Towards more equal participation of women in Aotearoa New Zealand's judiciary: A case for gender-sensitive policies in the judicial appointment process

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Abstract

Women are underrepresented in the New Zealand judiciary. Although the proportion of women judges has improved over time, in 2021, 60% of judges in New Zealand were still men. It is widely accepted that unequal representation of women threatens the representativeness, quality, and impartiality of the judiciary, which undermines overall judicial legitimacy. Yet, scholars have paid little attention to the complex and interconnected reasons for the unequal representation of women judges in New Zealand, with previous research focusing in an ad hoc manner on certain social factors influencing the decisions of potential candidates, such as the barriers women experience in advancing through the legal profession. Significantly, there is little understanding in the scholarly literature of the complex nature of factors preventing women from becoming judges, or the relative advantages of potential policies or initiatives for improving the representation of women in the New Zealand judiciary.

I aim to address this research gap by examining the impact of judicial appointment processes, and specifically the use of gender-sensitive initiatives and policies within those processes, on the representation of women in the judiciary. I take a temporal approach to explore the barriers to women becoming judges, considering the experience of women in judicial appointment processes before, during and after appointment. To do so, I investigate the legal profession, judicial appointment criteria, candidates' assessment systems, and the requirements of judicial roles. In addition, I compare the use of gender-sensitive initiatives developed and applied in New Zealand, which are 'soft measures' intended to enhance the proportion of female candidates for judicial positions, to result-based policies used in the Australian State of Victoria.

In this thesis, I argue that because women encounter multiple challenges during the judicial appointment processes in New Zealand, the processes, as they stand, perpetuate the unequal representation of women in the judiciary. Although the result-based policies in Victoria have rapidly increased the proportion of women judges, they failed to change the appointment processes. I recommend modifying the appointment processes by taking a systemic approach to address the interconnected issues discussed in this thesis. Overall, this thesis contributes to the ongoing discussion and debate on judicial diversity and effective initiatives for achieving greater judicial representation by women.

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Chapter one
Introduction

Women have achieved remarkable success in entering and excelling in the New Zealand judiciary. The majority of heads of bench[1] are women and Dame Helen Winkelmann stands as the second female Chief Justice in New Zealand's history, symbolizing the progress made by women in the highest echelons of the judiciary. Although the proportion of women judges has improved over time, in 2021, still 60% of judges were men.[2] The unequal proportion of women judges in New Zealand is an important societal issue that has received little attention from scholars. The literature on judicial diversity has predominantly focused on the rationales for judicial diversity,[3] women's challenges in the legal profession,[4] and initiatives and policies developed to improve judicial diversity.[5] However, scholars have failed to offer insights into the influence of judicial appointment processes on women's representation in the New Zealand judiciary. In addition, there has been no research on gender-sensitive initiatives in New Zealand. This thesis aims to address this gap by providing valuable information on how the appointment processes take place in practice and impact women's representation in the New Zealand judiciary.

In this thesis, I explore the impact of judicial appointment processes, and specifically the use of gender-sensitive initiatives and result-based policies within those processes, on the proportion of women judges in the judiciary. Gender-sensitive initiatives are soft measures for enhancing the proportion of female candidates for judicial positions, whereas result-based policies set a numerical target for increasing the appointment of women judges. I take a temporal approach to the study, considering women's experiences of the judicial appointment process for District Court and High Court judges in the time period before, during, and after appointment. In particular, I compare the use of gender-sensitive initiatives in New Zealand, with result-based policies used in the Australian State of Victoria. I examine whether a result-based policy would improve the participation of women in the New Zealand judiciary.

I contend that the low proportion of female judges is a wicked problem with a broad range of potential solutions. According to Per Lagreid and Lise Rykkja, the 'wicked problem' is a conceptual tool to show the complexity and vagueness of a social issue.[6] A wicked problem is a highly complex, multidimensional, and systemic social issue[7] that involves many stakeholders[8] and can be addressed by

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[1] Each court is headed by a senior judge who is often referred to as a head of bench.

[2] AIJA, 'AIJA Judicial Gender Statistics Number and Percentage of Women Judges and Magistrates at June 2021' (The Australasian Institute of Judicial Administration 2021).

[3] See chapter 2.

[4] See chapter 3.

[5] See chapter 2.

[6] Per Lagreid and Lise H Rykkja, 'Organizing for "Wicked Problems" – Analyzing Coordination Arrangements in Two Policy Areas: Internal Security and the Welfare Administration' (2015) 28 The International journal of public sector management 475.

[7] Horst WJ Rittel and Melvin M Webber, 'Dilemmas in a General Theory of Planning', *Foundations of the Planning Enterprise: Critical Essays in Planning Theory: Volume 1* (2017); Ann-Marie Kennedy, 'Macro-Social Marketing'

multilevel governance.[9] Here, I show that the argument that the low percentage of women judges is a complex wicked problem that needs a system of multiple solutions.

It is possible to take various approaches to address the low representation of women in the judiciary. As Horst WJ Rittel and Melvin M Webber note, 'The formulation of a wicked problem is the problem!' [10] Every person has a different definition and understanding of a wicked problem and offers multiple solutions to solve it.[11] The definition of the low representation of women in the judiciary depends on how one defines women. If one defines 'women' as a homogenous group, then the aim will be to ensure that 50% of judges are women, regardless of their social backgrounds. However, if one defines women as a group that includes individuals with various backgrounds, then the focus will shift towards increasing the representation of women judges from diverse social backgrounds. In addition, definitions of the problem of women's underrepresentation can vary. Does a diverse judiciary consist of 50% men and 50% women? Or would a judiciary containing 60% men and 40% women be sufficiently diverse? Moreover, should each division of each court have an equal proportion of male and female judges, or should the judiciary in general have equal representation of men and women? Therefore, as Peter Balint and others discuss, 'the definition of a given wicked problem is in the eye of the beholder.' [12]

The literature offers multiple reasons for the unequal representation of women in the judiciary. The information used to understand this wicked problem depends on one's views about solving the problem.[13] For example, I assume that reforming the judicial appointment processes might improve the representation of women in the judiciary. Therefore, I explore factors in the judicial appointment processes that can disadvantage women and recommend reforms in these processes. Another person might assume that the underrepresentation of students from low socio-economic backgrounds results in a lack of diversity in the legal profession and the judiciary. Thus, they investigate the impact of law school admission schemes on the socio-economic diversity of law schools and recommend reforms in the admission process.[14] Therefore, researchers can take various approaches to understand the causes of low representation of women in the judiciary and offer solutions based on their approach.

A significant challenge of addressing unequal representation of women is that our understanding of this problem evolves by applying different solutions and each solution reveals an aspect of the problem that requires further attention.[15] According to Lorna Turnbull, different stakeholders have distinctive

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(2015) 36 Journal of Macromarketing 354; Tom Ritchey, *Wicked Problems, Social Messes: Decision Support Modelling with Morphological Analysis*, vol 17 (Springer Science & Business Media 2011).

[8] Kennedy (n 7); Ritchey (n 7).

[9] Brian W Head and John Alford, 'Wicked Problems: Implications for Public Policy and Management' (2015) 47 Administration & society 711.

[10] Horst WJ Rittel and Melvin M Webber, 'Dilemmas in a General Theory of Planning', *Foundations of the Planning Enterprise: Critical Essays in Planning Theory: Volume 1* (2017), 161.

[11] ibid.

[12] Peter J Balint and others, *Wicked Environmental Problems: Managing Uncertainty and Conflict* (Island Press 2011), 11.

[13] Rittel and Webber (n 7).

[14] Imogen Little, 'Socio-Economic Diversity in New Zealand Law Schools: A Case for Adopting a More Nuanced Approach to Admission Schemes' [2020] New Zealand law review 335.

[15] Rittel and Webber (n 7).

perspectives on the nature of a wicked problem and its suitable solution.[16] In this thesis, I show that the judiciary, women lawyers' associations, and governments have identified various reasons for the low percentage of women judges and applied a broad range of initiatives to support women before and after taking a judicial position. For example, finding a proper mentor is challenging for most women lawyers.[17] To solve this problem, women lawyers' associations in New Zealand offer mentorship programmes. Furthermore, an inflexible working schedule is a major issue for female judges with care responsibilities. To address this issue, the judiciary offers flexible and part time judicial positions adaptable for people with care responsibilities.[18] My research shows a correlation between various gender-sensitive initiatives and the increase in the proportion of women judges in New Zealand. However, in this thesis, I show that gender-sensitive initiatives failed to increase the proportion of female judges from diverse social backgrounds.[19] Therefore, my research reveals another aspect of women's unequal representation that have not been addressed by current gender-sensitive initiatives and requires further attention.

Furthermore, in this thesis, I discuss issues in the legal profession and judicial appointment processes that contribute to the low participation of women in the judiciary. Multiple interdependent and interconnected factors cause a wicked problem[20] and a wicked problem can be a symptom of other issues.[21] Therefore, one might unearth a combination of problems in the process of defining a wicked problem.[22] In this thesis, I explore a broad range of generic issues that women lawyers encounter in the legal profession.[23] I explain that some judicial appointment criteria might disadvantage female candidates and explore issues, such as ambiguity and subjectivity of the criteria and women's challenges to achieving the minimum criterion for a judicial position.[24] I argue that issues such as a lack of diversity amongst the appointing authorities, lack of transparency in the appointment processes, and lack of accountability measures for appointing authorities can all contribute to a decreased proportion of female judges. In this way, I show a causal link between various problems leading to unequal representation of women in the judiciary.

There is not a single correct solution for a wicked problem;[25] consequently, this thesis shows that various policies and initiatives are conducive to improving the representation of women in the judiciary. Stakeholders involved in a wicked problem may interpret the problem in various ways and offer multiple solutions.[26] The judiciary, governments, and women lawyers' associations have applied various policies and initiatives to improve women's representation in the judiciary, and each policy or initiative may

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[16] Lorna Turnbull, 'The "Wicked Problem" of Fiscal Equality for Women' (2010) 22 Canadian journal of women and the law 213.

[17] See chapter 3.

[18] See chapter 6.

[19] See chapter 6.

[20] Kennedy (n 7); Ann-Marie Kennedy and Andrew Parsons, 'Macro-Social Marketing and Social Engineering: A Systems Approach' (2012) 2 Journal of social marketing 37.

[21] Rittel and Webber (n 7).

[22] Balint and others (n 12).

[23] See chapter 3.

[24] See chapter 4.

[25] Balint and others (n 12).

[26] Marshall W Kreuter and others, 'Understanding Wicked Problems: A Key to Advancing Environmental Health Promotion' (2004) 31 Health education & behavior 441.

increase the proportion of female judges to different extents. Solutions to wicked problems are not right or wrong: they are better or worse.[27] In this thesis, I argue that some policies, such as setting targets for improving the percentage of women judges have direct and assessable positive outcomes,[28] whereas initiatives used in New Zealand, such as advertising expressions of interest, impact judicial diversity indirectly.[29] Moreover, I assess the initiatives and policies and identify the most effective ones to increase the proportion of women judges.[30]

It is important to bear in mind that any policy or initiative for addressing the low representation of women in the judiciary might have unexpected outcomes. Any solution to a wicked problem generates different consequences depending on the context, and, therefore, it is difficult to examine a proposed solution for a wicked problem in advance.[31] For example, one might recommend that the Attorney-General advertise expressions of interest to improve judicial diversity. However, sometimes advertising a judicial position would be inconducive to improving judicial diversity. For instance, in 2003 the Attorney-General of Victoria advertised expressions of interest for the position of the Chief Justice of Victoria, but eventually had to resort to a 'tap on the shoulder'[32] system because no applicant was suitable for the position.[33] In fact, some senior lawyers who are competent candidates may not apply for a judicial position and prefer to be offered a judicial role.[34] This experience shows how the cultural context of a jurisdiction impacts the outcome of a gender-sensitive policy.

Previously, I noted the difficulties of defining a wicked problem because it is possible to define a wicked problem in various ways. In this thesis, I mainly focus on the numerical representation of women judges in 2021 and aim to recommend policy reforms conducive to equal representation of women and men judges in all the New Zealand courts with general jurisdiction. This thesis is mainly, but not exclusively concerned with numbers of woman judges. I discuss some aspects of diversity among women. For example, in chapter six, I note that most women lawyers do not have a senior position in the legal profession which in turn leads to a lower numerical proportion of women judges.

I narrow down my focus on women's sex, which is a biological attribute, rather than their gender, which is a social construction.[35] I do so because sex is a straightforward and objective category, while gender is a more complex and fluid concept that encompasses social and cultural factors, which may not be as easily quantifiable.[36]

In this thesis, I mainly focus on the numerical representation of women. However, an intersection of various identity aspects such as race, ethnicity, and class impact might play out in the appointment

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[27] Turnbull (n 16).
[28] See chapter 7.
[29] See chapter 6.
[30] See chapter 8.
[31] Rittel and Webber (n 7); Turnbull (n 16).
[32] In a 'tap on the shoulder' appointment system, the appointing authorities offer a judicial position to a person without them needing to apply. For more information see, Brenda Hale, 'Judges, Power and Accountability: Constitutional Implications of Judicial Selection' (Constitutional Law Summer School, Belfast, 11 August 2017), P 6.
[33] Interview with a former female Senior Judge (27 April 2022)
[34] Interview with a female judge (1 April 2022)
[35] Robyn Ryle, *Questioning Gender: A Sociological Exploration* (SAGE Publications, Inc 2016).
[36] Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (10th anniversary, Routledge 1999).

process and impact the numerical porportion of women judges. Indeed, delving into intersectional matters, especially the number of Māori women judges, is crucial. However, because there is insufficient information about the appointment process and the reasons behind the unequal representation of women in the New Zealand judiciary, I have focused the research specifically on the numerical representation of women judges.

I. Unequal representation of women in the New Zealand courts

In this section, I show the problem of women judges' unequal proportion in New Zealand courts. I should note that there are two types of courts in New Zealand: courts with general jurisdiction and specialised courts. The courts with general jurisdiction are the District Court, the High Court, the Court of Appeal, and the Supreme Court of New Zealand.[37] Specialised courts are courts with special jurisdictions, such as the Employment Court, the Environment Court, and the Māori Land Court. As this thesis focuses on the representation of women in the courts with general jurisdiction, I provide an overview of the District Court, the High Court, the Court of Appeal, and the Supreme Court.

A. District Court

In 2021, 61% of judges in the District Court were men.[38] The District comprises the Chief District Court Judge,[39] the Principal Family Court Judge, the Principal Youth Court Judge,[40] and up to 182 District Court Judges.[41]

The District Court has general divisions that exercise the civil and criminal jurisdiction of the court and two specialist divisions,[42] including the Family Court and the Youth Court.[43] The Family Court, which is a division of the District Court,[44] is the only female dominated court with general jurisdiction in New Zealand. In 2021, 60% of the Family Court judges were women.[45] The court deals with the cases related to the family law statutes, including marriage, adoption, care of children, relationship property, separation, dissolution, maintenance, paternity, and domestic protection issues.[46] Mediation is a crucial part of resolving disputes in this court.[47]

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[37] Duncan Webb, Jacinta Ruru and Paul Scott, *The New Zealand Legal System: Structures and Processes* (6th edn, Lexis Nexis New Zealand Ltd 2016).

[38] Email from the Ministry of Justice to the author (29 April 2021)

[39] District Court Act 2016, s24(2).

[40] District Court Act 2016, s7(2).

[41] District Court Act 2016, s12(1).

[42] The general divisions of the District Court deal with civil and criminal cases. The District Court hears civil cases in which the amount claimed or the value of the property in dispute does not exceed $350,000. The criminal division of the District Court has jurisdiction to hear category 1, 2, and 3 offenses. It also has jurisdiction to deal with category 4 offenses until they are transferred to the High Court. The decisions of the District Court can be appealed in the High Court.

[43] District Court Act 2016, s9.

[44] Grant Morris, *Law Alive: The New Zealand Legal System in Context* (4th edn, Thomson Reuters (Professional) Australia Pty Limited 2019).

[45] Email from the Ministry of Justice to the author (29 April 2021)

[46] Family Court Act 1980, s11.

[47] Morris (n 44).

The Youth Court, constituted under the Children, Young Persons, and their families' act 1989,[48] is the other specialist division of the District Court. In 2021, 66% of the Youth Court judges were men.[49] The court hears serious criminal cases, other than murder and manslaughter, when the offender is a young person aged 12 to 17 years old.[50]

B. High Court

In 2021, 59% of High Court judges were men.[51] The High Court of New Zealand, established in 1841,[52] includes a maximum of 55 High Court Judges.[53] The powers of the High Court may be exercised by one, two or more High Court judges.[54]

The High Court has both original and appellate jurisdiction.[55] The court has original civil jurisdiction over civil cases that involve amounts more than $350,000,[56] and original criminal jurisdiction over the most serious criminal cases,[57] such as the category four offenses.[58] The High Court has appellate jurisdiction and appeals the decisions of the Family Court, the Youth Court,[59] and the civil and criminal decisions of the District Court[60] except for a conviction for a category three offense after the convicted person elected a jury trial.[61]

C. Court of appeal

The Court of Appeal is the intermediate appellate court. In 2021, 80% of the Court of Appeal judges were men. The Court of Appeal, constituted in 1862,[62] includes the president of the Court of Appeal and between five to nine judges.[63] Each division of the Court of Appeal consists of three judges[64] and only significant cases will be heard by a full bench of five judges.[65]

The Court of Appeal hears appeals from the High Court.[66] In addition, it may hear appeals of serious criminal cases directly from the District Court.[67] It also hears appeals straight from the Employment Court and the Māori Appellate Court.[68]

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[48] Webb, Ruru and Scott (n 37).
[49] Email from the Ministry of Justice to the author (29 April 2021)
[50] Ministry of Justice, 'Youth Court/Te Kōti Taiohi o Aotearoa'.
[51] Anusha Bradley, '90 Percent of High Court, Court of Appeal Judges Pākehā' (*RNZ*, 20 September 2021) <https://www.rnz.co.nz/news/is-this-justice/451867/90-percent-of-high-court-court-of-appeal-judges-pakeha> accessed 21 October 2022.
[52] Webb, Ruru and Scott (n 37).
[53] Senior Courts Act 2016, ss 6 and 7.
[54] Senior Courts Act 2016, s9.
[55] Morris (n 44).
[56] ibid.
[57] The Office of the Chief Justice, 'Annual Report' (2022).
[58] Criminal Procedure Act 2011, s74.
[59] Morris (n 44).
[60] District Court Act 2016, S124.
[61] Criminal Procedure Act 2011, s230.
[62] Webb, Ruru and Scott (n 37).
[63] Senior Courts Act 2016, s 45(2).
[64] ibid, s 47.
[65] Morris (n 44).
[66] Senior Courts Act 2016, s 56.

D. Supreme Court

In 2021, the Supreme Court was the only court where 50% of the judges were women.[69] The Supreme Court of New Zealand, established by the Supreme Court Act 2003, is the highest court in the judicial system.[70] Before the Supreme Court Act 2003, the Privy Council was the final court of appeal in New Zealand.[71] The Privy Council appealed a small number of cases, usually less than 10 cases, every year.[72] The New Zealand Supreme Court started hearing cases in 2004 and was entirely staffed by former New Zealand Court of Appeal judges.[73] The Supreme Court comprises the Chief Justice, who presides over the Supreme Court,[74] and four to five Supreme Court judges.[75] Only important and substantive issues will be heard by a full bench of five judges.[76]

The Supreme Court appeals cases that involve an issue with public importance, general commercial importance, or a significant miscarriage of justice.[77] For instance, an important issue related to the Treaty of Waitangi is of public importance.[78] In addition, the Supreme Court hears civil and criminal appeals[79] from the Court of Appeal[80] or the High Court.[81] It may also hear appeals from other courts in exceptional situations.[82]

Courts	Percentage of women judges
District Court	39%
High Court	41%
Court of Appeal	20%
Supreme Court	50%

Table 1 Percentage of women judges in New Zealand

The statistics show that the proportion of female judges is lower than men in all courts except the family division of the District Court and the Supreme Court. In this research, I explore the question of how the judicial appointment processes and gender-sensitive initiatives impact the proportional representation of women in the District Court, High Court, Court of Appeal, and Supreme Court of New Zealand. Additionally, I conduct a comparative study on Victoria to identify alternative solutions for achieving equal participation of women in the judiciary.

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[67] Morris (n 44).
[68] ibid.
[69] Bradley (n 51).
[70] Webb, Ruru and Scott (n 37).
[71] Morris (n 44).
[72] Gordon Thatcher, 'The Supreme Court of New Zealand' (2010) 36 Commonwealth law bulletin 461.
[73] Morris (n 44).
[74] Senior Courts Act 2016, s 83(1).
[75] ibid, s 66.
[76] Morris (n 44).
[77] Senior Courts Act 2016, s 74(2).
[78] ibid, s 74(3).
[79] ibid, s 71.
[80] Webb, Ruru and Scott (n 37).
[81] Senior Courts Act 2016, ss 68 and 69.
[82] Webb, Ruru and Scott (n 37).

II. Socio-legal Research method

I have noted that unequal representation of women in the judiciary is a wicked problem. A network of various solutions is necessary to address a wicked problem[83] because wicked problems are persistent,[84] and our understanding of them changes with the application of different solutions.[85] By adopting a wicked problem framing, one can consider diverse strategies for managing complex social issues[86] and offer multiple partial solutions.[87] In this thesis, I show that the judiciary and women lawyers' associations offer a broad range of gender-sensitive initiatives in New Zealand.[88] I hypothesise that a systems approach can enhance the percentage of female judges. Adopting a mechanical solution for a wicked problem is insufficient and ineffective because a single solution that focuses on one aspect of a wicked problem might cause other problems.[89] Therefore, it is essential to take a holistic approach and offer a system of solutions for complex social issues,[90] such as the low representation of women in the judiciary. A systems thinking approach considers the complexity and interdependence of a wicked problem's elements.[91] This approach takes into account many interconnected levels of society that are involved in a wicked problem[92] and considers the input of different sectors to offer solutions.[93]

In this thesis, I take a socio-legal approach to explore complex and interdependent issues that have led to unequal proportion of women judges. By taking a socio-legal approach, I investigate how law applies in practice and unpack the political and socio-legal context in which the judicial appointments take place.[94] In this way, I take a holistic approach and identify a system of issues that impact the percentage of women judges. I used four research methods, namely doctrinal, desktop, empirical, and socio-legal comparative methods, to answer the question of how the judicial appointment processes and gender-sensitive initiatives and policies impact the proportion of women judges.

Identifying legal sources is of utmost significance in a legal research.[95] As Mitchel de SO -l'E Lasser argues, western legal systems manifest themselves through the official documents.[96] I use legal rules such as District Court Act 2016 and Senior Courts Act 2016 and judicial appointment protocols for

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[83] Tom Christensen, Ole Martin Lægreid and Per Lægreid, 'Administrative Coordination Capacity; Does the Wickedness of Policy Areas Matter?' (2019) 38 Policy & society 237; Rittel and Webber (n 7); Turnbull (n 16).

[84] Edward P Weber and Anne M Khademian, 'Wicked Problems, Knowledge Challenges, and Collaborative Capacity Builders in Network Settings' (2008) 68 Public administration review 334.

[85] Turnbull (n 16).

[86] Head and Alford (n 9); JB Ruhl and James Salzman, 'Symposium: Governing Wicked Problems' (2020) 73 Vanderbilt law review 1561.

[87] Head and Alford (n 9).

[88] See chapter 6.

[89] Kreuter and others (n 26).

[90] Head and Alford (n 9).

[91] Kreuter and others (n 26).

[92] Kennedy (n 7).

[93] Nancy Roberts, 'Wicked Problems and Network Approaches to Resolution' (2000) 1 International public management review 1.

[94] Peter De Cruz, *Comparative Law in a Changing World* (3rd edn, Routledge-Cavendish 2007); Ran Hirschl, *Comparative Matters: The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014).

[95] Stefan Vogenauer, 'Sources of Law and Legal Method in Comparative Law', *The Oxford Handbook of Comparative Law* (2019).

[96] Mitchel de SO -l'E Lasser, 'The Question of Understanding', *Comparative legal studies: traditions and transitions* (2003).

District Court and High Court judges to provide an official portrait of the judicial appointment processes in New Zealand. I have adopted a doctrinal research approach to identify the legal rules governing the judicial appointment processes, analyse the relationship between the rules, and predict future developments.[97] For example, I refer to District Court Act 2016 and Senior Courts Act 2016 to explain the courts' hierarchy and functions and use official statistics to explain the proportion of female judges in each court. Then, I explore the above statutes, authoritative legal texts, and literature to outline the judicial appointment processes and the role of appointing authorities in New Zealand.

It is necessary to note that the official legal sources do not show the social reality.[98] Thus, I interviewed judges to unpack the cultural context of New Zealand and to provide a better understanding of the legal rules because '[l]aw [is] cocooned inside a culture.'[99] For example, my interview findings enhance understanding of the hidden crucial role of the Attorney-General and how judicial appointment processes take place in practice. Therefore, I provide a picture of the judicial appointment processes and the role of different appointing decision makers that are not included in the official documents. In other words, I show how law works in practice by referring to my interview findings.

Exploring the socio-legal and political context would enhance a researcher's overall understanding of the subject under inquiry.[100] To do so, I used a desktop research method to review the literature on the culture of the legal profession which privileges norms associated with traditional masculine stereotypes. This can impede women's progress and, in turn, decrease women's chances of being selected for a judicial position. The literature on legal research methods suggests that a researcher should actively explore the social, cultural, and legal context of a jurisdiction. The socio-cultural environment of a jurisdiction is closely connected to the problems the law addresses.[101] I investigate women's low representation in the judiciary. Therefore, it is important to discuss female lawyers' generic challenges that influence the proportion of female candidates for judicial positions. I refer to the robust body of literature and my interview findings to highlight the work culture in New Zealand.

It should be noted that I did not intend to provide a comprehensive discussion of work culture in the legal profession, but instead focus on its dominant culture. I am aware that it is impossible to capture the whole culture objectively,[102] and multiculturalism is a challenge in my research.[103] For example, I do not unpack the experiences of women with diverse social backgrounds or the working culture of all law firms. Moreover, culture is a dynamic concept that is not frozen in time and space,[104] and working culture in the legal profession is always changing. Nevertheless, for the purpose of my research,

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[97] Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013); Terry CM Hutchinson, *Researching and Writing in Law* (3rd edn, Thomson Reuters/Lawbook Co 2010)

[98] Vogenauer (n 95).

[99] Roger Cotterrell, 'Comparative Law and Legal Culture', *The Oxford Handbook of Comparative Law* (2nd edn, Oxford University Press 2019), 711.

[100] De Cruz (n 94); Hirschl (n 94).

[101] Maurice Adams, 'Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law', *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing Limited 2013).

[102] Simone Glanert, Alexandra Mercescu and Geoffrey Samuel, *Rethinking Comparative Law* (Edward Elgar Publishing Limited 2021).

[103] Cotterrell (n 99).

[104] Glanert, Mercescu and Samuel (n 102).

I capture the contemporary working culture by referring to the new research on the legal profession and my interview findings.

In this thesis, I show that gender-sensitive initiatives in New Zealand have failed to address women's barriers in the judicial appointment processes and in turn, had a limited influence on the proportional representation of women in the judiciary. To identify an alternative solution, I conduct a comparative study on result-based policies for increasing the percentage of women judges in Victorian judiciary. Many comparatists, dating from Gutteridge to Kahn-Freund, emphasise the importance of exploring the specific context of a jurisdiction.[105] Mark Van Hoeke suggests that comparative research starts by exploring the cultural, social, and legal framework of the home jurisdiction, then investigating other cultures and legal frameworks.[106] I take a socio-legal comparative research method to explore the social and cultural context of Victoria.

According to Pierre Legrand, a comparatist should acknowledge the distinctive nature of each jurisdiction. [107] To do so, I highlight the differences between New Zealand and Victoria and explore Victoria's encultured legal system. Moreover, I show that New Zealand and Victoria are adequately interconnected[108] by explaining the similarities between these two jurisdictions. Then, I examine the impact of result-based policies on the proportion of women judges and argue that a result-based gender-sensitive policy rapidly would increase the percentage of women judges.

Olivier Moréteau argues that '[t]he best way to study a foreign legal system is not only to read its source documents in the original language but also to visit the foreign jurisdiction and experience its culture, legal and at large, by way of immersion, which may also include field experience and practice.'[109] However, I conducted this research during the Covid-19 pandemic, so I have not visited Victoria and have not experienced its culture by immersion. Therefore, understanding the legal culture of Victoria was a significant limitation in my research. As Maurice Adams discusses,

> One of the main challenges that thrust itself at the comparatist is indeed to make explicit the broader social and cultural context and assumptions of a foreign legal system or legal concepts, as they are understood by the people working from within the system. It is exactly this endeavour that doesn't come naturally to comparative lawyers.[110]

To overcome this challenge and understand the legal culture in Victoria, I have interviewed a broad range of individuals in different legal fields. I asked them to share their views and their life experiences.

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[105] Annelise Riles, 'Wigmore's Treasure Box: Comparative Law in the Era of Information' (1999) 40 Harvard international law journal 221; De Cruz (n 94).

[106] Mark Van Hoecke, 'Comparing across Societies and Disciplines', *Comparative Methods in Law, Humanities and Social Sciences* (Edward Elgar Publishing 2021).

[107] Pierre Legrand, 'The Guile and The Guise: Apropos of Comparative Law as We Know It' (2021) 16 Asian journal of comparative law 155.

[108] Catherine Valcke, *Comparing Law: Comparative Law as Reconstruction of Collective Commitments* (Cambridge University Press 2018).

[109] Olivier Moréteau, 'The Words of Comparative Law' (2019) 6 Journal of International and Comparative Law 183, 197.

[110] Maurice Adams, 'Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law', *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing Limited 2013), 235.

For example, I asked about their views on strong affirmative action policies, such as setting a quota, to understand how they perceive this type of policy in Victoria. I am aware that, as Lasser discusses, my understanding of the foreign legal culture is imperfect[111] and 'foreign law's reality lies beyond where a comparatist can reach'.[112] I am aware of my cultural differences and my external position as a comparatist.[113]However, the interview findings shed some light on the meaning of legal culture for people who participate in it[114] and provides valuable insights to the literature on gender diversity in the judiciary.

III. Collection of qualitative data

To understand how the judicial appointment processes take place in practice, I interviewed a broad range of people. My aim was to interview those knowledgeable in the judicial appointment processes. Therefore, I interviewed 11 participants in New Zealand, including two coroners, four District Court Judges, and five senior judges of various courts. It is important to note that coroners interviewed in this research explained common aspects of the appointment processes for both judges and coroners. Additionally, they provided information about the work culture in the legal profession and its impact on women lawyers.

All the interview participants had important information about the appointment processes and women's representation in the New Zealand judiciary. Six participants were directly involved in assessing candidates and making an appointment decision. They shared information about judicial appointment processes in New Zealand that was not included in the official documents or literature. Moreover, most interview participants provided valuable information about women's challenges before and after taking a judicial position.

In addition, to gather information on gender-sensitive policies and the judicial appointment processes in Victoria, I interviewed a broad range of people. I interviewed eight participants in Victoria, including two judges, two senior judges, one former senior authority who was directly involved in appointing judges, a former convenor of a women lawyers' association, and two academic lawyers. The judges provided useful information about the appointment processes and shared their experiences of judicial appointments in a tap on the shoulder system and their perspectives on gender-sensitive policies. The former senior authority elucidated how decision makers find and appoint judges and explained the social and legal culture in Victoria. In addition, the former convener of the women lawyers' association discussed the extent to which the association provides gender-sensitive programmes for female lawyers.

The two academic lawyers in Victoria provided a valuable perspective on judicial appointment processes, both in Victoria and in general, as experts who were not directly involved in the appointment processes but have done important research on them. In addition, I interviewed one academic lawyer in England because she has critical information about judicial appointment processes and gender-sensitive policies in general. In total, the three academic lawyers discussed their views on how a judicial appointment process should take place in practice and how judicial diversity can be increased.

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[111] Mitchel de SO -l'E Lasser, *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (2010).
[112] Pierre Legrand, *Negative Comparative Law: A Strong Programmeme for Weak Thought* (Cambridge University Press 2022), 3.
[113] ibid.
[114] Cotterrell (n 99).

In summary, I have explored how the appointment processes and gender-sensitive policies are applied in practice by interviewing people directly involved in selecting judges and increasing gender diversity in the judiciary, as well as academic lawyers who provide an outside expert's perspective. I then analysed the interview findings by referring to the literature on gender issues and judicial appointment processes.

