench.

			Germany in 1931.		
12	Rt Hon Dame Sian Elias	1999– present	London, England	Auckland University (LLB Hons); JSM Stanford	Began legal practice in Auckland in 1972; Law Commissioner 1986–1990; High Court, 1995. Second CJ to be appointed from the bench.