A. Ethical Approval of Low-Risk Research

Research that involves human participants must obtain approval from the Human Ethics Committee at the University of Canterbury.[115] My research met the criteria for low-risk research and was approved.[116] Moreover, I obtained approval from the Judicial Research Committee for interviewing judges in New Zealand.[117]

B. Search for interview participants

After I obtained ethics approval, I began to identify interview participants. Identifying interview participants in New Zealand was relatively easy. I sent a short professional biography, a brief explanation of my research topic, and my interview questions to the Office of the Chief Justice. Then, they distributed my documents to key judges who had critical information about the appointment processes, including the heads of bench and others who had a particular interest in the topic. Interview participants emailed me, and I sent them the information sheet and consent form and arranged an interview date. All interview participants signed a consent form which provided a list of matters they could select to consent to talk about.

It was more difficult to recruit interview participants in Victoria. I could not travel to Victoria because of Covid-19 restrictions; thus, I used publicly available websites to find interview participants' contact details. I contacted the communication team at the County Court of Victoria, and they helped me identify some interview participants. Moreover, I contacted the Office of the Chief Magistrate. Unfortunately, I failed to obtain approval from the Chief Magistrate to interview magistrates in Victoria and instead contacted a senior judge and a former senior authority to explore the judicial appointment processes.

C. The interviews

I conducted one-on-one interviews with each participant. The interviews were semi-structured, and I encouraged participants to talk about their experiences and views. I asked a slightly different set of questions from interview participants in New Zealand and Victoria because Victoria has a tap on the shoulder appointment system whilst New Zealand advertises for expressions of interest. I mostly focused on gender-sensitive policies in Victoria and explored the participant's views about them. Moreover, I interviewed academics on their perspectives and views on political reforms and the way that judicial appointment processes should take place. In this way, I collected the views of academics with in-depth knowledge of judicial diversity. I conducted all the New Zealand interviews in 2021 and all the Victoria interviews in 2022. I interviewed all participants online because of the Covid-19 restrictions in New Zealand at the time and used Microsoft Teams application to conduct the interviews. I recorded all interviews and transcribed them using Microsoft Word transcribe. Then, I sent all the transcripts to

[115] University of Canterbury, Human Ethics Policy - Research Involving Human Participants, UCPL-4- 136.
[116] I obtained the Human Ethics Committee approval on 9 September 2021.
[117] I obtained the Judicial Research Committee approval on 1 October 2021.

the participants and obtained their approval. Most interviews lasted between 20 and 45 minutes. After drafting the thesis, I sent a draft to one of the interview participants who requested to review the draft before thesis submission and modified quotes based on their comments. I anonymised all the interview participants except for one academic lawyer who requested to be quoted directly.

IV. Research Outline

In chapter two, I explore the rationales for increasing the proportion of women judges and explain the most common policies and initiatives for increasing judicial diversity. I take a temporal approach to examine the impact of judicial appointment processes on women's participation in the judiciary. I start by asking what issues decrease the proportion of female judges before the judicial appointment process. I explain that in New Zealand, judges are chosen from the legal profession. Therefore, in chapter three, I explore the challenges that female lawyers encounter in the legal profession that may impact the proportion of female judges. In addition, I examine whether it is possible to prepare for judicial appointment processes by referring to relevant legal rules and regulations.

In chapter four, I adopt a socio-legal approach to explore how appointment criteria, the composition of appointing authorities, and the structure of appointment interviews influence women's representation in the judiciary. The official criteria indicate the qualifications of a competent candidate. However, as Lasser argues, the official documents provide an incomplete picture of how the legal system works in practice.[118] Hence, rule-based or black-letter research might provide a misleading picture of reality.[119] For these reasons, in each section of chapter four, I explain the official legal rules then discuss how these rules are applied in practice by drawing on my interview findings. I have interviewed some appointing decision makers in New Zealand; the interview findings reveal that decision makers evaluate candidates against some characteristics that are not included in the official documents. By referring to the literature on gender issues in the legal profession, I analyse how the criteria stated in the official documents and the unwritten criteria found in the interviews would impact female candidates.

In chapter five, I explore the issues that impact the proportion of female judges after judicial appointment processes. First, I outline the mechanisms for structuring appointing authorities' discretionary power, including political accountability, public scrutiny, and providing feedback to unsuccessful candidates. Then, I show challenges of taking a judicial position that makes a judicial position less attractive for women.

In chapters four and five, I identify factors that potentially decrease the proportion of female judges. These factors include gender-blind criteria, homogeneity of appointing decision makers, insufficient accountability mechanism for the appointing decision makers, lack of appointment interview structure, the importance of reputation in being selected for a judicial position, and challenges in taking a judicial position.

In chapter six, I explore gender-sensitive initiatives in New Zealand to assess their impact on women's representation in the judiciary. I show an ecosystem of gender-sensitive initiatives in New Zealand and examine a causal relationship between gender-sensitive initiatives and judicial diversity. Causal

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[118] Lasser (n 96).

[119] A Esin Örücü, 'Methodology of Comparative Law', *Elgar Encyclopedia of Comparative Law, Second Edition* (2012).

relationships in social sciences are almost always probabilistic.[120] Therefore, finding direct causal relationships between gender-sensitive initiatives and judicial diversity is impossible. I argue that there is a correlation between gender-sensitive initiatives and appointing more female judges in New Zealand. However, I cannot claim that there is a causal relationship or identify how many female judges were appointed because of each gender-sensitive initiative.

In chapter six, I argue that because no gender-sensitive initiative has focused on the judicial appointment processes, the critical issues discussed in chapters four and five remain unaddressed. Hence, only women who can overcome the challenges of judicial appointment processes would be selected for judicial positions. I show that most female judges in New Zealand have similar backgrounds by referring to the statistics on judicial diversity. I argue that gender-sensitive initiatives mainly benefit female candidates with a narrow and specific background. To develop my argument, I investigate judges' profiles and research their backgrounds to find which part of the legal profession they are chosen from. I compile a dataset for 155 District Court judges, 39 High Court judges, and all Court of Appeal and Supreme Court judges in New Zealand. I collect publicly available information from different websites. [121] For instance, the official website of the New Zealand Government has announced judicial appointments since 1996 and provided a brief description of the appointees' career backgrounds. [122] For each judicial appointment, I collect the judge's name, gender, year of the appointment, and career background. I could not find the career backgrounds of all District Court judges because of a lack of publicly accessible data. However, the collected sample is adequate to show the career background of most judges. I analyse the data and show that judges are predominantly chosen from senior parts of the legal profession.

The findings discussed in chapter six show a gradual increase in the percentage of female judges in New Zealand. To find an alternative solution for greater diversity, I explore result-based gender-sensitive policies in Victoria. Catherine Valcke argues that any distinct entity is comparable regardless of whether they are similar or different, and that in a meaningful legal comparison, two jurisdictions should be adequately interconnected.[123] I show the interconnections between New Zealand and Victoria by pointing out their similarities. For example, both New Zealand and Victoria have a common law system. In both, judges are chosen from the legal profession,[124] whereas in most civil law jurisdictions, judges are selected from universities through a public examination.[125] As Esin Örücü argues, all jurisdictions are comparable. The aim of a comparative legal study determines the legal systems to be compared.[126] The

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[120] Mathew YH Wong, 'Methods in Comparative Politics', *Comparative Methods in Law, Humanities and Social Sciences* (Edward Elgar Publishing 2021).

[121] The Courts of New Zealand, 'Judges' (*The Courts of New Zealand*) <https://www.courtsofnz.govt.nz/the-courts/high-court/judges/> accessed 22 September 2021; The Courts of New Zealand, 'Judges' (*The Courts of New Zealand*) <https://www.courtsofnz.govt.nz/the-courts/supreme-court/judges/> accessed 28 July 2022; The Courts of New Zealand, 'Judges' (*The Courts of New Zealand*) <https://www.courtsofnz.govt.nz/the-courts/court-of-appeal/judges/> accessed 28 July 2022.

[122] https://www.beehive.govt.nz/

[123] Valcke (n 108).

[124] Michael Kirby, 'Modes of Appointment and Training of Judges - a Common Law Perspective' (2000) 26 Commonwealth law bulletin 540.

[125] Carlo Guarnieri, 'Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self-Government' (2004) 24 Legal studies (Society of Legal Scholars) 169.

[126] Örücü (n 119).

gender-sensitive initiatives in New Zealand and policies in Victoria are comparable because they influence the representation of women in the judiciary, which is a mutual concern in the two jurisdictions. I investigate the experience of improving women's representation in the Victorian judiciary because Victoria has proportionally more female judges than other Australian states and New Zealand.[127] Therefore, comparative research between New Zealand and the state of Victoria offers valuable contributions to the debates around women's representation in the New Zealand judiciary.

In chapter seven, I provide a brief overview of the Victorian court system and judicial appointment processes to show the legal context of Victoria. A comparatist should understand the cultural context of legal rules and concepts[128] and provide sufficient social context to achieve the research's aim.[129] To unpack the cultural context of Victoria, I interviewed a broad range of individuals, including lawyers, academics, and judges. The interview findings shed some light on the Victorian legal culture in the judiciary and legal profession.

I should note that there are legal, political, institutional, cultural, and social differences between New Zealand and Victoria. I recognise the singularity of each jurisdiction and consider the depth and breadth of the encultured legal system.[130] For example, I am comparing New Zealand, a sovereign jurisdiction, with Victoria, a state in the Australian commonwealth. Furthermore, the County Court and Supreme Court of Victoria have a tap on the shoulder appointment system meaning that judges are offered a judicial position, while all the courts in New Zealand advertise expressions of interest for judicial vacancies. Furthermore, the Attorney-General of Victoria should introduce candidates to the cabinet and obtain the cabinet's approval, while in New Zealand, the Attorney-General has unstructured discretion to recommend any candidate to the Governor General.[131]

In chapter seven, I explore result-based gender-sensitive policies to assist women's progress in the legal profession and increase women's representation in the judiciary. I show the differences between gender-sensitive initiatives in New Zealand and policies in Victoria and analyse their impact on the proportion of female judges. As Legrand maintains, comparative research must investigate the differences between studied jurisdictions and highlight their uniqueness.[132] In chapter seven, I explore the downstream result-based gender-sensitive policies in Victoria and show their differences from upstream gender-sensitive initiatives in New Zealand. Investigating the impact of different types of policies in Victoria offers valuable lessons for the discussion of judicial diversity in New Zealand.

In chapter eight, I discuss the findings of the thesis and analyse how this thesis contributes to the discussion on judicial diversity. I argue that unstructured discretionary power of the Attorney-General has led to the unequal proportion of women judges. In addition, I show that unsuccessful attempts to structure other appointing authorities' discretion has disadvantaged women candidates. For example, appointing authorities must assess candidates based on some gender-blind criteria that mostly disadvantage female candidates. In addition, I argue that low representation of women is the result of unequal opportunities for women to become aware of the judicial appointment criteria and prepare for

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[127] AIJA (n 2).
[128] Glanert, Mercescu and Samuel (n 102).
[129] De Cruz (n 94).
[130] Legrand, 'The Guile and The Guise: Apropos of Comparative Law as We Know It' (n 107).
[131] See chapter 7.
[132] Pierre Legrand, 'The Same and the Different', *Comparative legal studies: Traditions and transitions* (2003).

the process. Furthermore, I discuss whether a result-based gender-sensitive policy is an effective solution to improve women's representation in the New Zealand judiciary by referring to the lessons learnt from Victoria.

Comparative research on various policies results in policy recommendations for law reform.[133] In chapter eight, I recommend policy reforms conducive to improving women's proportional representation. I refer to my interviews with diverse academics to present different views on potential policy reforms.

[133] Mathias Siems, 'The Power of Comparative Law: What Types of Units Can Comparative Law Compare?' (2019) 67 The American journal of comparative law 861.

Chapter two
Why do we need more women judges?
Theories, rationales, and approaches

Introduction

This thesis focuses on the unequal representation of women in the New Zealand judiciary and gender-sensitive policies and initiatives for increasing the percentage of female judges. To thoroughly explore this topic, it is important to first investigate the public interest in achieving greater judicial diversity. Therefore, I start this chapter by explaining the reasons for greater judicial diversity.

In the first section of this chapter, I explain why increasing women's representation in the judiciary is important and explore the theoretical debates on the pluralism of judicial representation. I categorise rationales for judicial diversity into four groups: impartiality, legitimacy, quality of the judiciary, and equality.

In the second section, I briefly explain the judicial appointment processes and the role of appointing authorities' discretion in achieving equal participation of women in the judiciary. As this thesis aims to outline gender-sensitive initiatives in New Zealand and identify effective policies to ensure equal representation of women and men in the judiciary, in section three, I explore three types of affirmative action policies that aim to improve inclusiveness and diversity: quotas, targets, and soft affirmative action.[1] First, I assess the positive and negative outcomes of a quota system for underrepresented groups in judicial appointments. Then, I consider the concept of targets, which are more flexible than quotas.[2] Finally, I discuss soft affirmative action policies, which include plans and programmes designed to encourage underprivileged members of society to participate in appointment processes.[3]

I. Why do we need more female judges?

The literature shows that judges have usually been chosen based on criteria linked to traditional masculinity.[4] Additionally, there are well-known examples of implicit gender bias in assessing female judges.[5] Judith Resnick emphasises on the need for considering context and connection in making judicial decisions to argue for a revaluation of the traditional criteria favouring masculinity.[6] In chapter 4, I show how the masculine judicial appointment criteria in New Zealand impact on the proportional

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[1] J Edward Kellough, *Understanding Affirmative Action: Politics, Discrimination, and the Search for Justice* (Georgetown University Press 2006).
[2] Kate Malleson, 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36 Journal of Law and Society 376.
[3] Kate Malleson, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 Journal of Law and Society 126.
[4] Dermot Feenan, 'Women Judges: Gendering Judging, Justifying Diversity' (2008) 35 Journal of Law and Society 490; Dominic O'Sullivan, 'Gender and Judicial Appointment' (1996) 19 University of Queensland law journal 107.
[5] Rosalind Dixon, 'Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination' (2010) 21 Yale Journal of Law and Feminism 297.
[6] Judith Resnik, 'On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges' (1988) 61 Southern California law review 1877.

representation of women. Before discussing the importance of changing the appointment criteria, it is necessary to discuss the importance of having a gender balanced judiciary.

In this section, I discuss four rationales in favour of judicial diversity. I should note that although these rationales are not exhaustive, they justify the necessity of judicial diversity. This section elaborates on rationales related to legitimacy, equal opportunity, impartiality, and the quality of the judiciary.

A. Legitimacy rationale

There is a well-developed body of scholarship on the importance of judicial diversity.[7] One of the main rationales for judicial diversity, which I call 'the legitimacy rationale,' concerns the importance of public confidence in the judiciary: the judiciary must have legitimacy even among people who disagree with controversial or unpopular judicial decisions.[8] There is a risk that judges' lack of diversity decreases judicial legitimacy in the society. For example, in a case about child custody, the New Zealand Court of Appeal ordered in favour of the father. In response, the mother showed her dissatisfaction with the court decision by noting that 'three white old men' made an unfair decision for her life.[9] This example shows how people can question the legitimacy of a judicial decision by referring to the lack of diversity in the bench. The public, especially underrepresented groups of society, support a judiciary consisting of judges from diverse backgrounds[10] because it better resembles the social diversity than a homogenous bench.[11] Therefore, the presence of traditionally excluded groups strengthens the legitimacy of the judiciary.[12]

Rosemary Hunter suggests that judicial diversity has a symbolic value. She argues that a diverse judiciary including men and women, represents a wider society. Moreover, the presence of female judges shows that women have equal opportunity to be selected for judicial positions.[13] This can inspire and encourage potential female candidates to apply for judicial positions. Female judges may even become

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[7] See for example, Sherrilyn A Ifill, 'Racial Diversity on the Bench: Beyond Role Models and Public Confidence' (2000) 57 Washington and Lee Law Review 405; Kate Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) 11 Feminist Legal Studies 1; James Andrew Wynn Jr and Eli Paul Mazur, 'Judicial Diversity: Where Independence and Accountability Meet' (2004) 67 Albany Law Review 775; James Andrew Wynn Jr and Eli Paul Mazur, 'Judicial Diversity: Where Independence and Accountability Meet' (2004) 67 Albany Law Review 775.

[8] Shiri Krebs, Ingrid Nielsen and Russell Smyth, 'What Determines the Institutional Legitimacy of the High Court of Australia?' (2019) 43 Melbourne University law review 605.

[9] Shannon Redstall, 'Woman Forced to Send Daughters Back to Rich Father in France Feels "betrayed" by NZ Justice System' (Stuff, 9 June 2023) <https://www.stuff.co.nz/national/132270729/woman-forced-to-send-daughters-back-to-rich-father-in-france-feels-betrayed-by-nz-justice-system> accessed 11 June 2023.

[10] Erika Rackley, *Women, Judging and the Judiciary* (Taylor & Francis Group 2012).

[11] Luis Fuentes-Rohwer and Kevin R Johnson, 'A Principled Approach to the Quest for Racial Diversity on the Judiciary' (2004) 10 Michigan Journal of Race & Law; Kevin R Johnson, 'How Political Ideology Undermines Racial and Gender Diversity in Federal Judicial Selection: The Prospects for Judicial Diversity in the Trump Years' [2017] Wisconsin Law Review 345.

[12] Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (n 7).

[13] Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-Making' (2015) 68 Current Legal Problems 119.

role models for women in neighbouring or peer jurisdictions. Judicial appointment of women in senior positions can have a snowball effect and enhance female judges' promotion in other jurisdictions. [14]

In contrast, Sherrilyn A Ifill criticises the legitimacy rationale. She argues that the focus of the legitimacy rationale is only on the appearance of the judiciary. A judiciary consisting of diverse judges is more legitimate in the public eye. Ifill argues that diversity of views should instead be the main issue in the judiciary.[15] This criticism is about the scope of the legitimacy rationale. It argues that a legitimate judiciary is not just a diverse bench consisting of people from various sociocultural backgrounds, it should also reflect diverse views and perspectives. In this thesis, I focus on equal representation of women because a judiciary that equally represents men and women is more likely to reflect women's perspectives. Therefore, increasing the numerical representation of women is a step towards achieving the greater goal of representing various views.

It is worth noting that all types of judicial diversity may not enhance judicial legitimacy among all social groups. The public would not necessarily support all kinds of judicial diversity. For example, bisexuality might be less acceptable in traditional cultures. In that case, diversity of the judiciary would not necessarily ensure its legitimacy. Nancy Scherer and Brett Curry conducted a study that supports this argument. The study shows that in the United States, African American people's support for the judiciary was enhanced by increasing the number of African American judges. In contrast, white people had the opposite reaction.[16] Therefore, different groups in society may have different reactions to judicial diversity.

B. Impartiality rationale

The second rationale in favour of judicial diversity links the concept of impartiality with diversity. The importance of diversity of judicial views in judicial decision making arises because laws are indeterminate, as described by legal realism theory.[17] Based on legal realism theory, judges can interpret laws and precedents in various ways[18] by using different judicial reasoning.[19] Legal realists challenge the traditional concept of law and judicial decision making, which holds that referring to legal sources, such as statutes, leads to clear, similar, and mechanical outcomes in different cases.[20] Legal realists suggest that a judge makes judicial decisions based not solely on law, but also on psycho-social factors and his or her social history.[21] Thus, judges' values and perspectives are highly influential in the legal decision-making process.[22] An impartial judge is not without human prejudices, bias, and personal points of view,[23] but rather an impartial judge reflects on their personal experiences with an open mind.[24]

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[14] Ifill (n 7); Josephine Dawuni and Alice Kang, 'Her Ladyship Chief Justice: The Rise of Female Leaders in the Judiciary in Africa' (2015) 62 Africa today 45.

[15] Ifill (n 7).

[16] Nancy Scherer and Brett Curry, 'Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts' (2010) 72 The Journal of Politics 90.

[17] Brian Leiter, 'Legal Realism and Legal Doctrine' (2015) 163 University of Pennsylvania law review 1975.

[18] Hanoch Dagan, 'The Real Legacy of American Legal Realism' (2018) 38 Oxford journal of legal studies 123.

[19] Leiter (n 17).

[20] Frederick Schauer, 'Legal Realism Untamed' (2013) 91 Texas law review 749.

[21] Brian Leiter, 'Rethinking Legal Realism: Toward a Naturalized Jurisprudence' (1997) 76 Texas law review 267.

[22] Ifill (n 7); Wynn and Mazur, 'Judicial Diversity: Where Independence and Accountability Meet' (n 7).

[23] Charles Gardner Geyh, 'The Dimensions of Judicial Impartiality' (2013) 65 Florida law review 493.

Scholars have examined and proven the legal realism theory in practice. For instance, Hanoch Dagan has assessed the impact of judges' personalities on judicial decision-making within the Supreme Court of Ireland. He argues that judges rely on their personality in complicated cases that could not be decided based on unclear legal rules and stare decisis.[25] Furthermore, the literature on feminist judgments shows that judges who adopt a feminist method consider women's experiences and the gender impact of laws and judicial decisions.[26] Judges' personality, views, and perspectives influence their judicial reasoning and decisions.

An impartial judiciary is a diverse judiciary that considers various preconceptions about law and its impact on a litigant's life.[27] The dominance of a single set of values and ideas in the judiciary puts its impartiality at risk because judges' social experiences impact their perceptions and, in turn, their judicial decisions. Thus, a homogenous bench results in a structural bias in the judiciary.[28] A diverse bench considers traditionally excluded perspectives and values and then makes an impartial and informed decision.[29] According to Brian Opeskin, judicial diversity does not eliminate unconscious biases in the judiciary. It 'replaces one dominant norm with a plurality of cross-cutting affiliations so that courts are less systemically biased.'[30] Thus, improving women's representation in the judiciary would improve plurality of views which is conducive to an impartial judiciary.

C. Quality of judiciary rationale

The third rationale for judicial diversity is that judicial diversity improves the quality of the judicial decision-making process. It suggests that a diverse bench represents a variety of perspectives[31] and benefits from the talents and skills of diverse judges.[32] A diverse bench is more likely to make judicial decisions that reflect the views and perspectives of different groups of society. Thus, judicial diversity improves the court's decision-making process.[33] For example, a diverse bench that considers conflicting notions of political morality is more likely to make innovative judicial decisions reflecting various views in society.[34]

There are three theories in support of this rationale, which are discussed by Christina L Boyd in research about the effect of trial judges' gender and race on their decision-making. First, the balance theory argues that because minority decision makers have a historical experience of discrimination, they empathise more with people facing discrimination, even if they experienced a different form of

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[24] Wynn and Mazur, 'Judicial Diversity: Where Independence and Accountability Meet' (n 7).
[25] Dagan (n 18).
[26] Dianne Otto, 'Feminist Judging in Action: Reflecting on the Feminist Judgments in International Law Project' (2020) 28 Feminist Legal Studies 205; Hunter (n 13).
[27] Edward M Chen, 'The Judiciary, Diversity, and Justice for All' (2003) 91 California Law Review 1109.
[28] Wynn and Mazur, 'Judicial Diversity: Where Independence and Accountability Meet' (n 7).
[29] Ifill (n 7); Wynn and Mazur, 'Judicial Diversity: Where Independence and Accountability Meet' (n 7).
[30] Brian Opeskin, *Future-Proofing the Judiciary: Preparing for Demographic Change* (Springer Nature 2021),242.
[31] Rackley (n 10).
[32] Erika Rackley and Charlie Webb, 'Three Models of Diversity', *Debating judicial appointments in an age of diversity* (Routledge 2017).
[33] Rackley (n 10); Rackley and Webb (n 32).
[34] Joy Milligan, 'Pluralism in America: Why Judicial Diversity Improves Legal Decisions about Political Morality' (2006) 81 New York University Law Review 1206.

discrimination.[35] For example, a female judge might empathise with a person from a minority racial background more than a male judge. I should note that Boyd could not provide compelling evidence to prove this theory. There is a lack of data and evidence to show that the experience of discrimination and being from a minority background would necessarily make a judge aware of and sensitive to other forms of discrimination. Not all women judges who experienced discrimination would empathise with disadvantaged people. Nevertheless, the literature suggests that feminist judges who apply the feminist method tend to question discourses of sexism, racism, and heteronormativity.[36]

The second theory suggests that judges from unprivileged backgrounds can be representatives of their group. These judges have a distinct perspective because they try to advocate their group's interests through judicial decisions.[37] Judicial diversity would improve the quality of the judiciary because the judiciary would reflect the values and interests of the society it serves and considers the impact of judicial decisions on diverse social groups. The critics of this theory, however, put forward that judges cannot be representatives of groups in society. For example, female judges cannot necessarily represent other women because judges are drawn from a narrow background in comparison with other people.[38] Moreover, categorising judges as representatives puts judicial independence at risk.[39]

Arguably, we can consider judges from excluded parts of society as representatives of their group. Still, we should bear in mind that their role is not similar to a parliament member who actively supports the interests of their social groups. Indeed, judges must be impartial and make judicial decisions without fear or favour.[40] They can represent their groups' perspectives by considering the impact of legal rules and judicial decisions on the members of their groups.

The third theory, the informational theory, focuses on the knowledge and experiences of judges with diverse backgrounds. Based on this theory, women or black judges are likely to make different decisions from judges who belong to dominant groups in cases related to gender or race, such as cases about gender and race employment discrimination.[41] A judge with a particular racial and cultural background is arguably better positioned to understand and consider their own cultural values than a judge from the dominant background.[42] As Sherrilyn Ifill observed, black people have particular cultural 'narratives.' They analyse the social and political reality in a way that is different from white people.[43] From Joy Milligan's point of view, racial and ethnic communities have dissimilar social experiences to the dominant groups. As a result, their moral values are different from the dominant groups of society. He concludes that race has an impact on individuals' attitudes on issues of public morality.[44] Moreover,

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[35] Christina L Boyd, 'Representation on the Courts? The Effects of Trial Judges' Sex and Race' (2016) 69 Political Research Quarterly 788.
[36] Katharine T Bartlett, 'Feminist Legal Methods' (1990) 103 Harvard law review 829.
[37] Boyd (n 35).
[38] Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (n 7).
[39] Barbara L Graham, 'Toward an Understanding of Judicial Diversity in American Courts' (2004) 10 Michigan Journal of Race & Law.
[40] Courts of New Zealand, 'Guidelines for Judicial Conduct 2019'.
[41] Boyd (n 35).
[42] Iyiola Solanke, 'Where Are the Black Judges in Europe?' (2019) 39 Connecticut Journal of International Law Summer.
[43] Ifill (n 7).
[44] Milligan (n 34).

judges from minority backgrounds can influence their colleagues' decisions. Jonathan Kastellec notes that in a judicial bench, a black judge may share specific information or arguments tied to their life experience, which would convince other judges to make a different judicial decision.[45] Introducing the minorities' narratives would reduce the force of dominant narratives.[46] Therefore, a diverse judiciary would reflect the complex ideas and perspectives of diverse groups in society.[47] By extension, this theory would also apply to gender. 'Different voice theory' focuses on the difference between judicial decisions of men and women.

'Different voice' theory, applies primarily to judges' genders. Based on this theory, men and women view the world differently. Therefore, by improving gender diversity, the judiciary would reflect women's voices. According to Carol Gilligan, women and men approach moral problems in different ways. In her view, women consider contextual issues of a problem. For instance, they take into account the relationships of people involved in the problem and strive to preserve these relationships. On the contrary, men tend to analyse the problem, weigh up competing principles, and then make a conclusion. In other words, women adopt ethics of care, while men adopt ethics of justice.[48] I elaborate on the 'different voice' theory in the judiciary because this theory specifically focuses on female judges and shows the importance of improving women's representation in the judiciary. The literature on 'different voice' theory offers mixed findings. First, I outline research that show a difference between male and female judges, which I then contrast with research that indicate similarities between judicial decisions of men and women.

Some research shows that women judges' decisions are different from men, particularly in gender discrimination cases. For example, Susan Haire and Laura Moyer focus on the voting pattern of male and female African American, Latino, and white judges. They suggest that female judges from minority backgrounds actively represent the interests of women and their racial group. Moreover, African American female judges tend to support female plaintiffs in gender discrimination cases more than African American men, Hispanic men and women, and white men.[49] Kimi King and Megan Greening, who examine gender justice at the International Criminal Tribunal for the former Yugoslavia, reached a similar conclusion. They assess the effect of gender composition of the bench on sexual assault cases. Their research demonstrates that female jurists give more lenient sentences in comparison with their counterparts. Female judges tend to be protective of female victims in sexual assault cases.[50] Moreover, in 'Gender, Race, and Intersectionality on the Federal Appellate Bench,' Todd Collins and Laura Moyer

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[45] Jonathan P Kastellec, 'Racial Diversity and Judicial Influence on Appellate Courts' (2013) 57 American Journal of Political Science 167.

[46] Ifill (n 7).

[47] Solanke (n 42).

[48] Carol Gilligan, In a Different Voice. Harvard University Press (1982), Cambridge, MA cited in Steven D Edwards, 'Three Versions of an Ethics of Care' (2009) 10 Nursing philosophy 231, 232.

[49] Susan B Haire and Laura P Moyer, *Diversity Matters: Judicial Policy Making in the U.S. Courts of Appeals* (University of Virginia Press 2015).

[50] Kimi Lynn King and Megan Greening, 'Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia' (2007) 88 Social Science Quarterly 1049.

observe that minority women are more likely to support criminal defendants.[51] I should note that the research includes a small number of minority women, which limits the generalisability of the outcomes.

Similarly, Christina Boyd, Lee Epstein and Andrew Martin conducted a survey on female judges in the federal appellate bench of the United States. Their research shows that female and male judges have dissimilar approaches to sex discrimination cases. Moreover, Boyd and others have observed that, mostly in sex discrimination disputes, women have consistent and weighty individual and panel effects.[52] Panel effect refers to the impact of a bench's composition on a judge's decision.[53] Judges' behaviour and perspectives are influenced by alternative arguments and can change by deliberation with their colleagues.[54] Boyd and others' research indicate that in benches consisting of male and female judges, men tend to make judicial decisions in favour of plaintiffs.[55] Likewise, Haire and Moyer have proven the panel effect on individual judges. Their research shows that male judges are influenced by the composition of the bench in the appellate courts; the inputs of judges from minority groups affected the white male judges on the bench. Therefore, judicial decisions of a diverse panel reflect deliberative decision-making processes.[56] In summary, there is a considerable difference between male and female judges in terms of sex discrimination or sexual assault cases.[57]

The research discussed above indicates that female judges have particular perspectives in cases related to employment discrimination or sexual assault and, therefore, make different judicial decisions to male judges. However, Ifill stresses that the diversity of judicial decisions is only one area in which judicial diversity would have an impact. It is important to investigate other relevant indicators of gender differences between judges. For example, it is important to explore how male and female judges treat women and minority litigants, lawyers, witnesses, and observers.[58] In the following, I review research that examines behavioural diversity between male and female judges.

Kathy Mack and Sharyn Roach Anleu conducted research on behavioural differences between men and women judges. The research shows that women are more likely to communicate with unrepresented defendants.[59] Further, in 'Moving beyond numbers: What female judges say about different judicial voices,' Susan Miller and Shana Maier note that most female judges acknowledged the impact of gender on their approach to cases. The judges interviewed in this research said that they behave more patiently and try harder to solve the problem rather than just stating the punishment. They emphasised that men and women reach the same conclusion by different gender-related reasoning.[60] Arguably, female judges' self-assessment may not prove a difference between men and women in the judiciary because the

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[51] Todd Collins and Laura Moyer, 'Gender, Race, and Intersectionality on the Federal Appellate Bench' (2008) 61 Political Research Quarterly 219.

[52] Christina L Boyd, Lee Epstein and Andrew D Martin, 'Untangling the Causal Effects of Sex on Judging' (2010) 54 American Journal of Political Science 389.

[53] Kastellec (n 45).

[54] Milligan (n 34).

[55] Boyd, Epstein and Martin (n 52).

[56] Haire and Moyer (n 49).

[57] Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (n 7).

[58] Ifill (n 7).

[59] Kathy Mack and Sharyn Roach Anleu, 'In-Court Judicial Behaviours, Gender and Legitimacy' (2012) 21 Griffith Law Review 728.

[60] Susan L Miller and Shana L Maier, 'Moving Beyond Numbers: What Female Judges Say about Different Judicial Voices' (2008) 29 Journal of Women, Politics & Policy 527.

research did not explore male judges' views. Therefore, the research is limited to female judges' perspectives and views about their behaviour. Interviewing their male counterparts would have enriched the findings of the survey.

In contrast to the research that shows dissimilarities between male and female judges, some research does not indicate any differences between men and women. Malleson notes that in research conducted on the voting patterns in the Supreme Court in 1993, there was no significant variation between male and female justices. She suggests that many other studies on the sentencing decisions of judges came to the same conclusion.[61]

Furthermore, Bryna Bogoch argues that although some research has indicated that judges' gender affects their decisions in employment discrimination or family law, she could find no difference in criminal cases. She noted that one reason might be that when female and male judges are on a judicial bench, female judges tend to follow the dominant professional culture. Hence, female judges sentence more severely whereas in the absence of male judges, female judges sentence more leniently.[62] This suggests that women follow the culture of male judges when there is a small number of women in the judiciary. Hence, if the proportion of female judges increases, the female voice is likely to become stronger. The other reason for similarity between men and women judges might be the influence of female judges on their male counterparts.[63] Female judges would affect their male judges' behaviour by criticising sexist comments, gender stereotypes, and biased attitudes.[64] Therefore, if women work in a broader range of legal fields, gender differences between men and women judges would likely reduce.[65] These findings indicate the importance of equal representation of women in various courts to reflect women's views in judicial decisions.

In summary, the literature on 'different voice theory' shows mixed finding regarding female judges' judicial behaviour and decisions. Female judges make distinct judicial decisions in cases related to sex discrimination and sexual assault cases. They tend to decide in favour of the plaintiffs and support women. Moreover, female judges are more likely to communicate with underrepresented defendants. In contrast, other research has found few differences between the decisions made by male and female judges. This may be because women tend to follow the dominant professional culture and do not make distinct judicial decisions or demonstrate a different behaviour on a male-dominated bench. A judiciary consisting of equal proportion of men and women is more likely to reflect women's perspectives and values.

D. Equal opportunity rationale

The fourth rationale for judicial diversity, equal opportunity, is a right-based rationale which focuses on the candidates for a judicial position. All candidates should have an equal opportunity, or at least not experience discrimination in the judicial appointment process.[66] A judicial appointment system that

[61] Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (n 7).
[62] Bryna Bogoch, 'Judging in a "Different Voice": Gender and the Sentencing of Violent Offences in Israel' (1999) 27 International Journal of the Sociology of Law 51.
[63] Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (n 7).
[64] Brenda Hale and Rosemary Hunter, 'A Conversation with Baroness Hale' (2008) 16 Feminist legal studies 237; Elaine Martin, 'The Representative Role of Women Judges' (1993) 77 Judicature 166.
[65] Malleson, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (n 7).
[66] Opeskin (n 30).

ensures equal opportunities and includes anti-discrimination practices will result in a more diverse judiciary.[67]

It is worth noting that the concept of diversity should encompass all types of social diversity. Otherwise, ensuring only one aspect of diversity might not indicate the existence of equal opportunity between candidates. For example, the presence of a high percentage of female judges from privileged backgrounds does not necessarily show that women have equal opportunities to be selected for a judicial position. It only shows that a limited proportion of privileged women have greater opportunities, while a considerable percentage of women may nevertheless be disadvantaged in the judicial appointment process. In this research, I focus on the numerical representation of women which is only one aspect of judicial diversity, but the findings of my research can be useful to improve other aspects of judicial diversity.[68]

Based on the equality rationale, the principle of equality requires a diverse judiciary. To explain the equal opportunity rationale, it is necessary to unpack the concept of equality. Equality is a complex concept. There are three modes of equality: individual equality, group equality, and equality of opportunity. Individual equality, which is also called 'formal' or 'liberal' equality,[69] requires that similar cases be treated similarly, and different cases should be treated differently concerning their difference.[70] The individual equality values consistency in treatment.[71] The main concern of the individual equality model is providing equality for individuals and protecting them from direct discrimination. However, in practice, ensuring individual equality can be challenging.[72] As Peter Westen argues, the individual equality formula overlooks cases in which two individuals are relatively alike, but they are not totally similar. It is unclear whether two relatively similar cases should be treated the same or differently. Moreover, even when two similar individuals are treated differently, individual equality does not explain which treatment should be used for both.[73] For example, when a man is paid more than a woman for a similar work, can we decrease the man's salary to ensure individual equality? In this case two individuals have been treated equally badly to ensure individual equality. Hence, a claim of equal treatment can be addressed by eliminating an advantage from privileged and unprivileged groups rather than providing an advantage for both groups.[74]

In addition, the breach of individual equality requires proving a person was treated less favourably in comparison with a similar comparator on grounds of characteristics, such as race or gender. Thus, the breach of individual equality can only happen if a comparator exists. The individual equality perspective should answer the question of 'equal to whom?'. In comparison between men and women, the answer

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[67] Solanke (n 42).

[68] See chapter 8.

[69] Marc De Vos, *Beyond Formal Equality: Positive Action under Directives 2000/43/EC and 2000/78/EC* (European Commission 2007) 200.

[70] Barrett Gavin, 'Re-Examining the Concept and Principle of Equality in EC Law' (2003) 22 Yearbook of European law 117.

[71] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14 International journal of constitutional law 712.

[72] Lisa Waddington and Mark Bell, 'Reflecting on Inequalities in European Equality Law' (2003) 28 European law review 349.

[73] Peter Westen, 'The Empty Idea of Equality' (1982) 95 Harvard law review 537.

[74] Fredman (n 71).

is equal to men. Therefore, men set the standard for equal treatment.[75] Julia Adiba Sohrab argues that equal treatment requires comparing men and women and applying the male norm, while this comparison may not provide substantive equality for women because women might not be the same or similarly placed as men. Equal treatment does not consider the differences between men and women.[76]

Furthermore, individual equality can embed discrimination. This model of equality fails to consider institutional forms of discrimination, which are not imposed on one person but affect a group of people. For example, an informal employment mechanism that favours one group of people, such as law firm partners who are mostly men, over another is an institutional discrimination that would disadvantage people who lack experience in a senior position, who are mostly women. Moreover, the individual equality model does not consider that one person, for example a black woman, might experience multiple or intersectional disadvantages.[77] The individual equality rationale does not prove the importance of greater judicial diversity. Hence, it is necessary to explore other forms of equality.

The other form of equality is group equality, which is also called 'substantive' or 'asymmetrical' justice. In contrast to the individual equality model, which completely relies on one person's litigation, the group equality model considers the group characteristics of people,[78] and it was introduced to highlight the collective nature of discrimination.[79] Based on group equality, resources should be allocated to marginalised people to enhance their proportional representation and to redress past and present discriminations against them. Improving group equality entails seeking justice for diverse social groups, so that people would not have to prove individual discrimination in each case.[80] The group equality rationale justifies enhancing women's representation in the judiciary to redress past and present discriminations against them.[81]

There are various approaches to ensure group equality. This form of equality can justify initiatives and policies for improving judicial diversity. For example, an approach to ensure group equality would focus on procedures of gaining an advantage. A policy that replaces the informal appointment processes with a transparent system is an example of this approach. Another approach may focus on redressing past and present discrimination. To do so, an official may adopt a policy impacting the outcome of a system. For example, they would set a policy that places a quota on the proportion of women that should be employed in an institute.[82] Arguably, this approach to the group equality can lead to cosmetic reform without addressing the main source of inequality.[83]

Finally, the third model of equality focuses on providing equal opportunities for all candidates. Both group equality and equal opportunity models justify the importance of increasing women's representation in the judiciary. The equality of opportunity model includes some elements of individual

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[75] ibid.

[76] Julia Adiba Sohrab, 'Avoiding the "Exquisite Trap": A Critical Look at the Equal Treatment/Special Treatment Debate in Law' (1993) 1 Feminist legal studies 141.

[77] Waddington and Bell (n 72).

[78] De Vos (n 69).

[79] Waddington and Bell (n 72).

[80] Annick Masselot and Timothy Brand, 'Diversity, Quotas and Compromise in the Boardroom: Tackling Gender Imbalance in Economic Decision-Making' (2015) 26 New Zealand universities law review 535.

[81] In chapter 3, I discuss women's challenges in the legal profession.

[82] Waddington and Bell (n 72).

[83] Gavin (n 70).

and group equality.[84] This model can achieve more than individual equality and yet does not raise issues related to equality of outcome.[85] The rationale for providing equality of opportunities justifies applying affirmative action policies and positive actions. This approach does not rely on litigation-based enforcement. Instead, it demands policymakers to consider equality and the needs of diverse groups of society.[86] In section three, I explain policies that have been adopted based on this perspective on equality. I should note that applying diverse strategies carries the risk of ignoring and marginalising underrepresented groups who cannot be categorised into specific groups, such as people who experience the intersection of various oppressions.[87] However, this research focuses on the less complicated issue of increasing the proportion of women judges that can be achieved by using policies and initiatives discussed in section three.

II. Discretion, the heart of judicial appointment processes

In this thesis, one of the key issues explored is how the appointing authorities impact the proportion of female judges throughout the judicial appointment processes. In chapter three, I explain that the Attorney-General sets out the judicial appointment criteria and procedures for assessing and selecting candidates. He or she is the key decision-maker in the judicial appointment processes and significantly influences women's representation in the judiciary. In addition, the senior judges and the Solicitor-General are other influential actors who interpret appointment criteria, interview, shortlist, and recommend candidates to the Attorney-General. Therefore, judicial appointments are at the discretion of senior judges and the Attorney-General.

Discretion refers to a situation when an authority can choose between courses of action or inaction.[88] According to Anna Pratt and Lorne Sossin, 'Discretion arises when an official is empowered to exercise public authority and afforded scope to decide how that authority should be exercised in particular circumstances.'[89] In this thesis, I show that all appointing authorities, including the Attorney-General, senior judges, and the Solicitor-General have the discretion to assess candidates.[90] The Attorney-General has substantial legal discretionary power in making judicial appointment decisions. Legal discretionary power refers to instances when a legal rule or statute requires authorities to make a discretionary decision.[91] Based on section 11 of the District Court Act 2016 and section 100 of the Senior Courts Act 2016, judges are appointed by the Governor-General on the recommendation of the Attorney-General. The Attorney-General can choose between candidates or even delay a judicial appointment. In addition, the Attorney-General designs the appointment processes. Based on section 93 of the Senior Courts Act and section 11(3) of the District Courts Act, the Attorney-General must publish information explaining his or her judicial appointment process for District Court and High Court judges.

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[84] De Vos (n 69).
[85] Gavin (n 70).
[86] Waddington and Bell (n 72).
[87] ibid.
[88] Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry*, vol IB-71 (University of Illinois Press 1971).
[89] Anna Pratt and Lorne Sossin, 'A Brief Introduction of the Puzzle of Discretion' (2009) 24 Canadian Journal of Law and Society 301, 301.
[90] See chapters 3 and 4.
[91] Lorne Sossin, 'Redistributing Democracy: An Inquiry into Authority, Discretion and the Possibility of Engagement in the Welfare State' (1994) 26 Ottawa law review 1.

Moreover, the Attorney-General is involved in different stages of the appointment process and makes the final decision. Regarding District court judges' appointment, the Attorney-General has communicative discretion in terms of interaction with other groups and individuals.[92] He or she reviews the shortlisted candidates and 'after such consultation as he or she believes necessary, decides who should be on the shortlist for interview'.[93] The Attorney-General has a broad discretionary power to consult different organisations and individuals or even avoid consultation process. In chapter four, I explain that a panel of senior judges and a representative of the Ministry of Justice interview candidates. After the interview, the interview panel assesses the candidate and provides a report to the Attorney-General. The Attorney-General can add some names to the shortlist which were not considered by the interview panel.[94] Then, the Attorney-General selects and introduces a candidate to the Governor-General.[95] As BV Harris notes, the Attorney-General, as a member of the executive, has considerable power in the judicial appointment process.[96] He or she can recommend his or her preferable candidate without being obligated to any legal requirements.

Considering the appointment process of the High Court judges, the Solicitor-General prepares a long list of qualified candidates for the Attorney-General. Then, the Attorney-General selects three candidates to be interviewed. He or she might consult different associations, organisations, and individuals if he or she deems the consultation necessary.[97] It is worth noting that the Attorney-General can ignore the outcome of the consultation process and make an appointment decision based on his or her preferences. The Attorney-General 'may decide to seek an interview with or arrange for an interview by the Solicitor-General of, a person interested in appointment to the High Court.'[98] Hence, the Attorney-General can appoint High Court Judges with or without an interview. Finally, the Attorney-General selects their preferable candidate and recommends that person to the Governor-General.

The extent to which the appointment processes improve women's representation in the judiciary depends in large part on the Attorney-General, as he or she has a broad discretionary power. This issue was highlighted by the former Attorney-General of New Zealand. Margaret Wilson states, 'For me personally, it was obvious that there would not [be] an increase in the number of women appointed until there was an Attorney-General with a commitment to make the appointments.'[99]

In addition to the Attorney-General, other appointing authorities, such as senior judges and the Solicitor-General, enjoy an extent of discretion ensured by the Attorney-general.[100] As Tony Evans and Peter Hupe note, discretion entails some form of hierarchy, meaning that a body or individual ensures an extent of structured freedom to another to be exercised in a particular situation based on specific standards.[101] Throughout this thesis, I show that senior judges have significant interpretive discretion[102]

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[92] ibid.

[93] Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' 2019, p7.

[94] Interview with a female Chief Judge (18November 2021)

[95] Ministry of Justice (n 93).

[96] BV Harris, 'A Judicial Commission for New Zealand: A Good Idea That Must Not Be Allowed to Go Away' [2014] New Zealand law review 383.

[97] Ministry of Justice, 'The Judicial Appointments Protocol'.

[98] ibid, p5.

[99] ibid., p 46.

[100] See chapters 3 and 4.

[101] Tony Evans and Peter Hupe, 'Conceptualizing Discretion', *Discretion and the Quest for Controlled Freedom,*

to determine the meaning of judicial appointment criteria. They are involved in shortlisting candidates, interviewing them, and assessing and recommending preferred candidates to the Attorney-General.

Appointing authorities have considerable discretionary power in the judicial appointment processes, hence increasing women's participation in the judiciary is at the discretion of the appointing authorities. The literature offers various perspectives on the discretionary power of public authorities that I briefly discuss in this section. The literature on the discretionary power of public officials mostly focuses on the relationship between discretion and the rule of law. Albert Venn Dicey is one of the paramount scholars arguing that discretion is an arbitrary power opposite to the rule of law.[103] In his view, broad and unfettered discretion of authorities would likely interfere with citizens' rights.[104] Similarly, Ronald Dworkin adopted the metaphor of a doughnut, with the law, as a doughnut and discretion as the hole in the doughnut.[105] Based on this perspective, the discretionary power of the authorities in the judicial appointment processes is an arbitrary power hidden behind a legal facade. Legal rules and laws must constrain the exercise of discretion.

In contrast, Kenneth Culp Davis argues that an extent of discretion is a necessity.[106] Authorities' discretion is essential for ensuring individual justice because it allows authorities to tailor general rules to individual cases.[107] In respect to the judicial appointment processes, appointing authorities' discretion would allow them to tailor general rules regarding judicial appointment criteria to individual cases and identify meritorious candidates in female-dominated parts of the legal profession traditionally excluded from the judiciary.[108] Therefore, discretionary power may not necessarily lead to tyranny and discrimination. Davis stresses that discretionary power must be confined and structured to ensure the rule of law.[109] Similarly, Jeremy Waldron argues that the rule of law ensures that the authorities' discretion is properly framed.[110] Both Davis and Waldron analyse discretion in relation to the rule of law, advocating the importance of structuring discretion with legal rules.

The third perspective to discretion rejects the dichotomy between the rule of law and discretion. Based on this view, discretion forms a dialogue between authorities and those affected by authorities' decisions.[111] It offers an opportunity for authorities to ensure that their decisions and actions are responsive to the individuals' needs.[112] According to Lorne Sossin, people should be engaged in the process of exercising discretion. To achieve this, authorities must be transparent about how they

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(2020).

[102] Sossin (n 91).

[103] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty/Classics 1982).

[104] Panch Rishi Dev Sharma, 'Interpreting "Procedure Established by Law" with "Rule of Law": A Comparitive View of Irish, Japanese and Indian Constitution' (2017) 4 Forensic Research & Criminology International Journal, Medcarve,.

[105] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

[106] Jeremy Waldron, 'The Rule of Law' in Edward N Zalta and Uri Nodelman (eds), *The stanford encyclopedia of philosophy* (2016).

[107] Pratt and Sossin (n 89).

[108] See chapter 3.

[109] Davis (n 88).

[110] Waldron (n 106).

[111] Pratt and Sossin (n 89).

[112] Genevieve Cartier, 'Reconceiving Discretion: From Discretion as Power to Discretion as Dialogue' (ProQuest Dissertations Publishing 2004).

exercise their discretion and provide information on reasons for taking a decision and how it impacts people. He argues that exercising discretion cannot be legitimate without the engagement of individuals influenced by discretion.[113] Similarly, Woodrow Wilson stresses the necessity of transparency to monitor and hold authorities accountable for exercising their discretionary power. He emphasises the importance of accountability of authorities with broad discretionary power.[114] Based on this approach to discretion, appointing authorities should provide information about the judicial appointment processes and reasons for judicial appointments. In this way, people can engage in a dialogue with the appointing authorities and hold them accountable for their decisions. In this thesis, I explore whether the judicial appointment processes are transparent and whether it is possible to hold appointing authorities accountable for their decisions that impact women's representation in the judiciary.

Sossin argues that a purposive statutory framework is needed to set out values and priorities for authorities.[115] Legal rules and statutes should not limit discretionary power. They should set goals and values based on which people can evaluate the authorities' performance. In this way, they can participate in a dialogue with authorities. In addition, appointing authorities can respond to particular cases by considering social circumstances[116] and the statutes that granted their discretionary power. In this thesis, I explore whether legal rules have structured the discretion of appointing authorities to ensure women's representation in the judiciary. I show how the appointing authorities exercise their discretion and examine the impact of their decisions on the percentage of women judges.

III. Policies and initiatives to improve judicial diversity

In section two, I discussed that diversity has a significant impact on the judiciary. It enhances judicial legitimacy and public support. Diversity is crucial in ensuring the impartiality of the judiciary. It improves the quality of the judiciary by maintaining balance in society, broadening judges' information, representing various cultures, and including voices of diverse judges. A diverse judiciary would consider different views and perspectives in society and therefore, prevents the domination of one specific culture or ideology. Finally, judicial diversity indicates that all groups of society have equal opportunity to participate in the judiciary. Building on these arguments, I explore three types of affirmative action policies conducive to judicial diversity. This section provides an overview of the most common policies for improving diversity used in various jurisdictions.

Affirmative action policies were developed during the 1960s.[117] In 1961, the president of the United States, John F. Kennedy, used the term' affirmative action' in his Executive order 10925.[118] He required the federal government to take affirmative action to increase the employment of minorities.[119] Since

[113] Sossin (n 91).
[114] Woodrow Wilson, 'The Study of Administration' (1887) 2 Political Science Quarterly.
[115] Sossin (n 91).
[116] Pratt and Sossin (n 89).
[117] Kellough (n 1).
[118] Terry Eastland, 'The Case against Affirmative Action' (1992) 34 William and Mary law review 33; Jane Hodges-Aeberhard, 'Affirmative Action in Employment: Recent Court Approaches to a Difficult Concept' (1999) 138 International Labour Review 247.
[119] Robert Chrisman, 'Affirmative Action: Extend It' (2013) 43 The Black scholar 71.

then, affirmative actions have led to controversies and had specific meanings in particular contexts.[120] As Carol Lee Bacchi argues, the definition of affirmative actions is contestable.[121] Some definitions highlight the aim of affirmative actions and categorise them as remedial or diversifying policies. Remedial affirmative action policies aim to remedy discrimination, achieve diversity, and ultimately provide equality in society.[122] These types of policies include all programmes, policies, and practices that aim to remedy discrimination against disadvantaged groups of society[123] and redistribute opportunities among various social groups.[124] The group equality model, discussed in section two, justifies this type of affirmative action measures because group equality aims to redress past and present discrimination against disadvantaged social groups.[125]

Diversifying policies aim to enhance diversity.[126] They include any programmes or policies that focus on the under-representation of certain groups of society who have had less access to resources.[127] Thus, the policy makers adopt affirmative action measures and programmes to improve the representation of marginalised groups. According to Conrad Miller, affirmative actions have a persistent impact on increasing diversity.[128]

In this thesis, I adopt Elizabeth Anderson's definition of affirmative actions, which include,

> Any policy that aims to increase the participation of a disadvantaged social group in mainstream institutions, either through 'outreach' (targeting the group for publicity and invitations to participate) or 'preference' (using group membership as criteria [sic] for selecting participants).[129]

Affirmative actions can be a part of a statute, court order, or authorities' practices. Moreover, affirmative actions may impact education, employment, or appointment of disadvantaged groups.[130] For example, some affirmative action practices focus on the education of female law students, facilitate women lawyers' progress in the legal profession, prepare them for the judicial appointment processes,

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[120] Faye J Crosby and Cheryl VanDeVeer, *Sex, Race, and Merit Debating Affirmative Action in Education and Employment* (University of Michigan Press 2000).

[121] Carol Lee Bacchi, *The Politics of Affirmative Action: 'women,' Equality and Category Politics* (Sage Publications 1996).

[122] James P Sterba, *Affirmative Action for the Future* (1st edn, Cornell University Press 2009).

[123] Bacchi (n 121); J Scott Carter and Cameron D Lippard, *The Death of Affirmative Action? Racialized Framing and the Fight against Racial Preference in College Admissions* (Bristol University Press 2020); Anita L Allen, 'Was I Entitled or Should I Apologize? Affirmative Action Going Forward' (2011) 15 The journal of ethics 253; Margaret Thornton, 'Affirmative Action, Merit and the Liberal State' (1985) 2 Australian journal of law and society 28; Hodges-Aeberhard (n 118); Elisa Maaria Pylkkanen, 'Words That Carry Meaning: Issue Definition and Affirmative Action' (ProQuest Dissertations Publishing 2005).

[124] Kellough (n 1).

[125] Annick Masselot and Timothy Brand, 'Diversity, Quotas and Compromise in the Boardroom: Tackling Gender Imbalance in Economic Decision-Making' (2015) 26 New Zealand universities law review 535.

[126] Sterba (n 122).

[127] Thornton (n 123).

[128] Conrad Miller, 'The Persistent Effect of Temporary Affirmative Action' (2017) 9 American economic journal: Applied economics 152.

[129] Elizabeth Anderson, *The Imperative of Integration* (Princeton University Press 2010), 135.

[130] Harry J Holzer and David Neumark, 'What Does Affirmative Action Do?' (2000) 53 Industrial & labor relations review 240.

or modify a judicial role to be more adjustable for women. In addition, various organisations and authorities can apply affirmative action.[131] For instance, some affirmative action practices are applied by women lawyers' associations, by the judiciary, or by private law firms.

In this section, I explain how affirmative actions can be hard (pull strategies) or soft (push strategies). Pull strategies centre on the outcome of diversity programmes.[132] I explore two examples of hard affirmative action policies, namely: quotas and targets.[133] Quotas set a numerical goal that should be achieved in a specific timetable.[134] They are usually non-negotiable and sometimes can ignore the availability of qualified candidates. This issue often provokes negative reactions and criticism to setting quotas.[135]

Targets are the second type of hard affirmative action policies. Targets are hard affirmative actions because they set a numerical goal. Both targets and quotas set a diversity goal, but targets usually do not impose sanctions or other enforcement methods for failure in obtaining the goal.[136] As a matter of fact, targets encourage slower improvements by implementing flexible strategies.[137] Setting targets can be an appropriate alternative to setting quotas.[138]

The challenges in setting targets and quotas lead to the introduction of new affirmative action policies categorised as push strategies or soft affirmative action policies.[139] In the third part of this section, I discuss soft affirmative action policies. Soft affirmative action policies seek to support and encourage individuals from underrepresented groups to apply for a position.[140] These policies are introduced to eliminate direct and indirect discrimination and design suitable programmes for disadvantaged people.[141] Finally, in this section, I explore arguments for and against affirmative action policies.

A. Hard affirmative action policies

Hard affirmative action policies include policies, programmes, and practices that offer preferential treatment to underrepresented groups.[142] A hard affirmative action policy requires decision makers to increase diversity[143] and address the lack of structural integration of different groups.[144] Hence, decision

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[131] ibid.

[132] Jennifer Whelan and Robert Wood, 'Increasing Gender Diversity through Targets with Teeth', *Women in Leadership: Understanding the Gender Gap* (CEDA 2013).

[133] ibid.

[134] Linda Senden and Goran Selanec, *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, Including on Company Boards* (European Commission Directorate-General for Justice Unit JUST/D1 Equal Treatment Legislation 2013).

[135] Whelan and Wood (n 132).

[136] Victor E Sojo and others, 'Reporting Requirements, Targets, and Quotas for Women in Leadership' (2016) 27 The Leadership quarterly 519.

[137] Alice Klettner, Thomas Clarke and Martijn Boersma, 'Strategic and Regulatory Approaches to Increasing Women in Leadership: Multilevel Targets and Mandatory Quotas as Levers for Cultural Change' (2016) 133 Journal of business ethics 395.

[138] Malleson, 'Diversity in the Judiciary: The Case for Positive Action' (n 2).

[139] Whelan and Wood (n 132).

[140] Malleson, 'Rethinking the Merit Principle in Judicial Selection' (n 3).

[141] Senden and Selanec (n 134).

[142] Peter H Schuck, 'Affirmative Action: Past, Present, and Future' (2002) 20 Yale law & policy review 1.

[143] Pylkkanen (n 123).

makers should take proactive measures to ensure diversity. For example, in the judicial appointment process, a hard affirmative action policy would obligate the decision makers to appoint a specific proportion of women.[145] Thus, the policy holds decision makers responsible for increasing women's representation in the judiciary.

Hard affirmative actions are result-oriented practices[146] aiming to modify the unequal distribution of resources.[147] A hard affirmative action policy sets a numerical goal to enhance diversity; it can be a numerical target stated by an official or a rigid quota set in legislation.

1) Quotas

Quotas are the strongest type of affirmative action policies. A quota system sets a numerical goal to increase the proportion of underrepresented groups[148] in a specific period of time.[149] Quotas are mostly used for appointing judges of international tribunals and courts.[150] In judicial appointments, quotas are frequently applied to ensure different geographical, regional, and provisional representations in the judiciary.[151] One example of geographic quotas is the Supreme Court of the UK, which must have at least one judge from Scotland and one from Northern Ireland on the bench.[152] Setting quotas can be an efficient strategy to improve gender diversity in the judiciary. Broadly, there are three types of quotas: strict, flexible, and soft quotas.

Strict quotas reserve a specific number of positions for an underrepresented group.[153] For example, the requirement that in a political party at least 30% of candidates should be women is a strict quota.[154] Decision makers who apply a strict quota select the most qualified members of the underrepresented group that is the subject of the quota.[155] For instance, in the judicial appointment process, decision makers would appoint the most qualified female candidates until the quota was met.

Flexible quotas, sometimes called 'result quotas,' combine numerical targets with a tie-break preference. A tie-break preference refers to a situation when a decision-maker must choose a candidate from underrepresented parts of society over other candidates in situations where candidates are equally qualified for a position. The main aim of applying tie-break preferences is to remove prejudices and stereotypes that negatively affect underrepresented groups. In this type of quota, the numerical

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[144] Lesley A Jacobs, *Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice* (Cambridge University Press 2004).
[145] Rackley (n 10).
[146] Thornton (n 123).
[147] Allen (n 123).
[148] Louis Menand, 'The Changing Meaning of Affirmative Action' [2020] The New Yorker.
[149] Senden and Selanec (n 134).
[150] Geoffrey Bindman and Karon Monaghan, 'Judicial Diversity: Accelerating Change' (2014).
[151] Kate Malleson, 'The Disruptive Potential of Ceiling Quotas in Addressing the Over-Representation in the Judiciary', *Debating judicial appointments in an age of diversity* (Routledge 2017).
[152] Bindman and Monaghan (n 150).
[153] Senden and Selanec (n 134).
[154] Mark P Jones, 'Increasing Women's Representation Via Gender Quotas: The Argentine Ley de Cupos' (1996) 16 Women & politics 75.
[155] Senden and Selanec (n 134).

goal or timeframe is changeable in certain circumstances. Furthermore, the person or body in charge of applying quotas can design a suitable measure for achieving the numerical goal.[156]

Soft quotas set aspirational goals, so the decision maker has broad discretion to choose the measures and timeframe. Soft quotas do not set severe penalties for failure to achieve them.[157]

Quotas are also categorised as right-based and sanction-based according to the consequences of failure to achieve the quota. In a right-based quota, a member of the underrepresented group can enforce quotas through judicial proceedings and receive compensation, whereas sanction-based quotas set an administrative sanction for failure to achieve the target.[158] Therefore, people cannot enforce sanction-based quotas or receive compensation.

Setting quotas can be challenging. One of the challenges of setting quotas is the group classification of individuals. For example, setting quotas for different religious communities would disadvantage people who do not identify themselves as followers of any religion. To solve this issue, it is recommended to use other types of affirmative action that do not specify any disadvantaged group, such as some types of education programmes that are accessible for everyone but have been designed to answer the needs of specific groups of society. This solution is likely to also solve the 'diagonal discrimination' problem. 'Diagonal discrimination' refers to a situation when members of the dominant group face similar disadvantages to minorities. For example, a male single parent might encounter similar challenges as a woman with care responsibilities.[159]

Another challenge of designing quotas is identifying the subjects. Identification of an underrepresented target group is a dynamic process. It is worth noting that there is an important difference between affirmative action and equality policies. Affirmative action policies do not require each candidate to provide evidence of discrimination. Instead, affirmative action policies rely on the recognition of past group-based discrimination.[160] In other words, affirmative actions are based on group equality model.

An innovative method of setting quotas is to choose the over-represented groups as the subject of quotas. For example, in a male-dominated judiciary, the appointing decision makers could set a 50% quota for judicial appointment of men. The quota would require that only 50% of judicial appointments must be men. In this way, the problem would shift from the under-representation of one group to the over-representation of the dominant group. This so-called 'ceiling quota' prohibits selecting more than a specific percentage of candidates from dominant groups in society. Therefore, for example, the number of male candidates would be restricted, and judicial appointments would likely be more competitive and open to diverse groups of people.[161]

Critics of setting quotas maintain that applying quotas in the judiciary would undermine the position of qualified individuals from underrepresented groups. In other words, people who advantage from quotas (the subject of quotas, for example in a gender quota, women are the subject) might be considered less

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[156] ibid.
[157] ibid.
[158] ibid.
[159] Malleson, 'Diversity in the Judiciary: The Case for Positive Action' (n 2).
[160] Malleson, 'Rethinking the Merit Principle in Judicial Selection' (n 3).
[161] Rainbow Murray, 'Quotas for Men: Reframing Gender Quotas as a Means of Improving Representation for All' (2014) 108 The American political science review 520.

competent than other individuals who were not a quotas' subject.[162] Hence, in some cases, disadvantaged individuals who benefit from quotas have to prove that they are as qualified as or even more qualified than people from the dominant groups, and that their appointment was merit-based.[163] By using ceiling quotas, the burden of proving the qualifications shifts to the candidates from the overrepresented group.[164] Setting ceiling quotas is a prerequisite of the merit principle, because applying ceiling quotas excludes a weaker candidate who benefits from preferential treatment of the dominant group.[165]

2) Targets

Setting targets is the second type of hard affirmative action policies. It is the second generation of quotas systems and is mainly aspirational.[166] Both targets and quotas set a specific numerical goal. The main difference between quotas and targets is found in their enforcement strategies. Generally, achievable and challenging goals motivate individuals to improve their performance, achieve better results, and attain the goal. However, commitment to a goal depends on its consequences.[167] Jennifer Whelan and Robert Wood emphasise the importance of enforcement mechanisms to guarantee commitment to goals. Setting challenging goals, monitoring performance, being accountable to meet the goal, and being rewarded for the achievements are among the most effective strategies to make a change.[168] A study conducted by Victor Sojo and others highlights the relation between the goal level and the enforcement mechanisms. It suggests that setting lower goals with strong enforcement mechanisms produces similar results as setting higher goals with weaker enforcement mechanisms. Targets introduce a numerical goal without any consequences for failure to achieve it.[169] Whelan and Wood suggest designing diversity targets that are 'challenging, accompanied by mechanisms for accountability and reward, and aligned with a corporate-level diversity strategy.'[170]

Another difference between quotas and targets is that quotas ensure fundamental changes in a specific timetable while targets strive for slower changes by applying strategic measures.[171] Whelan and Wood argue that targets can be more successful in achieving diversity than quotas. Targets are more flexible and adaptable to different conditions, and hence they would provoke less resistance.[172] Malleson suggests that setting targets for judicial appointments would formalise the process of encouraging diversity in the candidate pool.[173] By setting targets, appointing authorities take practical steps to guarantee enough applications from diverse groups. Therefore, targets show real commitment of

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[162] Alysia Blackham, 'Court Appointment Processes and Judicial Diversity' (2013) 24 Public Law Review 233.
[163] Malleson, 'The Disruptive Potential of Ceiling Quotas in Addressing the Over-Representation in the Judiciary' (n 151).
[164] Murray (n 161).
[165] Malleson, 'The Disruptive Potential of Ceiling Quotas in Addressing the Over-Representation in the Judiciary' (n 151).
[166] Malleson, 'Diversity in the Judiciary: The Case for Positive Action' (n 2).
[167] Sojo and others (n 136).
[168] Whelan and Wood (n 132).
[169] Sojo and others (n 136).
[170] Whelan and Wood (n 205),39.
[171] Klettner, Clarke and Boersma (n 137).
[172] Whelan and Wood (n 132).
[173] Malleson, 'Diversity in the Judiciary: The Case for Positive Action' (n 2).

decision makers to modifying the appointment process.[174] Moreover, setting targets for applications may show that there is no bias or prejudice against disadvantaged groups of society.[175] Rackley suggests that if officials fail to meet the target, they have to give an explanation and introduce an effective strategy for the future.[176] Arguably, she did not consider that decision makers might select candidates from narrow and more privileged parts of an underrepresented group to show that the target is met. Therefore, this solution can also lead to a cosmetic representation of the underrepresented groups in society.

B. Soft affirmative action policies

Soft affirmative action policies aim to provide equal opportunities for different groups in society.[177] There are two types of soft affirmative actions. The first type of soft affirmative action policies prevent people' characteristics, such as gender or race, from impacting on the selection process. For example, a woman should not be rejected for a position based on her gender. The second type of soft affirmative action policies encompasses positive action and encourages more candidates from an underrepresented group to apply for a position.[178] For example, soft affirmative action for judicial diversity aims to increase the chances of women candidates being selected for a judicial position. Soft affirmative action policies upskill and prepare disadvantaged groups to compete with others from more privileged social groups.[179] The soft policies centre on the training and improvement processes and aim to increase the number of qualified women for senior positions.[180] Mentorship, networking, and training programmes for female lawyers are examples of soft affirmative action measures. These programmes prepare female lawyers for the judicial appointment process and increase their chance of being chosen for a judicial role. These outreach measures aim to increase the diversity of the candidate pool without changing the structure of the appointment processes.[181]

C. Critics of affirmative action policies

As I mentioned earlier in this section, affirmative actions are controversial[182] because there are various strong views in favour and against them. Critics note that affirmative action policies offer unfair benefits and advantages to underrepresented groups of society.[183] 'The relationship between equal treatment and affirmative action is central to affirmative action controversy.'[184] Critics of affirmative action policies argue that similar cases must be treated the same[185] from an individual equality perspective.

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[174] Rackley (n 10).
[175] Malleson, 'Diversity in the Judiciary: The Case for Positive Action' (n 2).
[176] Rackley (n 10).
[177] Louis P Pojman, 'The Case Against Affirmative Action' [1998] The International journal of applied philosophy 97; Bacchi (n 121).
[178] Malleson, 'Rethinking the Merit Principle in Judicial Selection' (n 3).
[179] Bacchi (n 121).
[180] Whelan and Wood (n 132).
[181] Pylkkanen (n 123); Daniel Fershtman and Alessandro Pavan, '"Soft" Affirmative Action and Minority Recruitment' (2021) 3 The American economic review. Insights 1.
[182] Crosby and VanDeVeer (n 120).
[183] Thekla Morgenroth and Michelle K Ryan, 'Quotas and Affirmative Action: Understanding Group-Based Outcomes and Attitudes' (2018) 12 Social and personality psychology compass e12374.
[184] Bacchi (n 150), 22.
[185] ibid.

Furthermore, critics of affirmative action policies argue that such policies are incompatible with the merit principle.[186] They assume that the overrepresentation of one group is based on meritocracy. Therefore, affirmative action policies such as setting quotas are in contrast with a merit-based selection system.[187] In other words, affirmative action policies result in the selection of less qualified candidates from under-represented groups.[188] As a result, people with lower competence and performance are likely to be chosen over competent ones.[189] Rachel Davis and George Williams for instance, reject the idea of using quotas, insisting that 'merit,' known by everyone, should be the main standard for judicial appointment.[190]

In response to these critics, Bacchi argues that merit, affirmative action, and equal opportunity are all contestable notions. Considering affirmative action policies against a meritorious system implies that the subjects of these policies are undeserving individuals who are privileged because of affirmative action policies.[191] Here, it is necessary to unpack the concept of merit and explore its various meanings.

In general, there are two perspectives on merit. First, a traditional perspective defines merit as a universal and neutral quality.[192] Merit is a fair and objective tool to assess candidates' abilities and qualifications. Therefore, fairness and objectivity are the key features of meritocracy. In a meritorious system, an individual's achievements are rewarded, and each person is responsible for their own failure or success.[193]

The second perspective defines merit as a subjective preference[194] made by society based on a system of accepted values.[195] In other words, merit is a tool to evaluate a person's ability to produce social values. The social values are defined by power holders in a historical context.[196] Merit refers to socially accepted preferences that power holders constructed over time and is followed by their descendants.[197] Hence, as Hilary Sommerlad argues, merit is a fluid and instrumental concept legitimising inequalities in society.[198] It justifies the allocation of power and authority in society.[199] David Knights and Wendy

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[186] Julia V Furtado, António C Moreira and Jorge Mota, 'Gender Affirmative Action and Management: A Systematic Literature Review on How Diversity and Inclusion Management Affect Gender Equity in Organizations' (2021) 11 Behavioural sciences 21.
[187] Rackley (n 10).
[188] Malleson, 'Rethinking the Merit Principle in Judicial Selection' (n 3).
[189] Morgenroth and Ryan (n 183).
[190] Rachel Davis and George Williams, 'Reform of the Judicial Appointment Process: Gender and the Bench of the High Court of Australia' (2003) 27 Melbourne University Law Review 819.
[191] Bacchi (n 121).
[192] Hilary Sommerlad, 'The "Social Magic" of Merit: Diversity, Equity, and Inclusion in the English and Welsh Legal Profession' (2015) 83 Fordham law review 2325.
[193] Savita Kumra, 'Exploring Career "Choices" of Work-Centred Women in a Professional Service Firm' (2010) 25 Gender in management 227.
[194] Daria Roithmayr, 'Deconstructing the Distinction between Bias and Merit' (1997) 85 California law review 1449.
[195] Hilary Sommerlad, 'Minorities, Merit, and Misrecognition in the Globalized Profession' (2012) 80 Fordham law review 2481.
[196] Roithmayr (n 194).
[197] Kumra (n 193).
[198] Sommerlad (n 192).
[199] Kumra (n 193).

Richards suggest that the meritocratic system is the result of masculine organising and thinking about social and political life.[200]

It appears that the critics of affirmative action policies have a traditional perspective on merit and define it as a neutral and objective tool to evaluate a person's competence. Accordingly, in a meritorious system, the most qualified person will be chosen for a position and applying affirmative action policies is reverse discrimination.[201] This understanding of affirmative action 'leaves untouched and unchallenged practices that exclude certain groups from positions of influence and authority. Hence the central debate … is about what forms of preferential treatment are acceptable, not about what factors are responsible for precluding women, blacks, and others from power.'[202]

To sum up, selecting qualified people based on merit is not an objective and neutral process. That is why the selection process and decision makers' views, and perspectives play a crucial role in a meritorious system.[203] It is necessary to critically analyse merit in the appointment process and assess its impact on female candidates. In chapter four, I unpack further the definition of merit in the judicial appointment processes by critically analysing judicial appointment criteria. I explore how appointing decision makers understand merit and interpret the criteria. Moreover, I explain female candidates' challenges in demonstrating their competence based on current understanding of merit.

This section has provided a framework for analysing gender-sensitive policies for improving women's representation in the judiciary. In chapter six, I show that in New Zealand, gender-sensitive initiatives similar to soft affirmative action policies have been adopted to increase women's representation in the judiciary. I explore the impact of these initiatives on the proportion of women judges. Then, in chapter seven, I consider whether a result-based gender-sensitive policy similar to a hard affirmative action policy can be an alternative solution for the unequal participation of women in the judiciary. To answer this question, I focus on a result-based gender-sensitive policy in Victoria and evaluate its impact on the percentage of Victorian women judges.

Conclusion

This thesis focuses on how judicial appointment processes and gender-sensitive initiatives impact women's representation in the New Zealand judiciary. In the first section of this chapter, I have shown the importance of this research by explaining four rationales in favour of judicial diversity. Judicial diversity improves judicial legitimacy in society and ensures that judicial decisions reflect different views and perspectives in society. In addition, judicial diversity enhances judicial impartiality because it prevents the dominance of a limited set of views in judicial decisions. A diverse judiciary shows that candidates with diverse backgrounds have equal opportunities to participate in the appointment processes and take judicial positions. Finally, judicial diversity enhances the quality of judicial decisions because judges from various social groups would share their knowledge and experiences with others,

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[200] David Knights and Wendy Richards, 'Sex Discrimination in UK Academia' (2003) 10 Gender, work, and organization 213.

[201] Randall Kennedy, *For Discrimination: Race, Affirmative Action, and the Law* (First Vintage books, Vintage Books, a division of Penguin Random House LLC 2015).

[202] Bacchi (n 150), 34.

[203] Morne Olivier, 'Some Thoughts on Judicial Diversity in the New Supreme Court Era' (2008) 16 Waikato law review: Taumauri 46.

represent their cultural beliefs and ideas in their judicial decisions, maintain a balance in the judiciary, and have different performances and behaviours than judges from dominant parts of society.

In section two, I have explained that judicial appointments are at the discretion of the Attorney-General. Thus, increasing the percentage of women judges depends on the views and perspective of the Attorney-General and other appointing decision makers, such as the senior judges. I have reviewed the literature on discretion and noted various views for and against the discretionary power of appointing authorities. I use the discussion on discretion to analyse the role of appointing authorities in this thesis.

This research aims to identify the most effective gender-sensitive policies for increasing the proportion of women judges. In this chapter, I have provided a framework for analysing gender-sensitive initiatives and policies in New Zealand and Victoria. I have elaborated on the most common types of affirmative action policies conducive to judicial diversity. I have explained that affirmative actions include any policies that aim to increase the proportion of underrepresented social groups in mainstream institutions. Quotas, targets, and soft affirmative action policies are three common forms of affirmative action policies used in different jurisdictions to diversify the judiciary. I have discussed the arguments in favour and against applying affirmative action policies.

I have noted that affirmative action is a controversial issue with different meanings in different contexts.[204] In this thesis, I avoid using the term affirmative action because of the controversy surrounding this term and the negative connotations associated with it.[205] Instead, I use the term 'gender-sensitive initiatives' to refer to a network of initiatives that aim to increase the percentage of women judges by encouraging women to apply for judicial positions and preparing them for judicial appointment processes; and use 'result-based gender-sensitive policies" to refer to the policies that set a numerical target for increasing women's representation in the judiciary.

[204] Crosby and VanDeVeer (n 120).
[205] Menand (n 148).

Chapter three
Navigating challenges: women lawyers on the road to becoming judges

Introduction

In this thesis, I explore how judicial appointment processes in New Zealand impact women's representation in the judiciary. This chapter aims to identify issues that have led to a low percentage of female candidates for judicial positions. In New Zealand, one of the salient requirements for appointment provides that candidates to judicial positions must hold a practising certificate as a barrister or as a barrister and solicitor for at least seven years.[1] This requirement links directly judicial appointment to the legal profession. In turn, the percentage of female lawyers impacts the proportion of female judges. This chapter begins therefore with an overview of the New Zealand legal profession and the proportion of women lawyers in different parts of the profession.

In section one, I explore vertical gender segregation in the legal profession limiting women's likelihood of being selected for a judicial position.[2] Section two looks at the reasons for the vertical segregation of women in the legal profession. I illustrate some generic issues in New Zealand and other jurisdictions, such as the Australian state of Victoria disadvantaging female lawyers. These issues include work-life conflicts, prejudice against women in the legal profession, and female lawyers' networking challenges. I refer to a robust body of scholarship and my interview findings to show the working culture of the legal profession.

This chapter concludes by asking whether a candidate can prepare for the judicial appointment process by referring to the relevant legal rules and policy guidance. I explore whether candidates have equal opportunities to upskill themselves and prepare for judicial appointment processes and how this issue affects female candidates in particular. I refer to the statutory requirements and the Attorney-General's booklets on judicial appointment to provide an official portrait of the process. I show that candidates who only refer to official documents will not gain a clear understanding of the appointment criteria and process. I argue that the lack of transparency in the judicial appointment processes mostly disadvantages women by referring to my interview findings. Therefore, most women lawyers have an unequal opportunity to obtain the requirements for taking a judicial position and prepare for the appointment processes.

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[1] See section 3 of this chapter.

[2] In chapter 4, I show that seniority in the legal profession is an important factor in being selected for judicial positions.

I. Overview of the New Zealand legal profession

The New Zealand legal profession, established in 1890, adopts the English legal system model.[3] In New Zealand, lawyers can practice as barristers and solicitors, or barristers (also known as barristers sole), or in-house lawyers. From the beginning of New Zealand settlement, lawyers could practice as barristers and solicitors because the New Zealand colony was too small to restrict lawyers to one branch. Therefore, New Zealand does not have rigid categorises of barristers and solicitors.[4] Most legal practitioners are admitted as barristers and solicitors. Barristers and solicitors have a right of audience in all courts[5] and often work in law firms.[6] 54% of New Zealand-based lawyers practice as barristers and solicitors in multi-lawyer law firms.[7] As of 2021, female lawyers outnumber male lawyers, with 53.9% of the profession being women.[8] This suggests that the proportion of potential female candidates for judicial positions is more than men. But why, then, is there not gender parity on the bench?

While the majority of female lawyers are women, the majority of senior lawyers are male. 52% of lawyers working in multi-lawyer firms are women, while only 22.9% of them are partners or directors.[9] This issue impacts women's representation in the judiciary because most judges are chosen from senior parts of the legal profession.[10] Therefore, courts inherit the problem of gender inequity in the legal profession.

Some lawyers practice as barrister soles. Barristers (barristers sole) are experienced litigators who are specialised in a particular area of law and are not allowed to be members of law firms. Yet senior barristers can employ junior barristers to assist them. Senior barristers can become King's Counsel (KC). They are often briefed on more serious cases.[11] There is a vertical gender segregation among barristers as men make up 60% of barristers sole and 38% of employed barristers, whereas most (62%) employed barristers are women.[12]

The third category of lawyers is in-house lawyers. 23.8% of New Zealand-based lawyers are working as in-house lawyers.[13] In 1987, the In-house Lawyers Association of New Zealand (ILANZ) was established as a section of the New Zealand Law Society to answer the needs of in-house lawyers.[14] In-house lawyers may work for the government, commercial enterprise, local government, community law

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[3] Grant Morris, *Law Alive: The New Zealand Legal System in Context* (4th edn, Thomson Reuters (Professional) Australia Pty Limited 2019).
[4] ibid.
[5] Cox Noel, 'The End of the Silk Road? The Metamorphosis of Queen's Counsel into Senior Counsel in New Zealand' (2006) 15 Commonw Law 27.
[6] Morris (n 3).
[7] Geoff Adlam, 'Snapshot of the Profession 2020' [2020] Lawtalk 26.
[8] James Barnett, Marianne Burt and Navneeth Nair, 'Snapshot of the Profession 2021' [2021] Lawtalk 36.
[9] ibid.
[10] See chapter 3 and 4.
[11] New Zealand Bar Association, 'About Barristers' (*New Zealand Bar Association*, 2022) <https://www.nzbar.org.nz/faqs-about-barristers> accessed 23 October 2022.
[12] Adlam (n 8).
[13] ibid.
[14] ILANZ, 'WHAT IS ILANZ?' (*In-House Lawyers Association of New Zealand*, 2021) <https://ilanz.org/about/what-is-ilanz/> accessed 17 August 2021.

centres and universities. The majority of in-house lawyers (66.2%), are women who work in unions, professional organisations and charities.[15]

The statistics show that female lawyers are underrepresented in senior ranks of the New Zealand legal profession. While in 2020, women comprise over 70% of law graduates[16] and 52.5% of the legal profession, they are still underrepresented in senior positions. Only 34% of law firm directors and partners[17] and 23% of King's Counsels are women. Moreover, around 60% of in-house lawyers are women, however, that percentage is not reflected in senior roles in government and corporate legal teams.[18] The statistics suggest that female lawyers in different parts of the legal profession may encounter challenges that impede their progress in the legal profession and, thus, have a lower chance of being selected for judicial positions.[19] In a study conducted in New Zealand, 86% of female respondents noted that they encounter some barriers to progress in their law firm. Furthermore, the study shows a considerable difference between men's and women's perceptions of promotion opportunities. 40% of men stated that they have a moderate level of promotion opportunities compared to only 20% of women.[20] Women's perception of promotion possibilities impacts their decision to stay in a law firm.[21] Lower promotion possibilities for women motivate them to leave the legal profession.[22] As a result, they might not even gain the bare minimum requirement for taking a judicial position.

II. Women lawyers' challenges

The low percentage of female partners in law firms indicates that female lawyers might encounter a 'glass ceiling.' The glass ceiling metaphor refers to the hidden barriers to women progressing in organisational hierarchies.[23] Gender bias and discrimination, difficulties in working part time[24], gender stereotypes[25], and difficulties in finding mentors and making informal social networks[26] are some of the issues that contribute to the glass ceiling in the legal profession. In this section, I explore these issues and show how they disadvantage female lawyers, and, consequently, decrease the percentage of qualified women for judicial positions. I mostly refer to the literature and my interview findings to

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[15] 'Spotlight on… in-House Lawyers' [2017] Lawtalk 84.

[16] 'By the Numbers' (*New Zealand Law Society*, 2020) <https://www.lawsociety.org.nz/professional-practice/diversity-and-inclusion/women-in-the-legal-profession/by-the-numbers/> accessed 21 November 2022.

[17] Adlam (n 8).

[18] 'By the Numbers' (n 16).

[19] In chapter four, I show that having a senior position is an important factor in being selected for a judicial position.

[20] Judith K Pringle and others, *Women's Career Progression in Auckland Law Firms: Views from the Top, Views from Below* (Gender & Diversity Research Group 2014).

[21] Janet Walsh, 'Not Worth the Sacrifice? Women's Aspirations and Career Progression in Law Firms' (2012) 19 Gender, work, and organization 508.

[22] Lisa Webley and Liz Duff, 'Women Solicitors as a Barometer for Problems within the Legal Profession - Time to Put Values before Profits?' (2007) 34 Journal of law and society 374.

[23] Paul Smith, Peter Caputi and Nadia Crittenden, 'A Maze of Metaphors around Glass Ceilings' (2012) 27 Gender in management 436.

[24] Stacey Shortall, 'Turning the Tide to Make More Women Law Firm Partners in New Zealand' (NZLS CLE 2016).

[25] Deborah L Rhode, 'The Unfinished Agenda: Women and the Legal Profession' [2001] American Bar Association Commission on Women in the Profession.

[26] Andrea Macerollo, 'Power of Masculinity in the Legal Profession: Women Lawyers and Identity Formation' (2008) 1 the Windsor Review of Legal and Social 121.

outline some generic challenges of female lawyers in various jurisdictions, such as New Zealand. I limit my discussion of the legal profession to barristers and solicitors working in law firms as many lawyers work in firms, and law firm employees are women.[27] I should note that in 2017, Sarah Taylor conducted a non-academic piece of research on the flexible working arrangements of in-house lawyers in New Zealand. The study points out some issues encountered by female in-house lawyers relating to their working arrangements.[28] In this section, I mention some of the findings of this study. However, due to the dearth of academic research on this topic, it is challenging to advance a conclusive discussion on the issues that female in-house lawyers face and their impact on the percentage of female judges.

This section proceeds in three parts. In the first part, I discuss work-life conflicts in the legal profession that might disadvantage female lawyers. In the second part, I explore gender bias and gender stereotype views that disadvantage women in the legal profession. Finally, in part three, I discuss women's challenges in building strong social networks in the legal profession.

A. Work-Life Conflicts

In this part, I outline the difficulties of maintaining a work-life balance for lawyers, specifically those with care responsibilities. This issue mostly disadvantages female lawyers because, in New Zealand, women take on more unpaid care responsibilities than men. [29] As male District Court judge number 10 stated,

> I know some women will have nannies and so forth... But I can tell it is not easy for some of them... Even though we have an equal society, the reality from my experience in dealing with families is that even where parents have shared time, it is very often the woman who has overall responsibility for the running of the household, or the children… The father may be great and spend a lot of time with the children and cook meals and so forth, but my experience is that it is pretty much the woman who takes the responsibility.[30]

The statistics confirm male District Court judge's views. In 2020, on average, women undertake 69% of unpaid work.[31] This suggests an unequal allocation of house chores[32] against women. Unpaid work is an umbrella term including both housework (activities such as cooking, cleaning, caring for pets, and shopping) and care responsibilities (activities such as looking after dependent children, taking care of disabled adults or dependent patent).[33] The statistics show that difficulties in adjusting the needs of work and family responsibilities impact women more than men because women take on more family responsibilities.

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[27] Adlam (n 8).

[28] Sarah Taylor, 'Valuing Our Lawyers: The Untapped Potential of Flexible Working in the New Zealand Legal Profession' (New Zealand Law Society 2017).

[29] Deloitte and Westpac New Zealand Limited, *Westpac New Zealand Sharing the Load Report* (Westpac New Zealand 2021).

[30] Interview with a male District Court Judge (18November 2021)

[31] Deloitte and Westpac New Zealand Limited (n 29).

[32] Victoria Wass and Robert McNabb, 'Pay, Promotion and Parenthood amongst Women Solicitors' (2006) 20 Work, employment and society 289.

[33] ibid.

Legal careers are made and designed by men who can commit to their work and prioritise their work over their family life,[34] while the best childbearing years of female lawyers correlate with their career progression towards becoming a partner.[35] Some female interview participants noted that caregiving responsibilities impede their progress in the legal profession. Female coroner number seven,[36] female senior judge number 14,[37] female coroner number eight,[38] and female senior judge number 11[39] stated that childcare responsibilities are a considerable challenge for women in the legal profession and a barrier that might decrease the proportion of female candidates for a judicial position. Female judge number 12 explained,

> It is still mostly women who take time out to look [after] the children, and it is still mostly women who work part time. That was my experience, I took time out [and] worked part time. My male peers in the law firm that I worked who did not do that, definitely went on more quickly to more senior positions… a lot of female judges have maybe one child, maybe no children. There is not a lot of female judges with four children. But there are lots of male judges with four children, five children, six children, and several relationships. So, family responsibilities are definitely a factor.[40]

According to female judge number 12, male lawyers can progress faster than women and take senior positions because men do not take childcare responsibilities and are less likely to work part time, while women take more unpaid care responsibilities and, as a result, are more likely to take leave or work flexibly. In addition, as I discuss in the next part, having children is a sign of stability for men while motherhood shows women's lack of commitment to their work.[41] Therefore, childcare responsibility is an important factor that can delay women's progress. This issue disadvantages female lawyers in both Victoria and New Zealand. Female senior judge number six, who is a Judge in New Zealand, explained her experience of childcare challenges. She stated,

> You also find that women are leaving the law firms for that same reason that they can't balance the work with the demands of the role. Because the hours are too long and too unpredictable. So, they leave or become part time and then [they] don't have the seniority they feel to apply for judicial positions.[42]

According to her, working hours of law firms are long and unpredictable. The main problem is that women take more care responsibilities which conflicts with the inflexible work culture of a law firm. Lack of work-life balance is a common problem among employees of the biggest private law firms in New

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[34] Nicole Ashby, 'Absent from the Top - a Critical Analysis of Women's Underrepresentation in New Zealand's Legal Profession' (2017) 1 New Zealand women's law journal 80.

[35] Deborah K Holmes, 'Structural Causes of Dissatisfaction among Large-Firm Attorneys: A Feminist Perspective' (1990) 12 Women's rights law reporter 9.

[36] Interview with a female coroner (17 October 2021)

[37] Interview with a female senior judge (8 April 2022)

[38] Interview with a female coroner (19 October 2021)

[39] Interview with a female senior judge (21 October 2021)

[40] Interview with a female judge (1 April 2022)

[41] Webley and Duff (n 7).

[42] Interview with a female Senior Judge(21 October 2021)

Zealand.[43] Difficulties in maintaining work and life balance may encourage some female lawyers to leave law firms. This issue was confirmed by a study on the New Zealand legal profession, where 41 percent of female practitioners noted that 'they have considered resigning from their jobs because of childcare difficulties.'[44] As a result of these challenges, some women choose other areas of legal practice that are more structured and have predictable working hours, such as working in the public sector[45] while, as I show in chapter six, a majority of judges are former law firm partners. Thus, female lawyers who change their legal careers and take in-house or academic roles have a lower chance of being selected for a judicial position. This can decrease the proportion of female judges.

1) 'Long hours' work culture

New Zealand law firms value a 'long hours' work culture that requires employees to be present in their offices over long hours and generate revenue for the firm.[46] The law firm culture values long working hours instead of productive working.[47] In New Zealand law firms, a full-time position entails working hours longer than the employment norm (40 hours a week)[48] and employees are expected to have an absolute commitment to the law firm. Working for long hours is an informal expectation associated with masculine norms.[49] Non-standard working hours lead to high-level conflicts between work and family duties.[50] Law firms encourage employees' workaholism and expect them to work in their office for long hours and be available in the evenings and weekends to maintain client relationships.[51] There is an unspoken cultural norm that employees who work part time or do job-sharing lack commitment to their careers.[52] Employees who do not follow the working hours norm will be marginalised and deprived of challenging and interesting work.[53] As a result, they will not get promotions and progress at the same speed as others.[54] This can particularly disadvantage female employees,[55] as women tend to work flexibly.[56] The long hours work culture significantly disadvantages people with care commitments who are disproportionately women[57] and makes it difficult for them to address work and family demands.[58]

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[43] Josh Pemberton and New Zealand Law Foundation, 'First Steps: The Experiences and Retention of New Zealand's Junior Lawyers' (The Law Foundation 2016).

[44] Jeannine Cockayne and Auckland District Law Society, *Women in the Legal Profession: The Report of the Second Working Party on Women in the Legal Profession* (Public Relations Dept of the Auckland District Law Society 1989), 69.

[45] Holmes (n 35).

[46] Pringle and others (n 20).

[47] ibid; Webley and Duff (n 22).

[48] Employment New Zealand, 'Hours of Work' (2022) <https://www.employment.govt.nz/hours-and-wages/hours-of-work/> accessed 12 March 2023.

[49] Pringle and others (n 20).

[50] Dirk Hofäcker and Stefanie König, 'Flexibility and Work-Life Conflict in Times of Crisis: A Gender Perspective' (2013) 33 International journal of sociology and social policy 613.

[51] Louise Grey, 'Reflections from a Young Woman Entering the Profession - Would a Female Partner Quota Address Gender Inequality within the New Zealand Legal Profession?' (2017) 1 New Zealand women's law journal 51.

[52] Pringle and others (n 20).

[53] Webley and Duff (n 22).

[54] Wass and McNabb (n 32); Webley and Duff (n 22).

[55] Webley and Duff (n 22).

[56] Ministry for Women, 'Gender Inequality and Unpaid Work: A Review of Recent Literature' (2019).

[57] Deloitte and Westpac New Zealand Limited (n 29); Brittany Arsiniega, 'Beyond Big Law: Toward a More Inclusive Study of Gender in the Legal Profession' (2020) 27 UCLA women's law journal 113.

[58] Pemberton and New Zealand Law Foundation (n 45); Rhode (n 25).

Therefore, they might have a lower chance of getting promotions and taking senior positions in law firms.

Moreover, another aspect of long work culture relates to clients. Clients expect instant responsiveness and total availability.[59] After globalization, many law firms use new technology to answer the demands of their international clients around the world. They work 24 hours a day, seven days per week, to provide a high-quality and responsive service.[60] Client development is a part of lawyers' work that requires working more than regular hours. Sometimes lawyers attract new clients by attending social activities outside office hours, such as sports events.[61] This work pattern is unsuitable for women with care responsibilities.

The long working hours lead to a conflict between work and family responsibilities.[62] This cultural norm has a negative impact on some female employees and motivates them to leave law firms[63] and find a legal career adaptable to care responsibilities. As a result, the proportion of female lawyers with senior positions in law firms decreases. As I discuss in chapter four, seniority is often used as an indication of a lawyer's excellence which is one of the judicial appointment criteria. The low proportion of women in law firms' senior positions thus means that most women are less likely to be selected for a judicial position. Challenges such as long work hours may eventually decrease the proportion of female judges in the New Zealand judiciary.

2) Inflexible working arrangements

The inflexible working schedule of New Zealand law firms can disadvantage female lawyers.[64] As I have explained previously, women take more care responsibilities[65] and are likely to work flexibly.[66] Therefore, inflexible working schedules can be inconvenient for them. In this part, I maintain that taking a flexible working schedule in New Zealand law firms raises challenging issues for women's progress in the legal profession. Consequently, female lawyers have a lower chance of being approached to take a judicial position because most judges are chosen from the senior ranks of law firms.[67] To advance my argument, I first explain the meaning of flexible work and its different types. Then, I explore the challenges of taking flexible work and finally point out the negative consequences of flexible working in the legal profession.

'Flexible working arrangement' is an ambiguous term with various definitions.[68] Generally, employees with flexible working schedules can work on the agreed total number of hours flexibly.[69] For example, an

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[59] Rhode (n 25).

[60] Margaret Thornton, 'The Flexible Cyborg : Work-Life Balance in Legal Practice' (2016) 38 The Sydney law review 1.

[61] Diane-Gabrielle Tremblay, 'Work-Family Balance for Women 20 Lawyers Today: A Reality or Still a Dream?', *Handbook on Well-Being of Working Women* (2016).

[62] Margaret Thornton, 'Work/Life or Work/Work? Corporate Legal Practice in the Twenty-First Century' (2016) 23 International Journal of the Legal Profession 13.

[63] Thornton (n 60).

[64] Pringle and others (n 20).

[65] Deloitte and Westpac New Zealand Limited (n 29).

[66] Ministry for Women (n 56).

[67] See chapter 6.

[68] Hofäcker and König (n 50).

employee may work part time, do job sharing with other employees,[70] work remotely, or undertake fixed-term roles, which involves working for a specific and finite period of time. In New Zealand, remote work is the most common type of flexible working arrangement.[71]

Flexible work has formal and informal dimensions. The formal dimension of flexible work refers to the arrangements between employers and employees regarding working conditions. For example, they can arrange the employee's work hours or workplace. The informal dimension of flexible working refers to the time that an employee works in addition to the official work hours, such as working on weekends or in the evenings.[72] It is important to note that flexible working does not necessarily entail reducing working hours. Full-time employees can adopt a flexible working schedule to distribute their work hours. Therefore, employees with flexible work hours might work for long hours or in the evenings or weekends.[73]

By applying flexible working arrangements, employees may be able to better reconcile work and family demands. In particular, the flexibility of the start and end of working hours and choosing the workplace helps people strike a balance between work and family responsibilities.[74] Since women take on more care responsibilities, flexible working arrangements would be particularly beneficial for them. However, in the following I show that adopting a flexible working schedule is challenging in the New Zealand legal profession.

The importance of presentism in the legal culture prevents people from taking flexible working arrangements. The legal career culture values employees' presence at work.[75] Presentism is a cultural norm that assumes a productive employee is a person who is physically present in the workplace.[76] Some New Zealand law firms do not encourage remote work as they do not trust employees working productively outside the office and employers prefer to monitor an employee's work in the office.[77] In addition, some law firm partners undervalue remote work. Female coroner number seven explained this cultural norm. She stated, '[o]ur practicing working life is not considered if we do not turn up [and] work a full 40- or 50-hour week. Sometimes I work from home, sometimes I come into the office. They should still have the same weight. I think that is still not being given fair consideration.'[78] According to her, law firm employers do not support remote work. The importance of being present in the office is associated with law firms' traditional masculine norms[79] because it is suitable for a male lawyer whose partner can

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[69] Sarah Taylor, 'Valuing Our Lawyers: The Untapped Potential of Flexible Working in the New Zealand Legal Profession' (New Zealand Law Society 2017).

[70] Margaret Thornton and Joanne Bagust, 'The Gender Trap: Flexible Work in Corporate Legal Practice' (2007) 45 Osgoode Hall law journal (1960) 773.

[71] Taylor (n 28).

[72] Thornton (n 60).

[73] Taylor (n 28).

[74] Hofäcker and König (n 50).

[75] Sharon C Bolton and Daniel Muzio, 'Can't Live with 'Em; Can't Live without 'Em: Gendered Segmentation in the Legal Profession' (2007) 41 Sociology (Oxford) 47; Thornton and Bagust (n 70).

[76] Taylor (n 28); Shortall (n 24).

[77] 'The Delicate Balance: Part Time/Flexible Work' (*New Zealand Law Society*, 2019) <https://www.lawsociety.org.nz/news/publications/lawtalk/issue-929/the-delicate-balance-part-timeflexible-work/> accessed 16 November 2022.

[78] Interview with a female coroner (17 October 2021)

[79] Thornton (n 60).

undertake the majority of care responsibilities.[80] As Sarah Taylor suggests, '[i]n the legal profession flexible terms are primarily used as a retention tool, rather than a tool to attract great talent. Flexibility is not often openly advertised or actively promoted.'[81] Therefore people may assume that flexible working is not available in a law firm and as a result, they do not even ask for it.[82]

I should note that Covid-19 restrictions and the requirement of remote work during lockdowns might have changed the work culture in the law firms. In the 2020 lockdown, law firms were forced to adopt remote working arrangements. This experience proved that remote work is a remarkably positive experience. As a result, some law firms in New Zealand offer remote working arrangements to their employees even after the Covid lockdown.[83] It appears that the work culture of law firms is changing. However, more research is needed to assess the cultural changes and their impact on female lawyers.

The second challenge of flexible work is linked to the lack of knowledge about the statutory framework on flexible working arrangements. Most employees in the New Zealand legal profession are not aware of the legal rules about flexible working.[84] Flexible working arrangements can be formal, within an employment contract, or informal as an agreement with an employer.[85] Formal policies for flexible or part time working arrangements in the legal profession are not common. In a study about the New Zealand legal profession, two-thirds of participants stated that they have an informal flexible working arrangement. This study indicates a lack of formal policies for flexible or part time working arrangements. It suggests that a flexible working arrangement is considered an exemption from the main norm. As a result, law firms do not provide formal flexible working arrangements to ensure work-life balance.[86]

The third challenge relates to gender-biased views. In the New Zealand legal profession, more female lawyers than men work flexibly.[87] The flexible working arrangement has been feminised since it was always associated with child-rearing responsibilities.[88] This issue might disadvantage male lawyers who want to take flexible work arrangements. The working culture and normative pressure discourage men take part time or flexible working schedules.[89] According to Margaret Thornton 'men are discouraged from working flexibly in order to care for children — even if they would like to do so — and may suffer a flexibility stigma because of the feminised connotations of caring.' [90] There is a risk that some male

[80] Thornton (n 59).
[81] Taylor (n 49), 56.
[82] ibid.
[83] Mark Simpson, 'Employment Matters: Post Covid-19 Realities for Law Firms' (*New Zealand Law Society*, 2021) <https://www.lawsociety.org.nz/about-us/contact/privacy-copyright-and-disclaimer/> accessed 16 November 2022.
[84] Ursula Cheer and others, *Flexible and Part-Time Work Arrangements in the Canterbury Legal Profession: A Report* (2017).
[85] Taylor (n 28).
[86] Cheer and others (n 84).
[87] Taylor (n 28); Cheer and others (n 84).
[88] Thornton (n 62).
[89] Thornton and Bagust (n 70).
[90] Thornton (n 39), 18.

senior partners would not support the requests for a flexible working schedule since they consider working flexibility to be a women's issue.[91]

The literature shows that taking flexible work can have some negative consequences for lawyers. In some New Zealand law firms, lawyers with flexible or part time working arrangements are assigned fewer high-profile cases.[92] This issue is true in other jurisdictions as well. According to Thornton, '[w]omen who worked flexibly may also be side-lined in the allocation of work, particularly if they were not around when the work was being assigned.'[93] Thornton notes that there is a flexibility stigma in the legal profession, which in turn means that women who work flexibly are likely to be placed on a "mummy track". In other words, they are not given high-profile cases because they are considered less committed to the work.[94] As a result, lawyers who take part time work have less chances of making a reputation by showing their competence in challenging and difficult cases. In chapter four, I show that having a reputation is a crucial factor to be successful in the judicial appointment processes. Since women take more part time and flexible work arrangements, it is more difficult for them to make a reputation and in turn, might not be selected for a judicial position.

In addition, flexible working arrangements can hinder the opportunity for promotion. In New Zealand, some lawyers avoid flexible working schedules since it has a negative impact on their career advancement.[95] The working culture in law firms promotes full-time work as the norm and part time work as an exception. Therefore, taking a part time role can be embarrassing for employees.[96] It should be noted that taking flexible work might have different consequences for men and women. Research on New Zealand law firms shows that men with flexible working arrangements are considered qualified and valuable employees, while women with flexible working arrangements are considered less competent than their male colleagues.[97] Therefore, women with flexible work schedules might be treated differently from men and have fewer chances of taking senior positions.

In summary, taking a flexible work schedule is challenging for female lawyers because of gender biased views, the presentism norm, and the absence of supportive legal frameworks for flexible working. Moreover, lawyers who work flexibly have fewer chances of gaining a reputation, getting a promotion, and becoming a law firm partner, which are important factors of being successful in the judicial appointment processes.[98] The difficulties and negative consequences of flexible work would disadvantage women more than men because women take more flexible work. Therefore, female lawyers are less likely to be successful in the judicial appointment processes.

Moreover, the difficulties of taking flexible working schedules and their negative impacts may demotivate some female employees to request a flexible working arrangement. They may rather change their career and choose a more flexible legal career such as in-house roles which a low proportion of

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[91] Keith Cunningham-Parmeter, 'Father Time: Flexible Work Arrangements and the Law Firm's Failure of the Family' (2011) 53 Stanford Law Review.
[92] Shortall (n 24).
[93] Thornton (n 59), 26.
[94] Thornton (n 60).
[95] Taylor (n 28).
[96] Pringle and others (n 20).
[97] Cheer and others (n 84).
[98] See chapter 4.

judges are chosen from.[99] This choice would reduce their chances of being selected for a judicial position.

B. Prejudice against women in the legal profession

Gender bias and stereotypes disadvantage women by impeding their progress in law firms and enticing them to change careers or causing them to never be promoted to a senior position, which impacts their ability to succeed in the judicial appointment process. In this section, I discuss gender stereotypes and biased views in the legal profession. I outline gender-biased views against women and explain how they disadvantage women lawyers. Additionally, I explore the influence of gender stereotypes on the self-assessment of female lawyers and the subsequent consequences it has on their progress in the legal profession.

1) Gender Bias

Gender bias in law firms is a barrier to women's progress, which leads to a leaking talent pipeline. Some organisational cultures promote values and norms more suitable and attainable for men,[100] whereas women have to tackle gender biases to get promotions and progress in their legal careers. Therefore, it is more difficult for female lawyers to progress in law firms and obtain a partnership position.

The literature shows that gender-biased views in New Zealand law firms disadvantage female lawyers.[101] A study conducted by Josh Pemberton suggests that female lawyers experience discrimination and bias in law firms.[102] In fact, the existence of conscious and unconscious gender-biased views in law firms is a generic challenge for female lawyers in various jurisdictions.[103] Unconscious biases are learned stereotypes that individuals apply automatically and unintentionally and can easily influence a person's behaviour.[104] In this part, I explain how gender-biased views impact female lawyers' progress so that female lawyers tend to leave law firms to follow a different career path.[105]

Social assumptions generally affect women lawyers' progress. some clients hold gender biased views against female lawyers and consider a male lawyer more competent than a female one.[106] This is a generic issue in various jurisdictions, such as Victoria. For example, female barrister number 19, a KC in Victoria, shared her experience of encountering gender biased views in the legal profession. She noted,

> I was in a case, it was the federal court, and it involved some tax structuring. I was the leader, and I won the case in the Federal Court. We knew that the Commissioner of Taxation, who was on the other side, would appeal. In the taxi on the way back to the office from the court, my

[99] See chapter 5.

[100] New Zealand. Ministry of Women's Affairs, 'Realising the Opportunity: Addressing New Zealand's Leadership Pipeline by Attracting and Retaining Talented Women' (Ministry of Women's Affairs 2013).

[101] Frank Neill, 'Women Face Variety of Challenges' New Zealand Law Society 30 June 2016; Shortall (n 24); Cockayne and Auckland District Law Society (n 43).

[102] Pemberton and New Zealand Law Foundation (n 45).

[103] Kathleen E Hull and Robert L Nelson, 'Assimilation, Choice, or Constraint? Testing Theories of Gender Differences in the Careers of Lawyers' (2000) 79 Social forces 229.

[104] Mike Noon, 'Pointless Diversity Training: Unconscious Bias, New Racism and Agency' (2018) 32 Work, employment and society 198.

[105] Pringle and others (n 20).

[106] Alice Anderson and Mary Scholtens, ''Even Now, People Still See a Good Lawyer as a Man in a Suit' : The Voice of Women in New Zealand's Senior Courts' (2019) 3 New Zealand women's law journal 183.

> solicitor took a telephone call from the client, and the client said, shall we get a man with grey hair to run our appeal? This was when I had just won the case, but we knew it was going to appeal... I do think there is a perception that on the whole men are more credible in court or more persuasive. I think some clients feel more comfortable having a male than a female Senior Counsel in an appeal.[107]

The female barrister's experience is an example of how clients' gender biased views can disadvantage female lawyers even when they were successful in a case. It suggests that biased views against women makes it more difficult for them to establish competence and reputation in the legal profession and judiciary.

In some law firms, lawyers are encouraged to adopt stereotypically masculine characteristics to show their competence for senior positions.[108] Andrea Macerollo argues that there is an expectation that a successful lawyer should have masculine attributes because the legal profession was historically dominated by men.[109] This is illustrated in New Zealand, where the legal profession included only 4.6% of women lawyers in 1977.[110] Therefore, although, in 2021, 53.9% of lawyers are women,[111] research on New Zealand law firms indicates that the legal profession still values stereotypically male characteristics.[112] For example, individualistic approaches such as competitiveness is more valued than collaborative approaches such as positive teamwork.[113] The gender biased views are barriers for women to achieve a partnership position because people tend to associate leadership with traits such as, self-confidence, decisiveness, and individualism which are typically considered as masculine characteristics. In contrast, women are associated with some communal traits such as being helpful or a positive team member, which are not perceived as leadership characteristics.[114]

Furthermore, women are held to higher standards than men to get a promotion or become a partner.[115] Even when women achieve a partnership position, they tend to encounter more scrutiny and criticism than men.[116] Thus, female lawyers have to outperform their male colleagues to achieve and maintain a senior position in the legal profession. In addition, when men and women do the same work with the same value, women do not achieve equal status, promotion, and pay as men.[117] There is evidence of a gender pay gap in New Zealand legal profession as the hourly charge of female lawyers is lower than male lawyers by an average of 7% to 10%.[118]

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[107] Interview with a female barrister (5 July 2022)
[108] Alice H Eagly and Linda L Carli, 'Women and the Labyrinth of Leadership' (2007) 85 Harvard business review 62.
[109] Macerollo (n 26).
[110] Geoff Adlam, 'Snapshot of the Profession at 1 February 2018' [2018] Lawtalk 43.
[111] James Barnett, Marianne Burt and Navneeth Nair, 'Snapshot of the Profession 2021' [2021] Lawtalk 36.
[112] Pemberton and New Zealand Law Foundation (n 45).
[113] Webley and Duff (n 22).
[114] Eagly and Carli (n 108).
[115] Shortall (n 24).
[116] Catalyst (Organization), *The Double-Bind Dilemma for Women in Leadership: Damned If You Do, Doomed If You Don't* (Catalyst 2007).
[117] Webley and Duff (n 22).
[118] 'The Gender Pay Gap' (*New Zealand Law Society*, 2022) <https://www.lawsociety.org.nz/professional-practice/diversity-and-inclusion/women-in-the-legal-profession/the-gender-pay-

Moreover, there are gender biased views against female lawyers who have children. The literature shows that having children may have different consequences for men and women in law firms. Motherhood in itself conveys less commitment to a career, while[119] the dominant culture of law firms considers fatherhood a sign of stability.[120] Thus, motherhood can be seen as an obstacle to getting a promotion in a law firm.[121] Stacey Shortall uses the maternal wall metaphor to explain women's difficulties in making partners. The maternal wall highlights negative assumptions about the commitment and deficiency of female lawyers with care responsibilities. There is an unconscious bias view that women might eventually leave a legal career because successful mothers cannot be successful law firm partners.[122] Women are often left with two choices: they can avoid having children to show their commitment to their careers[123] or change their career because they perceive that they have a low chance of becoming a partner.[124]

2) Gender stereotypes

The literature indicates that gender stereotypes impede women's progress in New Zealand law firms.[125] Gender stereotypes are shared cultural constructs that define individuals' characteristics[126] and reflect expectations about them based on their gender. Gender stereotypes influence how individuals perceive, interpret and remember information about others and themselves. They can impact an individual's life ambitions and self-worth.[127]

Gender stereotypes in the legal profession disadvantage women by assuming that women are less qualified, motivated, and committed to their careers. In addition, gender stereotypes negatively influence women's access to mentors and informal support networks,[128] which, as I discuss in chapter six, are of crucial importance to be chosen for a judicial position. Gender stereotypes influence how people evaluate others and themselves based on their gender.[129] In the previous part, I explored gender-biased views against women. In this part, I focus on the impact of gender stereotypes on women's perception of their own abilities. I discuss that some female lawyers experience imposter syndrome and stereotype threat because of common gender stereotypes in the legal profession.

Stereotype threat refers to the pressure that a member of stigmatised group experiences when they are judged or influenced by the negative stereotypes of their group. Research shows that stereotype threat has a negative impact on the performance and motivation of individuals.[130] Hence, women might

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ap/#:~:text=Evidence%20exists%20of%20a%20gender,upper%20ends%20of%20the%20scale.> accessed 21 November 2022.

[119] Webley and Duff (n 7).

[120] Macerollo (n 26).

[121] Wass and McNabb (n 32).

[122] Shortall (n 24).

[123] Webley and Duff (n 22).

[124] Holmes (n 35).

[125] Grey (n 51).

[126] Elizabeth H Gorman, 'Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms' (2005) 70 American sociological review 702.

[127] Naomi Ellemers, 'Gender Stereotypes' (2018) 69 Annual review of psychology 275.

[128] Macerollo (n 26).

[129] Ellemers (n 127).

[130] Julia T Crawford, 'Imposter Syndrome for Women in Male Dominated Careers' (2021) 32 Hastings Women's L.J.

experience stereotype threat that would negatively impact their performance and demotivate them to progress in their careers or apply for a judicial position.

Imposter syndrome is a common issue among women working in a male-dominant workplace. It refers to a situation when a person relates their achievements to luck, attractiveness, and manipulating others' impressions. Imposter syndrome has a significant negative impact on an individual's self-esteem. People with imposter syndrome consider themselves unqualified individuals who do not deserve their accomplishments.[131] My interview findings suggest that some female lawyers in New Zealand and Victoria are struggling with imposter syndrome and, therefore, do not apply for judicial positions. According to female senior judge number 11, women's lack of confidence and self-belief may decrease the percentage of female candidates for a judicial position in New Zealand.[132] In addition, Victorian female senior judge number 14 explained that even when women are offered a judicial position, some might not take it because of their lack of confidence in their abilities. She noted that shortly after she took silk, she was offered a judicial position. She rejected the offer because she wanted to have more work experience. She stated, '[t]here is also an element of imposter syndrome, which is not very much something that I think men in the same position often hold, but that is a sweeping generalisation.'[133] Female lawyers with imposter syndrome would not consider themselves eligible candidates for a judicial position and may not participate in the judicial appointment processes. Thus, even when they are encouraged to participate in the appointment process or offered a judicial position, they might not accept it. This factor would decrease the proportion of female judges.

C. Networking challenges

In this section, I explore female lawyers' challenges in building and maintaining strong social networks in the legal profession. Strong social networks are important to progressing,[134] becoming well-known, and developing a reputation in the legal profession. In chapter four, I show that being well-known and having a reputation is of utmost importance in being selected for a judicial position. Thus, the challenges of making social networks might disadvantage some female candidates in a judicial appointment process because they might not be known by the appointing decision makers. In this section, I explain the challenges of building mentorship relationships and social networks in the legal profession.

1) Mentorship

The literature shows that female lawyers in New Zealand have difficulties finding a proper mentor because of the low representation of women in senior positions, negative gender stereotypes, and difficulties in securing a mentorship relationship due to family responsibilities. Supportive mentors would assist female lawyers in progressing in the legal profession and encourage them to apply for judicial positions. Hence, the scarcity of mentors can negatively impact the proportion of female candidates for a judicial position.

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[131] ibid.

[132] Interview with a female senior judge (19 October 2021)

[133] Interview with a female senior judge (8 April 2022)

[134] Isabel Metz and Phyllis Tharenou, 'Women's Career Advancement: The Relative Contribution of Human and Social Capital' (2001) 26 Group & organization management 312.

Building mentoring relationships helps lawyers progress in law firms.[135] Lawyers with multiple mentors have better access to complementary resources and information and thus are more likely to obtain career rewards and advancement.[136] As I discuss in chapter four, having a senior position enhances the chances of being selected for a judicial position. Moreover, my interview findings show that a proper mentor may encourage and support a female lawyer to apply for judicial positions.[137] Therefore, mentors might improve the percentage of female judges by encouraging women to prepare and apply for judicial positions.

The literature indicates that it is challenging for female employees in New Zealand law firms to find mentors.[138] In the following, I explore four reasons for this generic issue disadvantaging women in New Zealand and other jurisdictions such as Victoria. First, some male partners or directors are reluctant to mentor a female employee since they are concerned about the appearance of impropriety. [139] For example, female judge number 12 explains that when she started her career in the middle of the 1990s in Victoria, it was difficult to maintain a mentoring relationship with a senior male judge because of the potential impropriety of doing so. Meanwhile, her partner had a senior male mentor who helped him progress in the legal profession. She noted,

> My partner was an associate in the Federal Court. He maintained a relationship with his judge and still does. They would go out for lunch every year. They would catch up. He supported his application to take silk... If you have got a judge that you have got a close relationship with, I suppose they can just be a support to you, put your name forward, say 'They were terrific, they were my associate back in the day' and you hear it in a lot of welcome speeches to judges that they were associates to other judges...I think for women my age that did not really happen nearly as much. [140]

Based on her experience, it was easier for male lawyers to find mentors who played a key role in their progress in the legal profession. It suggests that there was a boys' club in Victorian legal profession suitable for male lawyers. In addition, she explained that nowadays there are more female judges who can support and mentor female lawyers to progress in the legal profession. It is easier for women to find appropriate mentors where there is a high proportion of women in senior positions and judicial positions. In addition, female lawyers in senior positions can increase female employees' positive perception of career progress.[141] Therefore, increasing the proportion of female judges would change women lawyers' perception about the challenges of taking judicial positions.

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[135] Shortall (n 24); Cynthia Fuchs Epstein and others, 'Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession' (1995) 64 Fordham law review 291.

[136] Fiona M Kay and Jean E Wallace, 'Mentors as Social Capital: Gender, Mentors, and Career Rewards in Law Practice' (2009) 79 Sociological inquiry 418.

[137] Interview with a female coroner (19 October 2021)

[138] Stacey Shortall, 'Turning the Tide to Make More Women Law Firm Partners in New Zealand' (NZLS CLE 2016).

[139] Rhode (n 25).

[140] Interview with a female Judge (1 April 2022)

[141] Walsh (n 21).

In New Zealand, a low proportion of women are law firm partners and directors.[142] Therefore, as Josh Pemberton's research on the experiences of New Zealand's junior lawyers indicates, junior lawyers have difficulties finding female role models due to the low percentage of women in senior positions.[143]

Furthermore, some assume that it is not worth mentoring and training female employees because women tend to prioritise their family over career requirements.[144] Hence, some senior lawyers may not mentor and support women to progress in the legal profession.

In addition, some female lawyers with senior positions do not support female employees in New Zealand law firms[145] because they like to enjoy the visibility, special power, and status of being one of the few female partners in a law firm.[146] Deborah L Rhode uses the term 'Queen Bee' syndrome to describe women in senior positions who claim that they have progressed without any assistance.[147] These women often deny that there are gender inequalities and believe that they were not disadvantaged because of their gender. They tend to demonstrate their competence by emphasising their difference from other women and putting down women who made different life and career choices compare to their own.[148] Therefore, they may be reluctant to support and mentor other female lawyers.

Finally, it is challenging for both female employees and partners to allocate time for mentorship. On the one hand, some female employees cannot spend time on mentoring relationships and other informal social activities due to their care responsibilities.[149] On the other hand, overburdened female senior partners who have to strike a balance between work and family commitments may not have sufficient time to mentor junior attorneys.[150] Hence, because of care responsibilities, some female partners and employees may not have enough time to develop mentoring relationships.

2) Social networks

In New Zealand, shoulder tapping and networking are crucial to progress in a legal career.[151] Networking involves building and maintaining personal and professional relationships to access a system of information and support.[152] There are various forms of networking in a workplace. For example, Herminia Ibarra and David Krackhardt identify two types of network ties: instrumental ties and expressive ties. Instrumental ties refer to work-related interactions between people, and expressive ties

[142] Adlam (n 8).
[143] Pemberton and New Zealand Law Foundation (n 45).
[144] Ashby (n 34).
[145] Pringle and others (n 20).
[146] Rhode (n 25).
[147] Ashby (n 34).
[148] Ellemers (n 127).
[149] Rhode (n 25).
[150] Pringle and others (n 20); Rhode (n 25).
[151] Louisa Peacock, 'Law Firms Have "Unconscious Bias" That Stops Women from Getting Promoted, Says Senior City Lawyer' *The Telegraph* (United Kingdom, 24 May 2013).
[152] Vicki R Whiting and Suzanne C de Janasz, 'Mentoring in the 21st Century: Using the Internet to Build Skills and Networks' (2004) 28 Journal of management education 275.

refer to people's emotional closeness, such as friendship and personal support.[153] Besides, networks might be formal or informal. Informal networks are personal and voluntary interactions between people with similar social interests,[154] while formal networks are interactions among functionally defined groups to fulfil some organisational tasks.[155]

The literature shows that having formal and informal networks in the workplace would increase individuals' career satisfaction.[156] Therefore, women's challenges in developing social networks in New Zealand law firms[157] might decrease their career satisfaction and motivates them to change their legal career. Consequently, the percentage of qualified female candidates for a judicial position is likely to decrease.

In general, having strong social networks is crucial for employees' personal and career success[158] and advancement to senior positions.[159] The literature shows that building and maintaining social networks might be challenging for women with care responsibilities. For example, introducing new clients, presenting the firm's services, and improving the earning potential of a law firm often happens after official working hours.[160]Attending evening drinks and sports events that are scheduled after working hours may be difficult for people with care responsibilities,[161] who are mostly women.[162] Therefore, it is more difficult for women to advance their social networks and progress in law firms, which is an important factor to be successful in the judicial appointment process.[163]

Women's lack of networking opportunities hinders their chances of meeting with senior people in the legal profession and judiciary. The informal interaction with people in positions of power would help women to develop contacts and become well-known in the legal profession.[164] In chapter four, I show that being well-known and having a reputation in the legal profession is a crucial factor to be successful in the judicial appointment processes. Therefore, women's lack of networking opportunities might significantly disadvantage them in the appointment processes. In the next section, I explore the statutes and legal regulations on judicial appointment processes to investigate whether people lacking strong

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[153] Herminia Ibarra, 'Homophily and Differential Returns: Sex Differences in Network Structure and Access in an Advertising Firm' (1992) 37 Administrative science quarterly 422; David Krackhardt, 'Assessing the Political Landscape: Structure, Cognition, and Power in Organizations' (1990) 35 Administrative Science Quarterly 342.

[154] Gail M McGuire, 'Gender, Race, Ethnicity, and Networks: The Factors Affecting the Status of Employees' Network Members' (2000) 27 Work and occupations 501.

[155] Herminia Ibarra, 'Personal Networks of Women and Minorities in Management: A Conceptual Framework' (1993) 18 The Academy of Management review 56.

[156] IJ Hetty van Emmerik and others, 'Networking Your Way through the Organization. Gender Differences in the Relationship between Network Participation and Career Satisfaction' (2006) 21 Women in management review (Bradford, West Yorkshire, England : 1992) 54.

[157] Pringle and others (n 20).

[158] Whiting and de Janasz (n 152).

[159] Metz and Tharenou (n 134).

[160] Wass and McNabb (n 32).

[161] Webley and Duff (n 22).

[162] Deloitte and Westpac New Zealand Limited (n 29).

[163] See chapter 4.

[164] Leah V Durant, 'Gender Bias and Legal Profession: A Discussion of Why There Are Still so Few Women on the Bench' (2004) 4 University of Maryland Law Journal of Race, Religion, Gender and Class.

career networks can upskill themselves and prepare for judicial appointment processes only by referring to the official documents.

III. Challenges of preparing for judicial appointment processes: The processes' lack of transparency

In this section, I argue that the judicial appointment process in New Zealand is not transparent and this issue impacts negatively the proportion of female candidates. Transparency refers to the extent to which a judicial appointment system is open to the scrutiny of the public so that people can evaluate the candidates' assessment process.[165] A transparent judicial appointment process exhibits at least three characteristics: the judicial appointment criteria and assessment process are clear, the appointing decision makers justify their appointment decisions,[166] and the public has access to annual statistics on aspects of judicial diversity.[167] This section focuses on the first aspect of judicial transparency, which refers to judicial appointment criteria and assessment systems.

The interview findings indicate that insufficient information about the judicial appointment criteria and assessment process reduces the proportion of female candidates for judicial positions. Male senior judge number one noted that many competent female lawyers do not participate in the judicial appointment processes because they think that they would not be selected for judicial positions. He emphasised that a clear appointment process is important for increasing the representation of women in the judiciary.[168] According to him, some female lawyers do not consider themselves sufficiently qualified for a judicial position. This is caused by the fact that they do not have adequate information on the judicial appointment criteria and process.

In addition, according to female coroner number seven, there is a perception amongst female lawyers who do not work in large law firms that judicial positions are reserved for well-known law firm partners.[169] Similarly, female District Court judge number two noted that there is a perception in the legal profession that judges are chosen from a narrow pool, large law firms, and that it is challenging for women to reach a good position in these firms.[170] According to female District Court judge number three, some female lawyers perceive that they should be famous lawyers involved in important cases to be selected for a judicial position, while in fact many judges do not meet that criterion.[171] Thus, many female lawyers lack a clear understanding of judicial appointment criteria, and hence falsely believe they are unqualified for judicial positions.

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[165] Jeffrey D Jackson, 'Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System' (2007) 34 The Fordham urban law journal 125.

[166] Elizabeth Handsley and Andrew Lynch, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13' (2015) 37 The Sydney law review 187.

[167] Avner Levin and Asher Alkoby, 'Shouldn't the Bench Be a Mirror? The Diversity of the Canadian Judiciary' (2019) 26 International journal of the legal profession 69.

[168] Interview with a male senior judge (30 November 2021)

[169] Interview with a female coroner (17 October 2021)

[170] Interview with a female District Court Judge (25November 2021)

[171] Interview with a female District Court Judge (25November 2021)

The lack of transparency in the appointment criteria undermines the ability of most candidates to prepare for judicial appointments. Although female coroner number seven noted that formal criteria helped her to prepare for an appointment interview,[172] other interview participants had a different view. For example, in response to the question 'Did the appointment criteria help you to prepare for the interview?' female District Court judge number two pointed out that the official appointment criteria would not help candidates to prepare for the appointment process. She stated,

> I think the written criteria would not enable people to really understand what the requirements are... What prepares them for the appointment process in practice is discussions with friends who are currently judges or discussions with others who have applied for the process and applied to become candidates. So, in New Zealand, it is done in a very informal way. The written criteria, I think, would not enable people to really understand what the requirements are. Much of it is by word of mouth.[173]

According to her, candidates for judicial positions should learn the appointment criteria through their social networks with judges or people informed of judicial appointment processes. Likewise, male District Court judge number ten explained that candidates often contact judges to gain information about the appointment criteria. He noted,

> I think what tends to happen is that applicants will make contact with an existing judge that they might know to discuss the interview process, and that judge will then tell the applicant what sort of questions there are and how they need to prepare themselves. That is the reality of the situation.[174]

This suggests that having strong social networks is important to gain an understanding of the appointment criteria and candidates' assessment process. Moreover, female senior judge number five noted that the appointment criteria should become more transparent. She explained,

> So, I think that we are proposing to do some work around the appointments process across all courts because transparency in terms of the criteria that apply is really important. And from my conversations, it appears that people have a bit of a cynical view...you say you want intellectual capacity, objectivity, authority, etc. But is that really what you want? Or are there other things that are unspoken and that you are after? So, I think we need to be really honest with ourselves and be publicly clear about what we are looking for. So that people can have quite a high degree of confidence that they are not boxing shadows.[175]

According to female senior judge number five, the unwritten criteria can damage people's trust on the judicial appointment process. When I asked about the main obstacles for improving women's representation in the judiciary, female District Court judge number two noted that candidates may distrust the appointment process because it lacks transparency. To increase transparency, it is necessary to provide more information for candidates in preparing them for the judicial appointment process.[176]

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[172] Interview with a female coroner (17 October 2021)
[173] Interview with a female District Court Judge (25November 2021)
[174] Interview with a male District Court Judge (18 November 2021)
[175] Interview with a female senior judge (18 November 2021)
[176] Interview with a female coroner (19 October 2021)

In New Zealand, the Governor-General appoints all judges on the advice of the Attorney-General.[177] Section 93 of the Senior Courts Act and section 11(3) of the District Courts Act require the Attorney-General to publish information about the judicial appointment processes for District Court and High Court judges. The Attorney-General's booklet for District Court Judges and the Judicial Protocol for High Court Judges have been published to enhance the transparency of the judicial appointment process.[178] The booklets explain two separate systems for the appointment of District Court and High Court judges. Moreover, there is a special process for the indirect appointment of the Court of Appeal and the Supreme Court judges as they are chosen from the High Court judges. This section investigates the appointment processes in three parts. I refer to the official documents, such as the Attorney-General's judicial appointment booklets,[179] to advance my argument that the official documents lack detailed guidance for potential appointees and interested individuals, impacting negatively the proportion of female candidates. Then I refer to my interview findings to show how the appointment process takes place in practice.

A. Appointment of the District Court judges

Before explaining the process for the appointment of District Court judges, it is important to unpack the required criteria for candidates. The minimum requirements for a judicial position in District Court are outlined in the District Court Act 2016. Section 15 of the District Court Act 2016 provides that,

> A person may be appointed as a Judge if—
>
> (a) that person has for at least 7 years held a New Zealand practising certificate as a barrister or as a barrister and solicitor; or
>
> (b) that person—
>
> (i) holds a degree in law granted or issued by any university within New Zealand; and
>
> (ii) has been admitted as a barrister and solicitor of the High Court; and
>
> (iii) has held a practising certificate in a jurisdiction specified by Order in Council—
>
> (A) for at least 7 years; or
>
> (B) for a lesser number of years, but, when that number of years is added to the number of years that the person has held a New Zealand practising certificate, the total number of years is at least 7 years.

Moreover, section 5(2) of the Family Court Act 1980 sets the criteria for Family Court judges. It states that a competent candidate should be eligible to be a District Court judge and should be a suitable person to deal with issues related to family law based on her or his education, experience, and personality. Similar criteria apply for Youth Court judges, who are District Court judges with special experience, training, and personality suitable for dealing with issues related to youth justice.

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[177] District Court Act 2016, s 11; Senior Courts Act 2016, s 100

[178] Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' 2019; Ministry of Justice, 'The Judicial Appointments Protocol'.

[179] Ministry of Justice, 'The Judicial Appointments Protocol' (n 174); Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' (n 174).

In addition to the statuary appointment criteria, the Attorney-General published a booklet on District Court judicial appointment processes. This booklet outlines appointment criteria relating to candidates' legal ability, qualities of character, personal technical skills, and reflection of society. In Chapter four of this thesis, I analyse the non-statutory criteria in more detail.

The appointment processes of the District Court judges have four steps, as shown in Figure one. First, a candidate should fill out an expression of interest form, which is a document that seeks personal and professional information about a candidate and supplements a candidate's curriculum vitae. The candidate submits the expression of interest form at the Appointments Unit in the Ministry of Justice in response to the advertised judicial position. Then, in the second step, a list of competent candidates will be prepared for the Attorney-General. The Attorney-General, after consulting with other officials or bodies, prepares a shortlist of candidates.

In the third step, a panel interviews the shortlisted candidates. The interview panel includes the Chief District Court Judge, the Head of Bench where relevant, the Executive Judge for the relevant region, and a representative of the Ministry of Justice. The panel provides a report of the interviews and the candidates' assessments. Then, the Attorney-General consults with the Solicitor-General and the President of the Law Society. In addition, the Attorney-General may interview candidates.[180] Finally, the Attorney-General chooses the most competent candidate(s), mentions the appointment to Cabinet, and formally advises the Governor-General.[181]

In the appointment process, the Attorney-General consults various people to investigate the candidates' qualities. The Attorney-General particularly seeks the opinion of individuals of the professional legal community. Based on the judicial appointment protocol, the Attorney-General may contact,

> The President of the New Zealand Law Society and other organisations or groups representative of lawyers who the Attorney-General believes can contribute names of suitable persons. Such groups may include the New Zealand Bar Association, the Criminal Bar Association, and, in the interests of increasing diversity, the Women's Consultative Group of the New Zealand Law Society, the Māori Law Society and women lawyers' associations. Also, Community groups with which the applicant has had involvement may be consulted. Nominations may also be sought from the Minister of Justice, the Chair for the Justice and Electoral Select Committee and the Opposition Spokespersons for the Attorney-General portfolio.[182]

Arguably, the booklet for judicial appointments in the District Court provides an unclear explanation of the appointment process. For instance, the booklet specifies that after candidates submit their expressions of interest, a list of competent candidates will be prepared for the Attorney-General. It is unclear who shortlists the candidates and what criteria they apply to shortlist candidates at this stage. Furthermore, the consultation process is shrouded in mystery. The booklet does not clarify how the consultation process takes place. As female Coroner number seven noted,

> You do not get a lot of information as to how that screening is done at the next level. I do not know if it is a phone call, I do not know if it is a written list of questions that are sent out and

[180] ibid.
[181] ibid.
[182] ibid, [7].

> then filled out... So, you never really get a sense... I do not really know what that involves or how broad that is or what they do. They do not really give you that much information about that process.[183]

It appears that even successful candidates, such as female coroner number seven, have insufficient information about the appointment processes and particularly the consultation process. Therefore, even some judges may not have a clear understanding of the practicalities of the appointment processes.

My interviews with the senior judges involved in the process helped clarify the judicial appointment process. Female senior judge number five explained that the judiciary advertises vacant positions, and candidates submit expressions of interest. Then, the Appointments Unit collects all expressions of interest and provides a short report for the Head of Bench. The report summarises the candidates' backgrounds, such as their legal expertise and experiences. In addition, the Head of Bench may ask the Appointments Unit to send him or her the candidates' expressions of interest. Then, the Head of Bench shortlists the most competent candidates to be interviewed. The Attorney-General reviews the shortlist and may add some candidates to the list. In the next step, an interview panel will interview candidates.[184] Male Senior judge number one explained the interview process. He noted,

> There will be generally the principal judges in the District Court. So, the interview panel would traditionally be the Chief Judge, The Principal Family Court Judge and the Principal Youth Court Judge. There would also be a representative of the Ministry of Justice, usually a high-level management role in the Ministry of Justice, who generally is there to ask questions on behalf of the Attorney-General, such as any skeletons in the closet… those sorts of questions, but [in the interview the three of us conduct] the inquiry about [a candidate's] ability and whether they could do the job or not... So, there is some pretty standard questions like why do you want to be a judge, why now, how do you manage stress? All those things will come into it, but it becomes quite free flowing depending on the person and where it all leads us, so there is no set form of questions.[185]

According to male senior judge number one, three senior judges in the interview panel have the main role in assessing candidates. Therefore, a group of senior judges carry out the interview and evaluate candidates' competence. Then the interview panel prepares a report and recommends the most qualified candidates for the judicial position. According to female senior judge number five, the report is an overall assessment of candidates.[186] Male senior judge number one explained that the report includes justification for the recommendations. For example, the interview panel may not recommend a candidate because he or she lacks the required level of experience, or other candidates have more experience.[187]

In the next step, according to female District Court judge number three, the Attorney-General consults with law societies, mainly with the New Zealand Law Society, and asks them to make any comments

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[183] Interview with a female coroner (17 October 2021)
[184] Interview with a female Senior Judge (18November 2021)
[185] Interview with a male Senior Judge (30 November 2021)
[186] Interview with a female Senior Judge (18November 2021)
[187] Interview with a male Senior Judge (30 November 2021)

about a proposed candidate.[188] According to male District Court judge number ten, the consultation process is critical in judicial appointments. He explained that in one instance, the interview panel recommended a person for a judicial position, but the Attorney-General did not appoint that person because the Law Society advised against his or her appointment.[189] Therefore, the Attorney-General makes the final decision by referring to the interview report and the consultation results. Male senior judge number one noted that after the Attorney-General makes a final decision, the Chief Judge calls the candidates and informs them of the result. Unsuccessful candidates can ask for feedback from the Chief Judge.[190] In chapter four, I critically analyse the appointment processes and explore how the appointment processes impact the proportion of female judges in New Zealand.

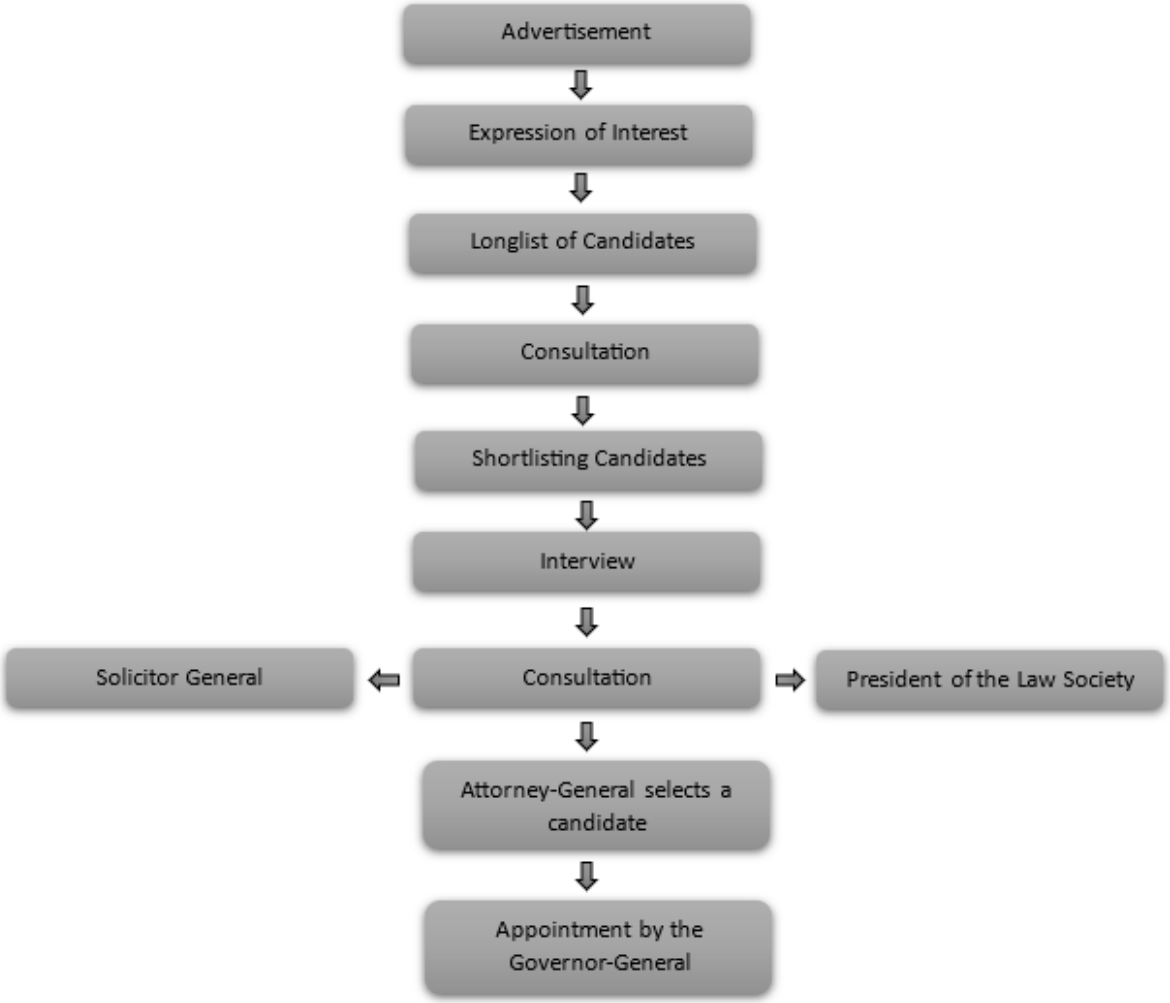

Figure 1 Appointment Process of District Court Judges

[188] Interview with a female District Court Judge (25November 2021)
[189] Interview with a male District Court Judge (18November 2021)
[190] Interview with a male Senior Judge (30 November 2021)

B. Appointment of the High Court judges

The Senior Courts Act 2016 specifies a formal framework for the appointment of Senior Court judges. Based on section 95 of the Senior Courts Act 2016, the criteria for judicial appointment to the High Court are as follows:

> (a) that person has, for at least 7 years, held a New Zealand practising certificate as a barrister or as a barrister and solicitor; or
>
> (b) that person—
>
> (i) holds a degree in law granted or issued by any university within New Zealand; and
>
> (ii) has been admitted as a barrister and solicitor of the High Court; and
>
> (iii) has held a practising certificate in a jurisdiction specified by Order in Council—
>
> (A) for at least 7 years; or
>
> (B) for a lesser number of years, but, when that number of years is added to the number of years that the person has held a New Zealand practising certificate, the total number of years is at least 7 years.[191]

It should be noted that appointment to the High Court requires qualifications beyond the statuary obligation of seven years' experience in the legal profession.[192] In 2013, the office of the former Attorney-General, Hon Christopher Finlayson, published a judicial protocol that explains the judicial appointment processes of the High Court, the Court of Appeal, and the Supreme Court. This booklet sets out the judicial appointment procedures and the appointment criteria.[193] The judicial protocol provides some additional appointment criteria, including candidates' legal ability, qualities of character, personal and technical skills, and reflection of society.[194] In chapter four, I critically analyse the impact of appointment criteria on female candidates.

There are 14 steps in the appointment of a High Court judge, as shown in Figure two. First, the Judicial Appointments Unit of the Ministry of Justice advertises judicial positions and invites expressions of interest.[195] It seeks expressions of interest approximately every three years. In addition, some people might be nominated and invited to submit an expression of interest following a consultation process. A variety of different associations and individuals may be consulted during the appointment processes. For instance, the Chief Justice, the President of the Court of Appeal, the Chief High Court Judge, the Secretary for Justice, the President of the Law Commission, the President of the New Zealand Bar Association, the President of the New Zealand Law Society, the Criminal Bar Association, the Māori Law Society, and women lawyers' associations and other organisations or groups representing lawyers may

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[191] Senior Courts Act 2016, s 94.

[192] Courts of New Zealand, 'Appointments' (*Courts of New Zealand*, 5 June 2021) <https://www.courtsofnz.govt.nz/about-the-judiciary/role-judges/appointments/> accessed 5 June 2021.

[193] ibid.

[194] Ministry of Justice, 'The Judicial Appointments Protocol' (n 174).

[195] Duncan Webb, Jacinta Ruru and Paul Scott, *The New Zealand Legal System: Structures and Processes* (6th edn, Lexis Nexis New Zealand Ltd 2016).

be consulted.[196] I should note that it is unclear who consults and invites people to submit an expression of interest. More importantly, there is a risk that by encouraging some people to submit expressions of interest, the judicial appointment process becomes similar to a tap on the shoulder system in that lawyers are directly appointed to judicial positions. There might be a perception that lawyers encouraged to apply for judicial positions are highly likely to take a judicial position. Thus, the appointment processes would not provide an equal chance for all candidates to be chosen for judicial positions.

Once candidates submit their expressions of interest, the Judicial Appointments Unit selects individuals who meet the statutory criteria, keeping their names on a confidential register.[197] In the next step, the Solicitor General reviews the names. She consults with the Attorney-General, the Chief Justice, the President of the Court of Appeal, the Chief High Court Judge, and the Secretary for Justice and discusses whether they should add additional names to the list.[198]

After finalising the list, the Solicitor General asks the Chief Justice, the President of the Court of Appeal, and the Chief High Court Judge to rate the candidates. Based on their rating, three lists will be prepared. The first list includes the names of candidates eligible for an immediate appointment. The second list includes those who will be qualified in two or three years, and the third list highlights those who are not suitable for either list.[199] Then, the Solicitor General hands on a long list of suitable candidates to the Attorney-General. The Attorney-General keeps the long list and annually discusses it with the Chief Justice, Chief High Court Judge, President of the Court of Appeal, Presidents of the Law Society, and President of Bar Association to keep it updated and relevant.[200]

In the next step, the Attorney-General, with the agreement of the Chief Justice and after necessary consultations with other officials, provides a shortlist with a maximum of three names.[201] Then, the Attorney-General may interview the short-listed candidates or may ask the Solicitor General to interview them. The Solicitor General also checks the reputation of the short-listed candidates.[202]

Finally, the Attorney-General selects a candidate from the shortlist, notifies Cabinet, and recommends the appointment to the Governor-General.[203] High Court judges and associate judges must be appointed on the recommendation of the Attorney-General.[204] Finally, all judges must be appointed by the Governor-General in the name and on behalf of His Majesty.[205]

I should note that the appointment process for senior court judges can be similar to a tap on the shoulder appointment system. In a tap on the shoulder system, the appointing decision maker offers a judicial position to a person. The booklet shows that the appointing decision makers can invite some candidates to submit an expression of interest. Therefore, although they do not offer a judicial position,

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[196] Ministry of Justice, 'The Judicial Appointments Protocol' (n 174).
[197] ibid.
[198] ibid.
[199] ibid.
[200] ibid.
[201] ibid.
[202] ibid.
[203] ibid.
[204] ibid, s100(3).
[205] ibid, s100.

inviting someone to submit an expression of interest might indicate that they have a high chance of being appointed. Moreover, the Attorney-General might not interview candidates. Female senior judge number five noted that the appointment process for senior courts is not based on formal interviews. [206] Hence, some judges may be appointed without attending an interview. A report by Anusha Bradley shows that in practice the appointment process of High Court judges is very similar to a tap on the shoulder system. The appointment process for High Court judges is opaque and non-transparent. Therefore, many people in the legal profession assume that High Court judges are chosen in a tap on the shoulder system.[207] In chapter seven of this thesis, I show that a tap on the shoulder system leads to the appointment of people with similar backgrounds.

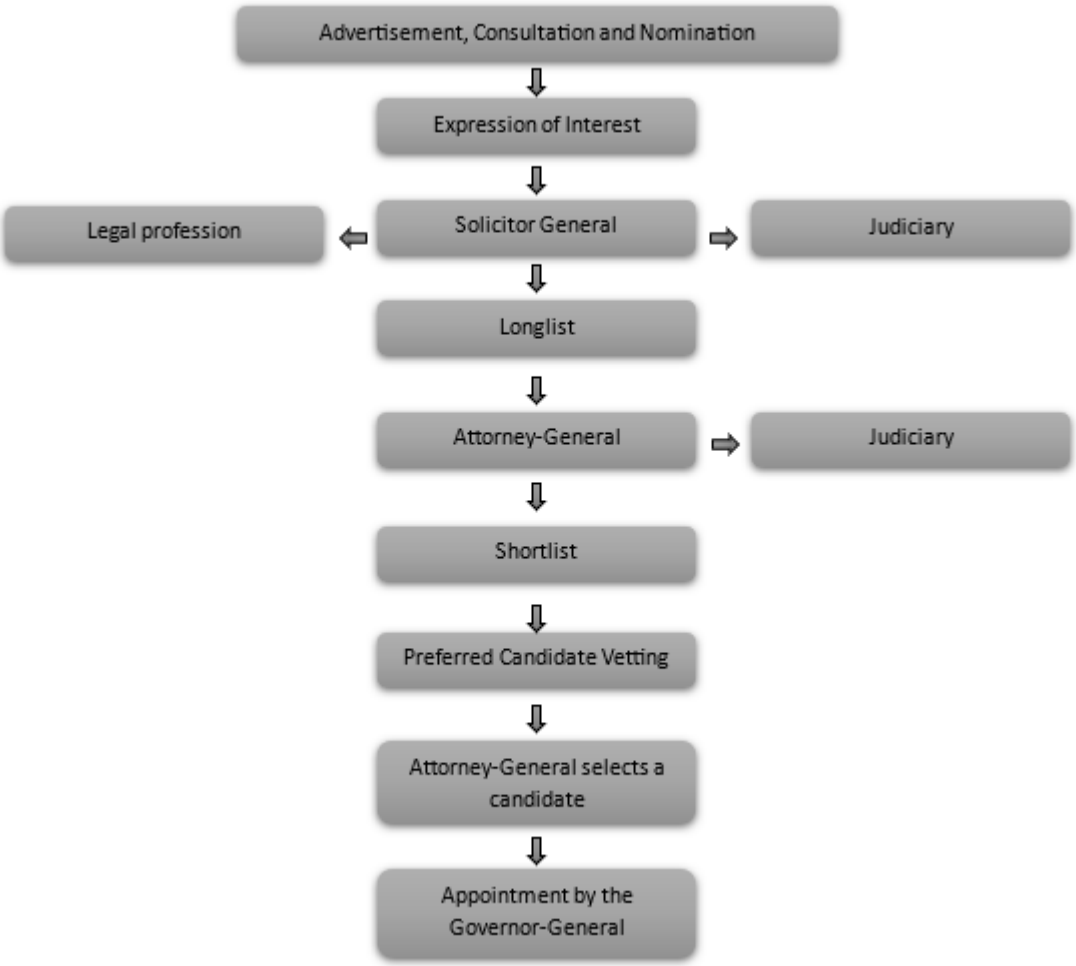

Figure 2 appointment process of the High Court Judges

[206] Interview with a female Senior Judge (18November 2021)

[207] Anusha Bradley, 'Judges Can Be Appointed without Ever Attending an Interview' (*RNZ*, 21 September 2021) <https://www.rnz.co.nz/news/is-this-justice/451941/judges-can-be-appointed-without-ever-attending-an-interview> accessed 22 October 2022.

C. Appointment of the Court of Appeal and Supreme Court judges

As I mentioned previously, the judges of the Court of Appeal and the Supreme Court are chosen among the serving judiciary. Based on the Senior Courts Act 2016, the judges of the Court of Appeal are chosen from the High Court Judges,[208] and the president of the Court of Appeal should be a High Court Judge.[209] Furthermore, the judges of the Supreme Court are selected among the judges of the Court of Appeal or High Court.[210] Therefore, the candidate for a judicial position in the Court of Appeal or Supreme Court should have fulfilled the appointment criteria for a High Court judicial position.

The appointment processes of the Court of Appeal and Supreme Court judges are quite similar. In contrast to the appointment of the District Court and High Court judges, the judiciary does not call for expression of interests because the Attorney-General is familiar with the potential candidates.[211] Instead, the Attorney-General consults with the candidates and different bodies to seek their advice on a suitable candidate.[212]

In the next step, the Attorney-General, with the agreement of the Chief Justice, prepares a shortlist of three candidates. Then, for the appointment of Court of appeal judges, the Chief Justice discusses the shortlisted candidates with the President of the Court of Appeal. For the appointment of the Supreme Court judges, the Chief Justice confers with other Supreme Court judges. In addition, the Solicitor General may confidentially consult relevant individuals or bodies at the request of the Attorney-General.[213]

The Attorney-General then evaluates the candidates. In addition to the appointment criteria, the Attorney-General considers the overall composition of the court, the diversity of the bench, and the experiences and expertise of current judges. Once the Attorney-General selects the most qualified candidate, he or she notifies Cabinet and recommends the appointment to the Governor General.[214]

The judicial appointment processes for selecting District and High Court judges in New Zealand have some similar features that I will elaborate on them in this thesis. First, all the judges in New Zealand are chosen from the legal profession and must have experience working in the legal profession for at least seven years.

Second, the appointment criteria are broader than the statutory requirements. The Attorney-General has introduced some additional criteria to evaluate candidates. Hence, the appointing decision makers, including senior judges, have the discretion to evaluate candidates against a broad range of criteria. In chapter four, I analyse the impact of these criteria on female candidates.

Third, consultation is a crucial part of the appointment process. Appointing authorities consult various officials and bodies to investigate the candidates' backgrounds. This suggests that a successful candidate

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[208] Senior Courts Act 2016, s95.
[209] ibid, s98(1).
[210] Senior Courts Act 2016, s96.
[211] Ministry of Justice, 'The Judicial Appointments Protocol' (n 174).
[212] ibid.
[213] ibid.
[214] ibid.

should be well-known in the legal profession. In chapter four, I elaborate on the importance of candidates' reputations in the appointment process and their impact on female candidates.

Finally, the Attorney-General plays a critical role in the appointment process of District Court and High Court judges. In this thesis, I show the impact of the Attorney-General's discretionary power on women's representation in the judiciary.

In this section, I showed that the appointment processes in practice differ from their official portrait. For example, I explain the importance of reputation, which the Attorney-General's judicial appointment booklets fail to include, in the assessment of candidates. Thus, candidates who wish to gain information about the appointment processes as they take place in practice should contact people involved in or informed of the appointment processes. As I explained in this chapter, a high proportion of women work as in-house lawyers or law firm employees, and hence are less likely to have contacts with senior members of the judiciary. Moreover, building strong social networks is more challenging for women lawyers than men. As a result, various candidates lack equal opportunities in preparing for the appointment process.

Moreover, in this section I showed that the Attorney-General has significant discretionary power. The Attorney-General's extreme amount of discretionary power has a harmful effect on appointment transparency. For instance, the official documents provide that the Attorney-General can conduct consultation as he or she believes necessary. It is unclear which associations and individuals the Attorney-General would consult and whether they are diverse or not.[215] In addition, the Attorney-General can decide to interview candidates for a judicial position in Senior Courts or make an appointment without conducting any interviews.[216] Therefore, there is a lack of transparency as to whether the appointing authorities fairly assess each candidate or apply differential treatment.

Conclusion

In this chapter, I have advanced two arguments in relation to women's challenges before participating in the judicial appointment processes. First, I argued that choosing judges from male-dominated parts of the legal profession leads to an unequal representation of women in the judiciary. I showed that there is a vertical gender segregation in the legal profession. Most women work as in-house lawyers, law firm employees and barrister employees, while those in senior positions, such as law firm partners and KCs, are mostly men. Then, I referred to the literature on the legal profession and my interview findings to outline barriers that impede women's progress in the legal profession or motivate them to change their legal careers. I explained barriers, such as work-life conflicts, prejudice against women in the legal profession, and networking challenges. Conflicts between work and life mostly disadvantage female lawyers because women take on more care responsibilities than men. I have explained that it is difficult for female lawyers with care responsibilities to develop social networks in the legal profession, as most networking events take place outside working hours. The informal interaction with people in positions of power would help women to develop contacts and become well-known in the legal profession, which is an important factor in being selected for a judicial position. Thus, women's lack of networking opportunities might significantly disadvantage them in the appointment processes. Then, I explained

[215] Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' (n 174); Ministry of Justice, 'The Judicial Appointments Protocol' (n 174).

[216] Ministry of Justice, 'The Judicial Appointments Protocol' (n 174).

that most judges are chosen from male-dominated senior parts of the legal profession. As a result, a low proportion of women are likely to be selected for judicial positions leading to the unequal representation of women in the judiciary.

Second, I argued that the confidentiality of the judicial appointment process disadvantages some female candidates and decreases the percentage of female judges. I explained the judicial appointment processes of the District Court, High Court, Court of Appeal and Supreme Court by referring to the statutes and Attorney-General's appointment booklets. I showed that the judicial appointment criteria and assessment process are unclear. Therefore, only candidates with strong networks in the legal profession and the judiciary would learn about the required appointment criteria, while a considerable proportion of female in-house lawyers and academics might not have informal networks. I showed that building social networks in the legal profession is more challenging for women than for men. Thus, diverse candidates have unequal opportunities to gain information about the appointment criteria and prepare for the appointment process.

In addition, the judicial appointment process is shrouded in mystery. It is unclear whether all candidates are assessed similarly or if biased practices disadvantage some candidates. Women lawyers lacking networks in the legal profession and judiciary might not trust the appointment system. Thus, a lack of transparency would discourage some female lawyers from applying for judicial positions, and consequently, lead to unequal participation of women in the judiciary.

Chapter four
Barriers impacting women in the judicial appointment process

Introduction

In the previous chapter, I explained the challenges that women encounter before applying for judicial positions. Issues such as work-life conflicts, prejudice against women in the legal profession, and networking challenges disadvantage most women lawyers, impede their progress in the legal profession, or motivate them to change their legal careers. In addition, I illustrated that the judicial appointment criteria and assessment processes are shrouded in mystery. Therefore, only candidates with strong networks in the legal profession and the judiciary would become aware of the required appointment criteria, while a considerable proportion of women face networking challenges and, in turn, may not gain enough information about the judicial appointment process and criteria.

In this chapter, I explore issues in the judicial appointment process that lead to unequal representation of women in the judiciary. The first section of this chapter focuses on appointing authorities' diversity. It explores how the lack of diversity among appointing authorities negatively impacts the proportion of women judges, particularly those from non-traditional career backgrounds.

In the second section, I ask how appointing authorities interpret and evaluate candidates against judicial appointment criteria. I show that appointing authorities tend to select candidates with more practicing experience than the statutory requirement while achieving even the statutory requirement is challenging for most women lawyers. Then, I explore how the Attorney-General's appointment criteria, set out in the judicial appointment booklets, impact female candidates. I show that the Attorney-General's appointment criteria are unclear, broad and ill-defined. Therefore, decision makers enjoy significant discretionary power in defining the criteria and evaluating candidates against them. Moreover, I unpack two unwritten criteria, namely, judicial diversity and resilience, and assess their influence on women's representation in the judiciary.

The third section focuses on how appointing authorities interview candidates to assess them against the criteria. I note that gender-biased views can affect the unstructured appointment interviews, leading to the unequal representation of women. Finally, I explain that most candidates are evaluated based on their reputations while gaining a reputation is more difficult for women than men. Hence, the importance of candidates' reputations undermines the potential for a more diverse judiciary.

I. Appointing authorities' own lack of diversity

Here, I put forward the argument that the lack of diversity of appointing authorities in New Zealand is a reason for women's underrepresentation in the judiciary. The literature shows that a lack of diversity

among decision makers likely results in limited diversity in judicial appointments. Samuel Spáč argues that homogenous appointing authorities tend to select candidates similar to themselves.[1] In fact, the hegemony of similar appointing authorities has 'a cloning effect' on judicial appointments.[2] There is a risk that homogenous appointing authorities have unconscious biases and select candidates who replicate the existing system.[3] Diversity among appointing decision makers would eliminate the influence of unconscious bias on the appointment process.[4] As Alan Paterson puts it, the presence of 'others' would 'debias' the decision making process.[5] A diverse body of appointing decision makers is more likely to challenge biased views and select candidates who do not replicate the existing system. For these reasons, the necessity of diversifying the appointing decision makers is widely acknowledged.[6]

The composition of the judiciary depends on the motivations and preferences of the appointing decision makers and candidates for judicial positions.[7] Diverse appointing decision makers are more likely to have various views and motivations and, as a result, select diverse candidates. Hence, the diversity of the appointing authorities enhances the diversity of the judiciary.[8]

Furthermore, as Jeffrey D Jackson argues, from a representativeness standpoint, it is valuable to engage people with diverse backgrounds in the appointment process.[9] By having appointing authorities with varied backgrounds, a broader range of perspectives can be represented, enabling authorities to make more informed and inclusive choices in selecting candidates from diverse social backgrounds.

My analysis of the judicial appointment processes indicates a lack of diversity among decision makers. The Attorney-General's booklet for District Court judges' appointment and the Judicial Protocol for High Court Judges each set out an appointment process that involves a limited number of senior officials in the judiciary and the Crown Law Office.[10]

Regarding the appointment of District Court judges, the interview panel consists of senior people in the judiciary, including the Chief District Court judge, the Head of the Bench, the Executive Judge for the relevant region, and a representative of the Ministry of Justice. In addition, the Attorney-General consults with the Solicitor General and the President of the Law Society to select a candidate and tender

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[1] Samuel Spáč, 'The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia' (2020) ahead-of-print Problems of post-communism 1.

[2] Alan Paterson, 'Power and Judicial Appointment: Squaring the Impossible Circle', *Debating Judicial Appointments in an Age of Diversity* (2017).

[3] Spáč (n 1).

[4] Jan van Zyl Smit, '"Opening up" Commonwealth Judicial Appointments to Diversity? The Growing Role of Commissions in Judicial Selection', *Debating Judicial Appointments in an Age of Diversity* (2017).

[5] Russell K Robinson, 'Perceptual Segregation' (2008) 108 Columbia law review 1093.

[6] Emma Greenman, Ciara Torres-Spelliscy and Monique Chase, 'Improving Judicial Diversity' in Jane Campbell Moriarty (ed), *Women and the Law* (Thomson/West 2009).

[7] Samuel Spáč, 'Recruiting European Judges in the Age of Judicial Self-Government' (2018) 19 German law journal 2077.

[8] Jeffrey D Jackson, 'Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System' (2007) 34 The Fordham urban law journal 125.

[9] ibid.

[10] Ministry of Justice, 'The Judicial Appointments Protocol'; Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' 2019.

formal advice to the Governor-General.[11] Thus, the appointing decision makers are mainly senior members of the judiciary and the legal profession.

Regarding the appointment of High Court judges, the Solicitor General reviews the names of candidates and consults with the Attorney-General, the Chief Justice, the President of the Court of Appeal, the Chief High Court Judge, and the Secretary for Justice. The Solicitor General also seeks comments from the Chief Justice, the President of the Court of Appeal, and the Chief High Court Judge. Then, the Attorney-General, with the agreement of the Chief justice, provides a shortlist of candidates, selects a can didate, and tenders formal advice to the Governor-General.[12] The appointing decision makers are mainly senior people in the judiciary and the legal profession. There is a risk that these senior people in the judiciary and legal profession would tend to appoint people from senior parts of the legal profession who will replicate the existing system.[13]

In response to my arguments, it could be argued that appointing authorities are diverse because various associations and individuals might be consulted in the appointment processes. The Attorney-General's booklet for District Court judges provides a list of organisations and individuals who might be contacted to seek comments about a candidate. The list includes the Chief Justice, the President of the Court of Appeal, the President of the New Zealand Law Society, and other legal organisations including,

> The New Zealand Bar Association, the Criminal Bar Association, and, in the interests of increasing diversity, the Women's Consultative Group of the New Zealand Law Society, the Māori Law Society, and women lawyers' associations, the Minister of Justice, the Chair for the Justice and Electoral Select Committee and the Opposition Spokespersons for the Attorney-General portfolio.[14]

For the appointment of High Court judges, in addition to the officials and organisations that were mentioned in the judicial appointment information booklet for District Court judges, the Chief High Court Judge, the Secretary for Justice, the President of the Law Commission, the Minister of Women's Affairs, and the Minister of Māori Affairs might be consulted.[15]

In response to this argument, I should note that the Attorney-General has significant discretion. The Attorney-General's booklets explain that the Attorney-General makes a decision 'after such consultation as he or she believes necessary.'[16] Therefore, the Attorney-General can consult a broad range of people and associations or avoid consultations altogether. There is no legal obligation to consult various associations, organisations, or individuals that might provide some valuable information on female candidates with a non-traditional background.

Moreover, the individuals and associations involved in the consultation process may not be able to assess the competence of female candidates with diverse legal career backgrounds. For instance, they may not be able to identify qualified female in-house lawyers or academic lawyers who did not appear in courts frequently. According to female District Court judge number three, the decision makers might

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[11] Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' (n 10).
[12] Ministry of Justice, 'The Judicial Appointments Protocol' (n 10).
[13] Spáč (n 1).
[14] ibid, 7.
[15] Ministry of Justice, 'The Judicial Appointments Protocol' (n 10).
[16] ibid, 5; Ministry of Justice, 'Judicial Appointments: Office of District Court judge' (n 11), 7.

only contact the New Zealand Law Society to provide comments on a candidate for a position in the District Court.[17] They may only contact the New Zealand Law Society since it has the highest number of members in comparison with other associations. In addition, male District Court judge number 10 stated that the New Zealand law society's comments on a candidate might significantly influence the final appointing decision. He explained that in one case the appointing decision makers did not select a candidate based on the New Zealand Law Society's comment.[18] This practice can disadvantage some female lawyers with non-traditional social and cultural backgrounds who may not be well-known in the New Zealand Law Society. According to female academic lawyer number 18, limited consultation makes a judicial appointment process similar to an unfair tap on the shoulder selection system. She noted,

> You might have a very open and very inclusive application process, but if consultation with the incumbents is part of the criteria for appointment, then it is a form of indirect discrimination... Because it has an adverse impact on the people who are the nontraditional applicants. So, you revert to that homosocial reproduction. It is kind of like a disguised tap on the shoulder... The elements of the conservative tap on the shoulder system being reintroduced into the supposedly objective appointment process. So, I think the way that you would deal with that is to scrap consultation altogether or have a wider range of consultation.[19]

According to academic lawyer number 18, consultation with a limited number of officials can indirectly discriminate against female lawyers from non-traditional backgrounds. Consequently, the consultation process not only fails to address the issue of appointing authorities' lack of diversity but can also worsen it.

Furthermore, as Spáč argues, 'how strong particular actors are in the recruitment process is not simply determined by their involvement in the process, but also by the stage of the process in which they are involved.'[20] The Attorney-General might consult some associations, such as the Māori Law Society and different women lawyers' associations for the appointment of District Court and High Court judges.[21] However, their involvement in the appointment process has a limited impact on women's representation in the judiciary. First, diverse associations are consulted during the later stages of the appointment process, mostly after interviewing a candidate. They are not a part of the interview panel and are not involved in shortlisting candidates. Second, the diverse lawyers' associations provide some comments on candidates, while the appointing authorities can overlook their comments.[22] Thus, the associations have a limited impact and might fail to eliminate the unconscious biases in the decision-making process.

In summary, appointing authorities are mainly senior people in the judiciary and the legal profession. They might not identify competent lawyers from non-traditional backgrounds, such as in-house lawyers, who are mostly women. Furthermore, the consultation with various individuals and associations might not improve women's representation in the judiciary because the appointing authorities can avoid

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[17] Interview with a female District Court judge (25November 2021)
[18] Interview with a male District Court judge (18November 2021)
[19] Interview with a female academic lawyer (6 August 2022)
[20] Spáč (n 2), 2086.
[21] Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' (n 10); Ministry of Justice, 'The Judicial Appointments Protocol' (n 10).
[22] Ministry of Justice, 'The Judicial Appointments Protocol' (n 10).

consultation or overlook its outcome. Therefore, the lack of diversity among appointing authorities might result in the appointment of people with similar backgrounds, perpetuating the underrepresentation of women in the judiciary.

II. Gender-blind judicial appointment criteria

Judicial appointment criteria are important references for both candidates and decision makers involved in the appointment process. Candidates, on one hand, consider these criteria as they apply for a judicial position and prepare for interviews. Meanwhile, decision makers, on the other hand, rely on these criteria to design interview questions and assess candidates accordingly. The appointment criteria play a significant role in shaping the entire judicial appointment process.

Appointment criteria set out the necessary qualities and skills to take a judicial position.[23] Individuals who perceive themselves capable of attaining the criteria will develop and invest in those skills.[24] One cannot expect a diverse judiciary without a diverse candidate pool.[25] Therefore, broader appointment criteria can result in a broader candidate pool and consequently lead to more diverse judicial appointments.

Moreover, appointment criteria provide guidance for candidates.[26] Candidates can prepare for the appointment processes by referring to the criteria. For example, female coroner number seven noted, 'I read the criteria and I went through each of them. I made notes about each competency and then found examples that I could portray them. So, it did help me. So, when I started getting questions, they were all related back to those criteria. I was already well prepared ...'[27] Female coroner number seven demonstrated her competence in accordance with the required appointment criteria. Hence, clear and well-defined criteria help candidates to prepare for the interview and show their skills. In the previous chapter, I noted that the lack of transparency of the judicial appointment processes and criteria has a negative impact on women's representation in the judiciary. In this chapter, I explore how appointing authorities interpret and apply the broad judicial appointment criteria.

Appointing decision makers consider the criteria when evaluating the suitability of candidates.[28] According to female coroner number seven, interview questions are related to the criteria.[29] Thus, interview questions are designed based on the criteria. Male senior judge number one, who is an appointing decision maker, explained that official appointment criteria are useful for potential candidates. He stated, 'This is the sort of material that we would be thinking about and certainly a candidate would be well advised to look at the criteria and address those matters in the interview. Be aware that those are the pretty general criteria, but they are not just ignored.'[30] According to male senior judge number one, appointing decision makers assess candidates based on the general

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[23] ibid; Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' (n 10).
[24] Kate Malleson, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 Journal of Law and Society 126.
[25] Brian Opeskin, *Future-Proofing the Judiciary: Preparing for Demographic Change* (Springer Nature 2021).
[26] Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' (n 10); Ministry of Justice, 'The Judicial Appointments Protocol' (n 10).
[27] Interview with a female coroner (17 October 2021)
[28] Ministry of Justice, 'The Judicial Appointments Protocol' (n 10).
[29] Interview with a female coroner (17 October 2021)
[30] Interview with a male senior judge (30 November 2021)

appointment criteria. Therefore, it is important to assess how the appointment criteria influence the judicial appointment processes.

In New Zealand, there are two types of criteria, the statutory criteria and the Attorney-General's criteria. The statutory criteria for judicial appointments are set out in section 15 of the District Court Act 2016 and section 95 of the Senior Courts Act 2016. In addition, the office of the former Attorney-General, Hon Christopher Finlayson, published two booklets that explain the appointment processes of District and High Court judges. The booklets set out some additional appointment criteria regarding candidates' 'Legal Ability', 'Qualities of character', 'Personal technical skills' and 'Reflection of society'.[31] Moreover, in this section, I unpack two unwritten criteria against which appointing authorities assess candidates. I have interviewed senior judges involved in the judicial appointment process to uncover the unwritten criteria. In addition, I refer to the literature to assess the impact of appointment criteria on female candidates.

A. Challenges of achieving the statutory criteria

The requirement of a certain number of years of legal practice as a prerequisite for eligibility to apply for a judicial position may present a potential barrier for female lawyers. Data on the legal profession in New Zealand suggests that a considerable proportion of female lawyers lack the required years of legal practice experience for a judicial position.[32] Section 15 of the District Court Act 2016 and section 95 of the Senior Courts Act 2016 prescribe that a competent candidate should have held a practising certificate as a barrister or solicitor for at least seven years. However, my interview findings show that in practice, there is a general assumption that candidates should have more than seven years of practicing experience. According to female coroner number eight, it is uncommon to appoint a person with only seven years of practicing experience. She noted, 'I would be very surprised to see someone who started practicing as a lawyer at 23 becoming a judge at 30. There is no reason why it could not happen, but I would be pretty surprised to see it.'[33] It indicates that judges are mostly chosen from people with longer practicing experience than seven years and it is less likely to select a judge with only minimum statutory requirement. Meanwhile, statistics show just under 46% of female lawyers have been working in the legal profession for 10 years or less.[34] Thus, a considerable percentage of female lawyers lack sufficient working experience and are less likely to be selected for a judicial position.

Furthermore, even if the appointing decision makers selected candidates with only seven years of legal practice, it might be difficult for a high percentage of female lawyers to even achieve the minimum statutory requirement. The median time in practice for a substantial percentage of women in the legal profession is less than seven years. In 2020, most law firm employees (62.3%) were women. The median time in practice for women lawyers was five years and 10 months. In addition, 62% of employed barristers were women; their median time in practice was four years and five months.[35] Therefore, a considerable percentage of female lawyers do not hold a practicing certificate for seven years. It is unclear on what basis the minimum statutory requirement is to have been holding a practicing

[31] Ministry of Justice, 'The Judicial Appointments Protocol' (n 10); Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' (n 10).
[32] Geoff Adlam, 'Snapshot of the Profession 2020' [2020] Lawtalk 26.
[33] Interview with a female coroner (19 October 2021)
[34] Adlam (n 32).
[35] ibid.

certificate for seven years, while similar jurisdictions such as Victoria require only five years of experience.[36] The statistics indicate that five years of legal practice experience is achievable for a majority of female lawyers.

A question that may arise is why women have less working experience in law than men. As discussed in the previous chapter, women lawyers often face common challenges that may entice them to consider changing their career path. Additionally, the lack of a parental leave policy for lawyers is linked to women's less working experience than men. When I inquired whether the period that a lawyer is on parental leave contributes to their practicing time, the Law Society responded that this is a subjective issue, and a lawyer may or may not cancel their practicing certificate for the period that they are on parental/maternity leave. The Law Society was unable to comment on the Law Society's parental leave policy, hence recommended approaching some of the larger law firms to inquire if they have any statistics around this.[37] The absence of policies to support lawyers who take parental leave might be a reason that women typically have a shorter period of working experience than men. In New Zealand, the majority of individuals who take parental leave are women. In fact, less than 1% of men take parental leave.[38] Therefore, the lack of a parental leave policy in the legal profession mostly disadvantages female lawyers. According to the female coroner number seven, the period of maternity leave does not contribute to practicing time. She noted,

> In legal careers, unfortunately, any gap in your practicing life does hinder you because it does not count. Before I left the association…we were really petitioning the Law Society to count the years that you had been away from active legal roles. We were petitioning for the Law Society to become more adapting to women. Stepping away from legal life to do a stint of being home mothers does not mean that we were stepping away from learning... So, I think law firms and generally the legal profession needs to accept that there will be times away from active legal work.[39]

In a lack of a clear legal framework for parental leave, law firms may not support lawyers who take parental leave. Hence, taking parental leave can impede women's progress in the legal profession. In addition, some female lawyers may not hold practising certificates during their parental leave and, therefore, would achieve the minimum requirement of seven years of experience later than their colleagues. Therefore, the statutory requirement of seven years' work experience is a gender-blind criteria that disadvantages women more than men. In addition, the practice of selecting judges from lawyers with more than seven years work experience significantly decreases the percentage of qualified female candidates for judicial positions, leading to unequal representation of women in the judiciary.

B. Challenges of achieving the Attorney-General's criteria

In this section, I explore the gender impact of the Attorney-General's criteria. I analyse how four sets of criteria, set out by the office of the Attorney-General, impact the percentage of female judges.

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[36] Constitution Act 1975, s 75B; County Court Act 1958, s8 (1A) (Victoria)

[37] Email from New Zealand Law Society (20 July 2022)

[38] Claire Breen, 'Fewer than 1% of New Zealand Men Take Paid Parental Leave – Would Offering Them More to Stay at Home Help?' (*The Conversation*, 14 April 2022) <https://theconversation.com/fewer-than-1-of-new-zealand-men-take-paid-parental-leave-would-offering-them-more-to-stay-at-home-help-180777> accessed 8 August 2022.

[39] Interview with a female coroner (17 October 2021)

1) The Ambiguous criteria of legal ability

Attorney-General's criteria for appointment in the District Court and High Courts set out similar features regarding the legal ability of a competent candidate.[40] The booklet for the appointment in the District Court defines 'legal ability' as,

> • Sound knowledge of the law and experience of its application.
>
> • Requisite applied experience and/or application of legal knowledge in other branches of legal practice.
>
> • Capacity to discern general principles of law and in doing so to weight competing policies and values.
>
> • Overall excellence demonstrated in a relevant legal occupation.[41]

The booklet for appointment in the High Court requires the following qualities,

> *Legal Ability:* Legal ability includes a sound knowledge of the law and experience of its application. Legal knowledge, in particular, is indicative of intellectual capacity and intelligence. Requisite applied experience is often derived from practice of law before the courts which is experience of direct relevance to being a Judge. But application of legal knowledge in other branches of legal practice, such as in an academic environment, public service or as a member of a legal tribunal may all qualify. At appellate level, legal ability includes the capacity to discern general principles of law and in doing so to weigh competing policies and values. More important than where legal knowledge and experience in application is serviced from, is the overall excellence of a person as a lawyer demonstrated in a relevant legal occupation.[42]

The formal criteria for the legal ability of candidates are limited in scope. My interview findings indicate that in practice, the appointing decision makers assess candidates' legal ability against a broader set of criteria than those spelt out in the Booklet. Appointing decision makers seek various specialties and skills for different types of courts, which are not mentioned in the official criteria;[43] this causes inequality between candidates because diverse candidates do not have equal opportunity to become aware of and obtain these skills. This issue leads to indirect discrimination against people lacking strong social networks, who are mostly women.[44]

The interview findings show that candidates who apply for a judicial position in courts of general jurisdiction, particularly senior courts, must have broad experience in different areas of legal practice. However, none of the Attorney-General's booklets noted this criterion. Female senior judge number 11 stated, '[A candidate] should also have general experience and be a knowledgeable lawyer.' She explained, 'When we speak of courts of general jurisdiction such as the senior courts, over specialisation can decrease the available applicants...Women have tended to be pushed into very specialised areas of

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[40] Ministry of Justice, 'The Judicial Appointments Protocol' (n 10); Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' (n 10).

[41] Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' (n 2), p4.

[42] Ministry of Justice, 'The Judicial Appointments Protocol' (n 2), p6.

[43] Interview with a female senior judge (19 October 2021) and Interview with a male senior judge (30 November 2021)

[44] See chapter 3.

the profession, which can be a problem for appointment to a court of general jurisdiction.'[45] Hence, a competent candidate for a judicial position in a senior court must have broad legal experience, while, according to female senior judge number 11, women tend to focus on specific areas of the legal practice. The Attorney-General's appointment criteria did not include this important factor.

In response to the question of what factors are most important for being selected as a judge, male senior judge number one, who was involved in the process of assessing candidates for judicial positions in District Court, stated, 'Firstly, legal competence, legal knowledge and probably experience in the wide range of cases.' He noted,

> They [candidates] need to have wide legal experience. Quite often… we deal with lawyers who specialise in a very small area and that makes it more difficult for them to be employed as a judge because, particularly in Family Court, they are expected to do such a broad range of work, and if they do not have that experience then it makes it very difficult for them and they are less likely to be employed.[46]

According to the male senior judge number one, having a broad experience in the legal profession is an important factor to be selected for a judicial position in the District Court, specifically the Family Court division. However, official appointment criteria do not inform candidates of this requirement. Therefore, candidates who refer to the published criteria cannot plan their career path to be qualified for a judicial position. This might explain the over-specialisation of some female lawyers[47] who would otherwise have sought out broader work experience when planning their career.

Furthermore, according to female District Court judge number three, different benches require candidates to have specialties in specific areas of legal practice. She stated,

> There will be some people who have really strong skills in one area and not so strong in others. It really depends on what we are looking for [in] a particular community. So, the kind of judge you would send to one end of the country might be very different to the kind of judge you need at the very opposite end of the country.

As female District Court judge number three noted, various judicial positions may require a specific set of skills depending on the community of the court. Thus, appointing decision makers may weigh the appointment criteria differently for various judicial positions.

In addition, my interview findings indicate that appointing authorities for District Courts tend to select candidates who have appeared in jury trials. In response to the question of 'which factors are important to be selected for a judicial position?', female District Court judge number four noted, 'Make sure that you get lots of career experience in criminal [law]. Make sure that you have got jury trials as well as judge alone stuff... So, the criminal exposure really where you would look for in a District Court.'[48] Likewise, male senior judge number one stated, 'If we are looking for a judge to do jury trials, ideally [we are looking for] somebody [who] demonstrated competence as a criminal defence, barrister or prosecutor, so we would be looking for somebody who has got that level of experience and

[45] Interview with a female senior judge (19 October 2021)
[46] Interview with a male senior judge (30 November 2021)
[47] Interview with a female senior judge (19 October 2021)
[48] Interview with a female District Court Judge (22November 2021)

competence.'[49] Therefore, having experience in criminal law is an important factor to be selected for a judicial position in courts such as the Jury Division of District Court.

The appointment criteria regarding candidates' legal ability fail to include certain skills and qualities, such as general legal experience for senior court candidates, and trial experience for District Court candidates. Hence, candidates cannot prepare for the appointment process by only referring to the formal criteria. This means that candidates with strong social networks, who are more likely to become aware of these informal skills and qualities, have an advantage over others because they can obtain these skills and qualities and demonstrate them during the appointment process.

Furthermore, the Attorney-General's booklet for appointment to the District Court notes that a competent candidate should have 'applied experience of legal knowledge in other branches of legal practice'.[50] Legal ability can be obtained by working in different areas and types of practice. However, the booklet does not provide any examples of diverse legal career paths that candidates may have pursued. In other words, it does not set out a comprehensive guideline for the decision makers to identify qualified candidates from various areas of legal practice. My interview findings show that in practice, appointing decision makers assess candidates based on their performance in court. In response to the question 'What issues would decrease the number of qualified women for a judicial position?', female District Court judge number four explained, 'The exposure as a litigation lawyer in court. So, if they [candidates] are in company positions, university teaching, government departments, all those things do make their CVs less appealing to those that are doing the appointments.'[51] The de facto requirement of having the experience of jury trials is a gender-blind consideration that disadvantages a considerable proportion of female in-house lawyers who do not appear in courts frequently. Thus, there is a risk of overlooking female lawyers who have experience in non-traditional legal practices, such as 66.2% of women in-house lawyers working in unions, professional organisations, and charities.[52]

The Attorney-General's criteria for the appointment of District and High Court judges require candidates to meet the standard of 'overall excellence'.[53] The meaning of overall excellence is unclear, which in turns means that the appointing decision makers can evaluate the overall excellence of a candidate based on their personal views and perceptions. My interview findings show that the appointing decision makers tend to identify excellence in candidates from senior ranks of law firms. This understanding of overall excellence arguably disadvantages a high proportion of female candidates working as law firm employees, in-house lawyers, or barrister employees.[54] For example, female senior judge number six, who is an appointing decision-maker, noted,

> There are usually so many applications for these positions…there are a lot of very senior people who can be considered, so they are going to be given preference over someone who has only

[49] Interview with a male senior judge (30 November 2021)
[50] Ministry of Justice, 'The Judicial Appointments Protocol' (n 10).
[51] Interview with a female District Court Judge (22November 2021)
[52] 'Spotlight on… in-House Lawyers' [2017] Lawtalk 84.
[53] Ministry of Justice, 'The Judicial Appointments Protocol' (n 10); Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' (n 10).
[54] Adlam (n 32).

> been or had an outbreak in their career... There is a lot of competition for the positions, so seniority is one advantage.[55]

In her view, a senior lawyer is more suitable for a judicial position. This perception favours candidates who progressed in the legal profession and achieved a senior position without taking long-term leave. Hence, female lawyers who took parental leave or do not have a senior position are less likely to be successful in the appointment process. In addition, female senior judge number 11, who is one of the appointing decision makers for the senior courts, stated,

> Being a partner or having a senior position is not an informal criterion. However, lawyers with senior positions would be knowledgeable in a variety of ways. They can show their excellence, which is one of the appointment criteria. Therefore, while being a partner is not an informal appointment criterion, seniority often reflects excellence, which is one of the appointment criteria.[56]

According to her, appointing authorities are more likely to identify the overall excellence of candidates who have had senior positions in law firms. The Attorney-General's protocol for the appointment of High Court judges highlights different career paths that a competent candidate may have followed, including working in an academic environment, public service, or as a member of a tribunal.[57] However, according to female senior judge number 11, in practice, appointing decision makers mainly rely on the seniority of a candidate to assess their excellence. Arguably, this perception of excellence disadvantages a considerable proportion of female lawyers because only 34% of law firm partners and directors are women.[58] Therefore, based on this perception of overall excellence, a low percentage of female lawyers can meet this criterion.

Moreover, it seems that appointing decision makers tend to select senior lawyers working in male-dominated sectors of the legal profession. As female District Court judge number two noted,

> I think [part of the barrier] is the perception that judges are drawn from the same pool. So, … just taking the High Court as an example, one of the barriers for women is that traditionally judges who are appointed to the High Court in New Zealand largely come from either six major law firms, or maybe Crown Law…which is a very narrow pool. Women traditionally have found it quite a challenge to reach good positions, even if they can get into those particular law firms and of course, those law firms tend to focus on specific areas of work that are not often attractive to women. So, that is a barrier to getting a position on the High Court. That is changing to an extent, but it is changing slowly.[59]

According to female District Court judge number two, appointing authorities are more likely to select judges from male-dominated parts of the legal profession, including law firms' senior positions, or male-dominated law firms. This practice can systematically exclude women from the judiciary.

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[55] Interview with a female senior judge (21 October 2021)
[56] Interview with a female senior judge (19 October 2021)
[57] Ministry of Justice, 'The Judicial Appointments Protocol' (n 10).
[58] Adlam (n 32).
[59] Interview with a female District Court Judge (25November 2021)

In chapter two, I explained that due to gender biases some women who work part time are considered less qualified and committed to their work. The unconscious biases and gender stereotypes may colour the decision makers' views, potentially influencing their assessment of the excellence of female candidates. As a result, a disproportionate number of female candidates are likely to fail at being selected for a judicial position, particularly in senior courts.

In summary, the general criterion to demonstrate overall excellence in a relevant legal occupation is interpreted as being equivalent to demonstrated seniority. My interview findings show that appointing decision makers tend to identify excellence in candidates with senior positions. In turn, the reduction of the criteria of 'overall excellence' to mere seniority, is likely to disadvantage female lawyers who are overrepresented as law firm employees, in-house lawyers, and academic lawyers.[60]

2) The gender-blind qualities of character and personal technical skills

The Attorney-General's criteria for the qualities of character of High Court and District Court judges are identical. The booklet for the judicial appointment in the District Court provides the following qualities of character:

- Personal honesty and integrity.
- Open-mindedness and impartiality.
- Courtesy, patience and social sensitivity.
- Good judgement and common sense.
- Ability to work hard, to listen and concentrate.
- Collegiality, breadth of vision, independence, and acceptable of public scrutiny.[61]

In addition, the booklet for judicial appointment in the High Court highlights the following qualities of character,

> *Qualities of character:* Personal qualities of character include personal honesty and integrity, open mindedness and impartiality, courtesy, patience and social sensitivity, good judgment and common sense, the ability to work hard, to listen and concentrate, collegiality, breadth of vision, independence, and acceptance of public scrutiny.[62]

Moreover, the Attorney-General's booklet for judicial appointment in District Court provides that a candidate should have the following personal technical skills,

- Effective oral and written communication.
- Ability to absorb and analyse and explain in a concise and lucid manner complex and competing factual and legal material.
- Mental agility, administrative and organisational skills.

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[60] Adlam (n 32).
[61] Ministry of Justice (n 1) [6].
[62] Ministry of Justice, 'The Judicial Appointments Protocol' (n 10).

- Capacity to be forceful when necessary and to maintain charge and control of a court.
- Ability to inspire respect and confidence.
- Impartiality and collegiality.
- A person shall not be appointed to be a Family Court Judge unless they are by reason of their training, experience and personality, a suitable person to deal with maters of family law. (Section 5(2) of the Family Court Act 1980).[63]

The booklet for appointment in the High Court requires the following features,

> *Personal technical skills:* There are certain personal skills that are important, including skills of effective oral communication with lay people as well as lawyers. The ability to absorb and analyse complex and competing factual and legal material is necessary. Mental agility, administrative and organisational skills are valuable as is the capacity to be forceful when necessary and to maintain charge and control of a court. Judges often have to work at speed and under pressure. Accordingly, the ability to organise time effectively and produce clear reasoned judgments expeditiously is necessary.[64]

I maintain that some of the required personal technical skills are general and subjective. They include the ability to inspire respect and confidence, the capacity to be forceful when necessary and maintain charge and control of a court, impartiality, and collegiality.[65] Applying these criteria and assessing candidates based on them depends on the views and perspectives of appointing decision makers who may be influenced by implicit gender stereotypes, especially in the absence of ongoing training on unconscious bias.[66] Qualities such as honesty, integrity, open-mindedness, impartiality, courtesy, patience, and social sensitivity are broad concepts that can be interpreted in various ways. According to Barbara Hamilton, these types of characteristics depend on other people's views about a candidate rather than their inherent attributes.[67] Therefore, appointing decision makers may rely on a candidate's reputation to assess these subjective criteria. While, as I discuss in chapter three, it is more difficult for women to gain a reputation in the legal profession.

Furthermore, appointing decision makers enjoy unstructured discretion in assessing candidates against subjective criteria. As a result, the appointment system is open to the influence of gender-biased views and gender stereotypes. According to Madeline Heilman, in the lack of concrete criteria, gender stereotypes tend to colour judgments. She argues, 'This ambiguity in performance criteria provides ample opportunity for the cognitive distortion that acts to maintain stereotypes, casting women as unsuccessful in their accomplishments regardless of their actual performance quality'.[68]

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[63] Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' (n 10).
[64] Ministry of Justice, 'The Judicial Appointments Protocol' (n 10).
[65] Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' (n 10).
[66] Jennifer K Elek and David B Rottman, 'Methodologies for Measuring Judicial Performance: The Problem of Bias' (2014) 4 Oñati Socio-legal Series 863.
[67] Barbara Hamilton, 'The Law Council of Australia Policy 2001 on the Process of Judicial Appointments: Any Good News for Future Female Judicial Appointees?' (2001) 1 Law and justice journal 223.
[68] Madeline E Heilman, 'Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organizational Ladder' (2001) 57 Journal of social issues 657, 663.

Moreover, the Attorney-General's criteria provide that a competent candidate should be able to work hard.[69] It might be more challenging for people with flexible working schedule to demonstrate this criterion. This issue can mostly disadvantage female lawyers because in New Zealand women disproportionately provide care more often than men.[70] Some women with care responsibilities adopt flexible or part time work arrangements to strike a balance between their work and family demands. In fact, one in three employed women in New Zealand work part time.[71] The flexible working arrangements can be evaluated as counter-indicative of the criterion of 'hard-working'.[72] Female lawyers with part time or flexible working arrangements might be considered less productive and committed in a working culture that values long working hours.[73] Hence, appointing decision makers might evaluate them as unsuitable for a judicial position.

Simon Evans and John Williams argue that candidates should provide evidence to prove their qualities of character. Otherwise, 'there is too great a risk of subjectivity re-entering the process, despite the attempts to limit it by breaking 'merit' down into its constituent elements'.[74] For example, a competent candidate can provide evidence of their ability to absorb and analyse complex and competing factual and legal material by providing examples of their past work experience. In this way, the appointing authorities would be able to assess some of the appointing criteria objectively.

In the absence of evidence-based assessments, appointing authorities can use these subjective criteria to hide their gender-biased views behind ostensibly objective assessments. Furthermore, there is a risk that appointing decision makers formulate various meanings for the open-ended criteria and flexibly apply them to each candidate. They may have various interpretations of the similar behaviour of diverse candidates. For example, a behaviour seen as assertive for men can be seen as aggressive for women.[75]

3) Reflection of society

The fourth set of Attorney-General's criteria refers to a candidate's awareness of social diversity in New Zealand. The booklet for judicial appointment in District Court provides that a competent candidate should be,

- Aware of, and sensitive to, the diversity of modern New Zealand society including of tikanga Māori and Te Reo.
- Experience of the community of which the court is part.
- Social awareness.[76]

In addition, the booklet for the appointment of High Court judges requires,

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[69] Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' (n 10).

[70] Deloitte and Westpac New Zealand Limited, *Westpac New Zealand Sharing the Load Report* (Westpac New Zealand 2021).

[71] Ministry for Women, 'Gender Inequality and Unpaid Work: A Review of Recent Literature' (2019).

[72] Hamilton (n 67).

[73] Judith K Pringle and others, *Women's Career Progression in Auckland Law Firms: Views from the Top, Views from Below* (Gender & Diversity Research Group 2014).

[74] Simon Evans and John (Australian law professor) Williams, 'Appointing Australian Judges: A New Model' (2008) 30 The Sydney law review 297, P8.

[75] Prue Hyman, *Hopes Dashed?: The Economics of Gender Inequality* (Bridget Williams Books Limited 2017).

[76] Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' (n 10).

> *Reflection of society:* This is the quality of being a person who is aware of, and sensitive to, the diversity of modern New Zealand society. It is very important that the judiciary comprise those with experience of the community of which the court is part and who clearly demonstrate their social awareness. The Report of the Royal Commission on the Courts in 1978 put the point as the need for "a good knowledge, acquired by experience, of New Zealand's life, customs and values". (p 199).

This set of criteria generally requires a candidate to be aware of the social diversity in New Zealand. The criteria of reflection of society can structure the appointing decision makers' discretion to broadly consider judicial diversity. I argue that the appointing authorities should consider multiple aspects of social awareness and commitment to diversity when selecting judges so that judges can more effectively interact with diverse people. Because more than half of the population are women, adopting this policy would consequently increase the proportion of women judges, particularly those from diverse backgrounds.[77]

Most people may be aware of social diversity. However, a homogenous judiciary consisting of male judges is likely to lack the experience of people from diverse social backgrounds. As a result, they may not comprehend the sophisticated and sensitive nature of diverse groups of society.[78] As academic lawyer number 18 noted,

> Being aware of the diversity of society does not really say very much. I mean any white man can be aware of the diversity of society. I think what I would like to see as a criterion is something more like having actively contributed to promoting diversity or having some track record of promoting diversity in the areas that you have worked in or being a diverse employer or working in some kind of a way to increase the diversity of the bar... So, I think it is a demonstrated commitment to diversity rather than just an awareness of or a willingness to acknowledge, or something like that.[79]

As the academic lawyer noted, the appointing authorities should require candidates to provide some evidence of social awareness and commitment to improving diversity in practice. Selecting judges committed to promoting judicial diversity would make a positive change in the practice of the judiciary because they are more likely to consider and reflect social diversity in their judicial decisions. According to academic lawyer number 18, 'judges who are likely to question taken-for-granted legal orthodoxies, tend to be the ones who have a background in questioning social orthodoxy. So, a demonstrated commitment to diversity… would help to ... change, not just the face of the judiciary but the practices of the judiciary as well.'[80] Appointing decision makers should require a candidate to provide some evidence, such as their past experiences in promoting diversity in their former roles. In this way, the

[77] The main focus of this thesis is the numerical representation of women in the judiciary. However, inclusion of women from diverse backgrounds is also an important aspect of this discussion.

[78] Iyiola Solanke, 'Where Are the Black Judges in Europe?' (2019) 39 Connecticut Journal of International Law Summer.

[79] Interview with a female academic lawyer (6 August 2022)

[80] Interview with a female academic lawyer (6 August 2022)

appointing authorities can objectively assess a candidate's social awareness and commitment to social diversity.[81]

I should note that the recently updated expression of interest form for the appointment of High Court judges requires candidates to provide examples of their commitment to judicial diversity. The form asks in particular: 'How has your experience, both professional and personal, provided you with both an understanding of and the skills to judge in the diverse, complex and modern society that is Aotearoa New Zealand'.[82] In addition, it requires candidates to give details of their involvement with community groups and activities during their professional and personal life.[83] Candidates for a judicial position in High Court can provide some evidence of their social awareness by answering these questions.

My interview findings show that in practice, the appointing decision makers focus on the cultural diversity in society. Female coroner number seven noted that some of the appointment interview questions focus on the awareness of society's diversity. She explained,

> When I was interviewed, one of the criteria was my awareness of the New Zealand community and diversity and how I would be able to feel that and relate to that community in my role. So, that is part of the actual interview process, as they want to get a sense of your awareness or how you would be able to deal with a multicultural society or a multi-diverse sort of community that you are fronting. I think the policy behind everything is the encouragement for us to do education and training and be aware of different cultures that we come in contact with. So, I think it is a bit of both policy and legislation that are pushing us towards that way, and so the job positions reflect that they need people that are getting these roles that do have an appreciation and understanding of that.[84]

According to the female coroner, the interview panel assess a candidate's understanding and awareness of New Zealand's multicultural society. They aim to assess whether a candidate can effectively interact with people from diverse cultures. Interviewers specifically assess a candidate's knowledge of Māori culture. Male senior judge number one, who is one of the appointment decision makers, stated,

> We are looking secondly at [a candidate's] ability to be connected with communities that the court is serving. [Candidates should] see it as an important role for a judge to be seen as relevant to the community in which they are judging. So, we are looking at their acceptance of that. Their cultural competency in terms of understanding our main Treaty partner, Māori culture. So, we are looking very carefully at their openness to do that.[85]

It is more likely for Māori candidates to demonstrate their understanding of their culture. Candidates with diverse racial and cultural backgrounds are better positioned to understand their own communities.[86] Hence, female candidates with diverse social or cultural backgrounds are more likely to

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[81] Simon Evans and John (Australian law professor) Williams, 'Appointing Australian Judges: A New Model' (2008) 30 The Sydney law review 297, P8.

[82] The Attorney-General's Judicial Appointments Unit, 'Expression of Interest to Be Appointed to the Bench of the High Court', 5.

[83] ibid.

[84] Interview with a female coroner (17 October 2021)

[85] Interview with a male senior judge (30 November 2021)

[86] Iyiola Solanke, 'Where Are the Black Judges in Europe?' (2019) 34 CONN. J. INT'L L. 289.

have an understanding of people with the same intersectional identities. Their social awareness increases their chance of being successful in the judicial appointment processes.

Arguably, the appointing decision makers should consider different aspects of social awareness because social awareness is not limited to just cultural diversity. A person with social awareness is conscious of other's perspectives, can empathise with them, and can appreciate and respect social diversity.[87] Cultural diversity is only one aspect of social diversity. Social diversity includes various aspects of an individual's condition, such as diversity of religious beliefs, lifestyles,[88] sexual orientation, career backgrounds, and so on.

In addition, it is important to evaluate candidates' social perspectives. Appointing decision makers must select candidates with diverse views and backgrounds. There is a risk that appointing a high proportion of members of a specific social group would not change the practice of the judiciary if they were chosen from similar backgrounds and perspectives. For example, the presence of women in the judiciary does not necessarily ensure that women's perspectives and experiences are considered in judicial decisions.[89] Rather, appointing decision makers should choose feminist candidates who are aware and sensitive to women's issues. A feminist judge takes into account the gender impacts of rules and practices. They ask how legal rules impact women. In turn, asking this question can arguably lead to considering other forms of exclusion on the bases of ethnicity, religion, and so on in a particular case.[90]

A feminist judge listens to diverse stories and experiences of women to gain a broader understanding of women's issues and incorporate them into their judicial decisions.[91] Hunter shows that an element of feminist judging is questioning discourses of sexism, racism, and heteronormativity. Thus, a feminist judge does not rely on stereotypical perspectives about sexual behaviour. Moreover, feminist judges adopt practical reasoning. They focus on the context and women's different experiences in each case.[92] They strive to remedy injustices and improve substantive equality.

Dianne Otto assessed the effects of feminist methods on judicial decisions. She explored the judicial decisions of feminist judges who rewrote 15 famous international law cases.[93] Otto notes that using the feminist method can result in different judicial reasoning and decisions from the original cases.[94] In addition, in research on feminist judgements in Australia, two-thirds of 41 interviewed judges noted that they judge differently as feminists because of their knowledge of women's experiences and issues, their

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[87] Kathleen L McGinn and Rachel Croson, 'What Do Communication Media Mean for Negotiations? A Question of Social Awareness' in Michele J Gelfand and Jeanne M Brett (eds), *The handbook of negotiation and culture* (Stanford University Press 2004); Veronica O'Toole and others, 'Emotional Wellbeing as Perceived and Understood through the Lenses of SEL and PYD: A Qualitative Commentary and Suggestions for Future Research in Aotearoa New Zealand' (2019) 48 New Zealand journal of psychology 91.

[88] Jonathan Boston and Paul Callister, 'Diversity and Public Policy' (2005) 1 Policy Quarterly.

[89] Rosemary Hunter, 'Can Feminist Judges Make a Difference?' (2008) 15 International journal of the legal profession 7.

[90] Katharine T Bartlett, 'Feminist Legal Methods' (1990) 103 Harvard law review 829.

[91] Christine Boyle, 'Sexual Assault and the Feminist Judge' (1985) 1 Canadian journal of women and the law 93.

[92] Bartlett (n 89).

[93] Hodson Loveday and Troy Lavers (eds), *Feminist Judgments in International Law* (Bloomsbury Publishing 2019).

[94] Dianne Otto, 'Feminist Judging in Action: Reflecting on the Feminist Judgments in International Law Project' (2020) 28 Feminist Legal Studies 205.

concern for promoting equality and justice, and their interest in applying feminist principles in cases.[95] Therefore, feminist judges' reasoning and judicial decisions differ from traditional judges. Their reasoning considers the social context, gender assumptions and stereotypes. In addition, feminist judges bring their feminist sensibility and knowledge to various aspects of the judicial role, such as court management, interacting with juries and other judges, and fact-finding.[96]

In summary, I argue that the appointing authorities should consider different aspect of social awareness and adopt a broader approach to select judges who can effectively interact with diverse people. The interview panel can design some interview questions to assess if a candidate considers the gender impact of rules and regulations. In addition, they can require a candidate to show that they have strived to improve substantive equality in their past roles. In this way, they might be able to select female judges who can change the practice of the judiciary.

C. Additional informal appointment criteria

When I asked the interview participants if they were aware of any informal appointment criteria, some participants, such as female senior judge number six, explained that there are no informal appointment criteria. She stated, 'since I am involved in the process, I have not been aware of any sort of unwritten criteria… [Judicial appointment is] just based on merit in particular interest on the job.'[97] However, my interview findings show that the appointing decision makers consider some features that are not included in the official criteria; I consider these unwritten criteria. Interested individuals can gain a comprehensive understanding of the informal criteria that may impact the selection process through networking and talking with people involved in the appointment process.

1) Judicial diversity, an informal criterion

In New Zealand, the percentage of female judges improved from 34%, in 2019, to 40% in 2021. The recent increase in the proportion of female judges suggests that the appointing authorities consider gender diversity in their appointments. In addition, the new form of expression of interest for High Court judges clearly notes that 'The Attorney-General is committed to appointing a judiciary that reflects and understands the diverse community it serves.'[98] This suggests that the Attorney-General is actively involved in improving judicial diversity.

Moreover, my interview findings show that most appointing decision makers are concerned about judicial diversity and committed to improving it. Hence, candidates from non-traditional and underrepresented cultural and career backgrounds might have a high chance of being selected for a judicial position. As Kate Malleson discusses, 'different selectors within a merit-based selection process can quite legitimately disagree about how to rank the relative merits of different candidates.'[99] In New Zealand, some appointing decision makers prioritise candidates' diversity over their working experience. For example, female senior judge number six, noted, 'We have discussed it a lot at the Heads of Bench

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[95] Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-Making' (2015) 68 Current Legal Problems 119.

[96] Rosemary Hunter, 'Feminist Judging in the "Real World"' (2018) 8 Oñati socio-legal series 1275.

[97] Interview with a female senior judge (21 October 2021)

[98] The Attorney-General's Judicial Appointments Unit (n 62), 3.

[99] Kate Malleson, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 Journal of Law and Society 126, 128.

meetings that how we can attract more diverse applicants… some of that is accepting people who have fewer years' experience because they may have some other roles … before becoming a lawyer that would be of assistance to the role [the judicial role].'[100] She explained,

> So, I have tried to interview more applicants who might not display on paper that they have got the experience that we need. …. But there are applicants who are very experienced, and the obstacle is trying to get over that lack of experience to say, right, will they have other skills that are going to be valuable to us... We often do appoint [applicants] who are from a background that would be useful to increase the diversity of the bench or to reach other members of the public.[101]

According to female senior judge number six, appointing authorities tend to actively select candidates from diverse backgrounds even when they have less experience than other candidates. Thus, female candidates, particularly those with diverse social and cultural backgrounds, have a high chance of being selected for a judicial position. Female District Court judge number two highlighted the importance of judicial diversity as an informal appointment criterion. She noted,

> I think there is a growing awareness to reach more diversity on the benches…a more representative bench so that when people come to court can see the diversity of the judiciary, people who they can relate more closely. That brings in cultural diversity as well as gender diversity... I think our understanding is that those consultations with the Law Society... the Māori Law Society, those sorts of things, lead to wider criteria being considered for appointments, but they are not structurally [em]bedded in.[102]

According to female District Court judge number two, appointing decision makers are actively committed to enhancing various aspects of judicial diversity, including gender diversity. This concerted effort creates more favourable opportunities for female lawyers to be considered and selected for judicial positions, resulting in a more inclusive and representative judiciary. Similarly, female senior judge number five stated, 'What we are looking for in my court is a judiciary that fairly reflects the diversity of the community it serves. We really need people who can communicate with the broad range of people that come before the court… both in court and in writing, in our judgments.'[103] Thus, the appointing authorities are likely to select candidates who can interact with diverse people and consider values and perspectives of various social groups in their judicial decisions. As I explained in chapter one, the quality of the judiciary argument suggests that judges from diverse backgrounds are more likely to understand and consider their cultural values and perspectives in their judicial decisions. Hence, it appears that the appointing authorities try to improve judicial diversity based on the quality of the judiciary argument.

Furthermore, female coroner number seven explained the importance of improving judicial diversity in the appointment processes. She noted,

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[100] Interview with a female senior judge (21 October 2021)
[101] Interview with a female senior judge (21 October 2021)
[102] Interview with a female District Court judge (25November 2021)
[103] Interview with a female senior judge (18November 2021)

> There is a general push towards more diversity, diversity in ethnicity, and diversity between males versus females. I think that is probably an unwritten criterion now in modern New Zealand... it is a consideration that the bench needs to be more reflective of our communities… Most judicial officers are from the elderly white male category. Now, if you are coming in and you have a more diverse background, and you are female, I think you are more attractive if your skills clearly match up for the role. So, I think that is probably an unwritten criterion, the push for diversity.[104]

As female coroner number seven explained it appears that improving judicial diversity is an unwritten criterion. In response to the question "what factors are most important to determine who is selected for a judicial position?", she explained that having a different cultural or career background increases the chance for being successful in the appointment process. She noted,

> I think skills are first and foremost, the most important thing to do in the role. After that, what else you can bring to the role that will enhance your skills. So, there could be previous work experience. It could be your knowledge of a language or a culture. You could come from a cultural background that will obviously give you an extra skill set.[105]

According to female coroner number seven, legal skills, work experience, and cultural awareness, such as the knowledge of a language or culture, are important factors to be successful in the appointment process. The new form of expression of interest for the appointment of High Court judges specifically ask candidates about their knowledge of te reo Māori or any other languages other than English.[106] It appears that appointing decision makers consider candidates' cultural awareness and perceive candidates from diverse cultural backgrounds to be more suitable to undertake a judicial position. This suggests that decision makers responsible for appointments recognise the importance of judicial diversity and actively strive to mitigate the potential limitations of gender-blind formal appointment criteria.

The findings of my interviews suggest that qualified candidates from diverse backgrounds have a high chance of taking a judicial position. However, since the consideration of increasing judicial diversity is not formalised, some female lawyers may be unaware of this issue and, as a result, perceive their chances of being selected for a judicial position as unlikely. According to Malleson, people who perceive that they have a chance to be in the candidate pool will acquire and develop the required qualities and skills.[107] As female coroner number seven explained, some female lawyers are reluctant to apply for a judicial position because they think they are less likely to be chosen. She stated,

> I think women believe that they do not fit the criteria, these unwritten criteria. So, why would they bother? ... I think there is a need to try and encourage people from different backgrounds to apply… I think they need to do more in the early stages of trying to get people to apply, to encourage and say we are looking for people from a diverse range of legal backgrounds. Because there is a perception when I speak to people, they go: 'I would never get that'.[108]

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[104] Interview with a female coroner (17 October 2021)
[105] Interview with a female coroner (17 October 2021)
[106] The Attorney-General's Judicial Appointments Unit (n 81).
[107] Malleson (n 24).
[108] Interview with a female coroner (17 October 2021)

According to female academic number 18, noting judicial diversity as a statutory appointment criterion is essential. She explained,

> I think it is almost essential because that is the one thing that can ensure against [judicial diversity] being simply a matter of government policy. Obviously, the government could repeal it, but if it is in legislation that does future proof it somewhat, it means that [judicial diversity] is not entirely dependent on the government of the day as to what happens.[109]

Female academic number eighteen argues that a legal provision for judicial diversity will obligate the government to contribute to judicial diversity. In addition, this criterion would encourage more people from diverse backgrounds, such as women, to apply for judicial positions.

2) Resilience, a hidden quality of character

The interview findings show that a candidate's resilience is an informal appointment criterion for District Court and High Court judges. Resilience has various definitions. From a psychological perspective resilience refers to an individual's ability to cope with adversity and pressure by being flexible.[110] Appointing authorities consider a candidate's ability to deal with pressure and criticism. Female senior judge number 11, who is an appointing decision-maker for senior courts, noted, 'One of the important criteria is the resilience of a potential appointee. They should be interested in and have an understanding of the overall justice system. They should also have courage. They may have to decide on some hard cases, face media attention, and encounter the litigants' disappointment.'[111] Female senior judge number 11 defines resilience as the ability to decide complicated cases, deal with the media scrutiny and litigants' disappointment, and be courageous.

Moreover, female senior judge number five explained the importance of resilience for District Court judges. She stated, '[As a competent judge], you need to be resilient because you will be criticised from time to time by the Court of Appeal and the public. You need to be able to work hard and under sustained pressure.'[112] Similarly, female District Court judge number three said, 'Your ability to cope with the pressures of the job is a really important factor.'[113] Hence, based on these interviews, the appointing authorities' understanding of resilience mainly entails the ability to face criticism and working under pressure.

Furthermore, my interview findings show that appointing decision makers assess a candidate's resilience during the appointment interview. Female coroner number eight explained, 'I suspect even though it was only an hour-long interview, I think they were probably interested in our ability to cope with pressure, [and] time management. ... So, I think [the interview panel was] looking at if you have got 150 files how are you going to cope with prioritising that work?'[114] This suggests that appointing decision makers assess candidates' ability to cope with pressure and criticism.

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[109] Interview with a female academic lawyer (6 August 2022)

[110] Siri Wiig and others, 'Defining the Boundaries and Operational Concepts of Resilience in the Resilience in Healthcare Research Program' (2020) 20 BMC health services research 330.

[111] Interview with a female senior judge (19 October 2021)

[112] Interview with a female senior judge (18November 2021)

[113] Interview with a female District Court judge (25November 2021)

[114] Interview with a female coroner (19 October 2021)

Having resilience is an essential informal criterion for High Court and District Court judges, which is not included in the official documents. Candidates who refer to the official criteria may not be aware of this criterion and not be well-prepared to demonstrate this feature in the appointment interview. Interested individuals might become aware of this informal criterion through their social networks in the legal profession and the judiciary. This might disadvantage women lawyers such as in-house or academic lawyers who are less likely to have strong social networks in the judiciary. As a result, a high proportion of women working as in-house[115] or academic lawyers may be unaware of this criterion.

Furthermore, it is unclear how appointing decision makers evaluate a candidate's resilience. Resilience is an ambiguous characteristic which may invite bias in candidates' assessments.[116] Thus, the appointing authorities might fail to identify the resilience of female lawyers who adopt a flexible or part time working schedule. As I discussed in chapter three, some female lawyers take part time or flexible work schedules to maintain a work and life balance. An appointing decision maker with unconscious gender biased views might find a female lawyer with a part time working schedule unsuitable to cope with the work pressure. Therefore, unconscious bias in assessing a female candidate's resilience creates invisible barriers for some women to join the judiciary.

III. Unstructured judicial appointment interviews

This section shows that the interviewers' impressions of a candidate can influence the judicial appointment interview process in New Zealand because the interviews are unstructured. There is a risk that an interview panel might apply a positive interviewing style for favourable candidates and a negative style for less favourable ones. Furthermore, the interview panel might analyse candidates in a way that confirms their initial impressions.[117] For example, if the interviewers consider a candidate with a reputation and high profile as qualified, they may adopt a positive interviewing style and evaluate him or her highly. This disadvantages many in-house lawyers and law firm employees who are not well known in the judiciary. These candidates have a low chance of being chosen over a lawyer with a reputation. As I have discussed in chapter three, most in-house and law firm employees are women. Therefore, most female lawyers are disadvantaged overall.

Interviewing candidates is a step in the judicial appointment process in New Zealand and a common procedure for evaluating candidates around the world.[118] Appointing decision makers interview candidates to predict their future job performance based on their responses to oral questions.[119] Hence, an interview is a platform for exchanging information between a candidate and an interviewer.[120] For this reason, it is important to understand how the appointment interview might impact female candidates and their success in the judicial appointment processes.

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[115] Adlam (n 32).

[116] Heilman (n 68).

[117] Therese H Macan and Robert L Dipboye, 'The Effects of Interviewers' Initial Impressions on Information Gathering' (1988) 42 Organizational behavior and human decision processes 364.

[118] Michael A McDaniel and others, 'The Validity of Employment Interviews: A Comprehensive Review and Meta-Analysis' (1994) 79 Journal of applied psychology 599; Lynn Ulrich and Don Trumbo, 'The Selection Interview since 1949' (1965) 63 Psychological bulletin 100; Robert C Liden, Talya N Bauer and Charles K Parsons, 'Person Perception in Employment Interviews' in Manuel London (ed), *How People Evaluate Others in Organizations* (Psychology Press 2001).

[119] McDaniel and others (n 117).

[120] Liden, Bauer and Parsons (n 117).

I should note that the interview process of High Court and District Court judicial appointments are different. For selecting District Court judges, a panel interviews all candidates;[121] however, the Attorney-General can appoint a High Court judge without an interview. The Judicial Appointments Protocol for the High Court Judges' appointment notes, 'The Attorney-General may decide to seek an interview with, or arrange for an interview by the Solicitor General of, a person interested in appointment to the High Court.'[122] A report by Arusha Bradley shows that the possibility of appointing judges without interviewing them can decrease the judicial diversity in the High Court.[123] This practice makes the judicial appointment process similar to a tap on the shoulder system. There is a risk that only well-known female lawyers who have a reputation in the legal profession would be chosen for a judicial position. Thus, a high proportion of women working as in-house lawyers, academic lawyers, or law firm employee are systematically excluded from High Court positions.

In this part, I focus on the interview procedure for the appointment of District Court judges and critically analyse the impact of interviews on female candidates by drawing on the data collected from my research interviews and the literature on employment interviews. Due to a lack of data, I am unable to discuss the interview process for High Court judges.

The appointment interviews for District Court judges lack a clear structure. According to male senior judge number one, the panel do not have a set of pre-drafted questions. He stated, 'So, there [are] some pretty standard questions like why do you want to be a judge, why now, how do you manage stress? All those things will come into it, but it becomes quite free flowing depending on the person and where it all leads us, so there is no set form of questions.'[124] Hence, the interview panel might ask different questions of different candidates.

I argue that the unstructured judicial appointment interviews disadvantage a majority of female lawyers. Studies on the interview processes in an employment context have shown that an interviewer would likely assess candidates subjectively if he or she has discretion in choosing what questions to ask and how many, without drafting a specific set of questions before the interview.[125] A study conducted by John Binning and others showed that the interviewers' perceptions of a candidate influence the type and number of questions they ask. The interviewers who lacked a set of questions tended to ask confirmatory questions to support their impression of a candidate. Thus, they asked more questions to find negative information during an interview with a less favourable candidate, whereas they asked more confirmatory questions of favourable candidates.

Binning and others observed that the interviewers who used a list of pre-drafted questions did not apply confirmatory strategies. The results of this study indicate that preparing a list of questions can eliminate confirmatory questioning.[126] Another study by Therese Macan and Robert Dipboye reached the same

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[121] Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' (n 10).
[122] Ministry of Justice, 'The Judicial Appointments Protocol' (Ministry of Justice, 2019), 5.
[123] Anusha Bradley, 'Judges Can Be Appointed without Ever Attending an Interview' (*RNZ*, 21 September 2021) <https://www.rnz.co.nz/news/is-this-justice/451941/judges-can-be-appointed-without-ever-attending-an-interview> accessed 22 October 2022.
[124] Interview with a male senior judge (30 November 2021)
[125] John F Binning and others, 'Effects of Preinterview Impressions on Questioning Strategies in Same- and Opposite-Sex Employment Interviews' (1988) 73 Journal of applied psychology 30; Macan and Dipboye (n 116).
[126] Binning and others (n 124).

result. They found that interviewers asked fewer questions about positive characteristics of a less favourable candidate.[127] Therefore, drafting a set of questions for all the appointment interviews reduces the impact of interviewers' impression on the interview process. In the previous chapter, I explained that some women lawyers often face gender biases within the legal profession, leading to unfair perceptions of incompetence. There is a risk that unconscious gender biases impact the unstructured appointment interviews, disadvantaging most women particularly those with non-traditional career backgrounds.

The interview panel has the discretion to pose varying sets of questions to different candidates [128] and apply differential treatment between candidates. Some questions may fail to provide a chance for a candidate to present their personal skills. Moreover, the interview panel evaluates candidates based on their answers to different sets of questions. Hence, asking different questions of different candidates might lead to unfair assessment of candidates. If the interview process for District Court appointments lacks any clear structure in terms of interview questions and candidate assessment, it is easy to see how the interviewer's preconceptions or gender biases might lead them to pre-judge or poorly consider female candidates.

Furthermore, female senior judge number six,[129] female senior judge number five,[130] and male senior judge number one[131] explained that although the interview panel might not know most interviewees, in some cases they know a candidate who has a reputation in the legal profession. A robust body of scholarship indicates that the pre-interview impression of interviewers influences different aspects of the interview process and candidate assessment.[132] John Callender and others examine how interviewers' behaviour is affected by their impressions of candidates. The study indicates that the interviewers adopt a positive interviewing style and confirmatory behaviour that proves their positive impression of a candidate. This means that they gather less information from a candidate that they view favourably and provide more information about a judicial position to him or her.[133] Similarly, Robert Dipboye argues that interviewers display a supporting and positive nonverbal behaviour for a preferable candidate and give low regard for candidates who they consider as less qualified.[134] Moreover,

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[127] Macan and Dipboye (n 116).

[128] Interview with a male senior judge (30 November 2021); Interview with a female senior judge (18November 2021)

[129] Interview with a female senior judge (21 October 2021)

[130] Interview with a female senior judge (18November 2021)

[131] Interview with a male senior judge (30 November 2021)

[132] Allen I Huffcutt, 'From Science to Practice: Seven Principles for Conducting Employment Interviews' (2010) 12 Applied H.R.M. Research 15; Liden, Bauer and Parsons (n 117); Thomas W Dougherty, John C Callender and Daniel B Turban, 'Confirming First Impressions in the Employment Interview: A Field Study of Interviewer Behavior' (1994) 79 Journal of applied psychology 659; Liviu Florea and others, 'From First Impressions to Selection Decisions: The Role of Dispositional Cognitive Motivations in the Employment Interview' (2019) 48 Personnel review 249; Therese H Macan and Robert L Dipboye, 'The Relationship of Interviewers' Pre-Interview Impressions to Selection and Recruitment Outcomes' (1990) 43 Personnel Psychology 745; Brian W Swider, Murray R Barrick and T Brad Harris, 'Initial Impressions: What They Are, What They Are Not, and How They Influence Structured Interview Outcomes' (2016) 101 Journal of applied psychology 625; RL Dipboye, 'Structured and Unstructured Selection Interviews: Beyond the Job Fit Model' (1994) 12 Research in Personnel and Human Resources Management.

[133] Dougherty, Callender and Turban (n 131).

[134] Robert L Dipboye, 'Self-Fulfilling Prophecies in the Selection-Recruitment Interview' (1982) 7 The Academy of Management review 579.

interviewers' differential treatments influence a candidate's behaviour during the interview. According to Allen Huffcutt, interviewers provide a less favourable candidate fewer opportunities to display his or her positive attributes during the interview, denying the candidate a fair chance to promote his or her positive characteristics and qualifications.[135]

In addition, interviewers' pre-interview impressions influence their post interview evaluations of candidates. Interviewers' assessments of a candidate tend to be similar to their initial impressions of them.[136] They unconsciously process and analyse interview information to confirm their initial perceptions of a candidate unless they encounter disconfirming information.[137] Interviewers notice, recall, analyse and interpret a candidate's performance consistent with their pre-interview impression.[138] According to Huffcutt, after conducting an interview, interviewers may evaluate a candidate by over-focusing on strengthens and positive characteristics of a favourable candidate to confirm their positive impression of them.[139] As Diploy states, 'suggestive of this automaticity, when interviewers are asked why they evaluated applicants as they did, they often appear to grasp for an explanation. The most common response is that the applicant does or does not provide a good fit'.[140]

Building on the results of these studies, I argue that the interviewers' impressions of candidates impact the interview and evaluation of candidates in the judicial appointment process. According to female senior judge number six, there is a lot of competition for a judicial position in New Zealand.[141] Since different candidates will be compared with each other, favourable candidates for the interviewers have an advantage over others. As I discussed in chapter three, a considerable proportion of female lawyers are working as in-house lawyers or law firm employees, and hence are not as well-known as the senior members of the legal profession, which is male dominated. They might have a lower chance of being selected over a well-known candidate. Therefore, interviewers' impressions of candidates during the interview and the post-interview evaluation of candidates impact the level of representation of women.

IV. Gender-blind practice of assessing candidates based on reputation

My interview findings indicate that a candidate with a high profile and reputation has a greater chance of being chosen over an unknown candidate. I argue that gaining a reputation is more challenging for women than for men because of gender status beliefs in the legal profession. Therefore, the importance of a candidate's reputation in the appointment process disadvantages most female lawyers. To make my argument, first, I suggest that reputation is a pivotal factor in accessing candidates by referring to the data collected from my interviews with various judges. Second, I draw on the literature about social status construction and gender status beliefs to argue that there are gender status beliefs in the New Zealand legal profession, which makes it difficult for women to gain a reputation.

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[135] Huffcutt (n 131).

[136] Macan and Dipboye (n 131); Florea and others (n 131).

[137] Susan T Fiske and Steven L Neuberg, 'A Continuum of Impression Formation, from Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation' (1990) 23 Advances in experimental social psychology 1; Liden, Bauer and Parsons (n 117).

[138] Dipboye (n 133).

[139] Huffcutt (n 131).

[140] Dipboye (n 115), 85.

[141] Interview with a female senior judge (21 October 2021)

Male District Court judge number ten,[142] male senior judge number one[143], and female District Court judge number four[144] emphasised the significance of having a reputation in being selected for a judicial position. Male senior judge number one, who is involved in the appointment of District Court judges, stated that having a profile and reputation is an important consideration for judicial appointment. He explained,

> We are relying on the fact that, well, they are well known, they are known for their competence in court…. So, it does rely on people already come into the interview table with a reputation. So, if somebody has not got that profile and that reputation, but they are nevertheless highly competent and would make a very good judge, it is difficult in that process for them to shine through. Because we are not actually spending hours assessing them or giving them an opportunity to prove that they can do the job. We are really relying on reputation.[145]

According to male senior judge number one, candidates might not have an opportunity to demonstrate their competence in the judicial appointment process. The appointing authorities mainly consider candidates' reputation to assess their competence for a judicial position. There is a risk that appointing authorities do not select a meritorious female academic or in-house lawyer due to their lack of reputation in the judiciary. Therefore, not all candidates have an equal opportunity to be selected for a judicial position. In addition, in response to a question 'which factors are important to be selected for a judicial position', female District Court judge number four stated,

> Well, just to be a good litigator in court. To have integrity as a lawyer so that the judges rely on you. Do not overstretch for your client. Make sure that you are being an officer of the court with high integrity and reliability…. make sure that you are employed by people that are regarded as reliable. If you are working for a firm or a barrister, you have got mentored by people who are seen as reliable; even called good lawyers that will really help. You might be a great lawyer, but you have got a dodgy person that you are working for, and that is on your CV, that is not good either.[146]

Female District Court judge number four explained the characteristics of a reputable lawyer. It seems that reputation is a subjective matter that depends on the personal preferences and views of people involved in the appointment process. According to male District Court judge number ten, a candidate should be respected in the legal profession.[147] Candidates with a reputation are well-known for their competence and are respected by others. Not only are they reliable, but they have been working with reliable people. Therefore, gaining a reputation entails more than being competent. A candidate with a reputation is a 'well-known' and 'well-liked' lawyer. Therefore, personal preferences, biased views, or gender stereotypes can influence the assessment of a candidate's reputation. It is likely that some competent female candidates fail to gain a reputation in the judiciary and legal profession and hence are disadvantaged in the appointment process. For example, in-house lawyers who do not appear in courts frequently will be disadvantaged compared to a solicitor and barrister or a barrister sole.

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[142] Interview with a male District Court judge (18 November 2021)
[143] Interview with a male senior judge (30 November 2021)
[144] Interview with a female District Court judge (22 November 2021)
[145] Interview with a male senior judge (30 November 2021)
[146] Interview with a female District Court judge (22November 2021)
[147] Interview with a male District Court judge (18November 2021)

I argue that acquiring a reputation in the legal profession is more challenging for female lawyers than for male lawyers. My argument refers to the literature on status construction theory. Status construction theory explains the impact of people's different characteristics on their social status in society. Based on this theory, face-to-face interactions between people are constrained by unequal distribution of resources, classifying people based on different characteristics, and the connection between these two issues. As a result of constrained social interactions, people construct status beliefs about different characteristics. They think that some individuals with specific characteristics and access to resources have a higher status than others. Thus, the structurally constrained social interactions create and reinforce social status beliefs in society.[148]

Society constructs gender status beliefs when there is an unequal distribution of valued resources or assets between different genders. In this situation, people consider the gender that has access to resources more qualified and worthy of reward.[149] Therefore, when men are resource-advantaged, their interactions with other genders promote status beliefs that favours them.[150] In addition, gender status beliefs can lead to error discrimination which means that people evaluate and reward the similar performance of two individuals differently.[151] Thus, people evaluate men's performance higher than women's similar performance.

In summary, based on status construction theory, having access to resources and privileges facilitates the process of gaining respect, power, and reputation in society. Status construction theory explains how characteristics such as race and ethnicity can promote status value. For example, in some societies, cultural beliefs dictate that individuals with specific attributes, such as men are more competent than individuals with other attributes, such as women.[152] In addition, the theory suggests that the combinations of diverse attributes of one person impact his or her status in society because various characteristics of people are never encountered in isolation. Therefore, we never meet someone who is only a man. Instead, we notice diverse attributes of an individual simultaneously. For example, we meet an Asian male lawyer.[153] The interaction of various attributes of candidates influences their social status in the legal profession and the judiciary. Hence, women with diverse racial, ethnicity, religion, and career backgrounds may have more challenges in gaining status and reputation.

I maintain that female lawyers have more challenges in improving their status and gaining a reputation in the legal profession due to gender status beliefs. I make my argument by showing that there is an unequal distribution of resources in favour of men in the legal profession. As a result, people construct gender status beliefs that advantage male lawyers, and it is therefore, more difficult for women to prove their competence and gain a reputation in the legal profession.

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[148] Cecilia L Ridgeway and James W Balkwell, 'Group Processes and the Diffusion of Status Beliefs' (1997) 60 Social psychology quarterly 14.

[149] Cecilia L Ridgeway, 'Interaction and the Conservation of Gender Inequality: Considering Employment' (1997) 62 American sociological review 218.

[150] Ridgeway and Balkwell (n 147).

[151] Ridgeway (n 148).

[152] Ridgeway and Balkwell (n 147).

[153] Murray Webster and Stuart J Hysom, 'Creating Status Characteristics' (1998) 63 American sociological review 351.

In New Zealand, a minority of female lawyers have senior positions in the legal profession.[154] As Matthew Brashears argues, labour segregation of women to low-status occupations limits their access to necessary valued resources to obtain high status. As a result, even if the percentage of female labour increases, a low proportion of them win status in their career.[155] Having a senior position in law firms is a way of proving competence and gaining a reputation. According to female senior judge number 11, lawyers with senior positions can show their excellence which is one of the appointment criteria.[156] Having a senior position helps female lawyers to gain a working reputation. As of 2020, female lawyers make up only 34% of directors and partners in multi-lawyer firms, and under 23% of King's Counsels.[157] Thus, there is vertical occupational segregation in the legal profession. This means that men occupy higher-grade, higher-paid positions while women are concentrated in lower-grade, lower-paid positions.[158] The low percentage of women in senior positions indicates that there is an unequal distribution of resources between men and women in the legal profession. Hence, women face more barriers to gaining status.

Furthermore, increasing the proportion of women in the legal profession does not necessarily influence female status.[159] Studies on challenges of women in the New Zealand legal profession indicate that female lawyers face a number of generic barriers similar to other countries.[160] The barriers such as childcare responsibilities,[161] institutional gender bias in law firms,[162] long working hours,[163] lack of flexible working arrangements,[164] and gender stereotypes,[165] impede women's career progress. Female senior number six noted that law firms' long and unpredictable working hours encourage some women to leave their careers or work part-time. As a result, they think that they do not have the seniority to apply for a judicial position.[166] Moreover, they might not gain a reputation in the legal profession and the judiciary. As female District Court judge number three noted,

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[154] Adlam (n 32).

[155] Matthew E Brashears, 'Sex, Society, and Association: R Cross-National Examination of Status Construction Theory' (2008) 71 Social psychology quarterly 72.

[156] Interview with a female senior judge (19 October 2021)

[157] Adlam (n 32).

[158] Catherine Hakim, 'Women, Careers, and Work-Life Preferences' (2006) 34 British journal of guidance & counselling 279.

[159] Brashears (n 154).

[160] See chapter 3.

[161] Pringle and others (n 73); Jeannine Cockayne and Auckland District Law Society, *Women in the Legal Profession: The Report of the Second Working Party on Women in the Legal Profession* (Public Relations Dept of the Auckland District Law Society 1989).

[162] Frank Neill, 'Women Face Variety of Challenges' New Zealand Law Society 30 June 2016; Stacey Shortall, 'Turning the Tide to Make More Women Law Firm Partners in New Zealand' (NZLS CLE 2016); Cockayne and Auckland District Law Society (n 160).

[163] Josh Pemberton and New Zealand Law Foundation, 'First Steps: The Experiences and Retention of New Zealand's Junior Lawyers' (The Law Foundation 2016); Pringle and others (n 73).

[164] Pringle and others (n 73); Sarah Taylor, 'Valuing Our Lawyers: The Untapped Potential of Flexible Working in the New Zealand Legal Profession' (New Zealand Law Society 2017).

[165] Louise Grey, 'Reflections from a Young Woman Entering the Profession - Would a Female Partner Quota Address Gender Inequality within the New Zealand Legal Profession?' (2017) 1 New Zealand women's law journal 51.

[166] Interview with a female senior judge (21 October 2021)

> I think what was critical for me was being in a law firm where I was able to express my whole self as opposed to being in a place where I felt, rightly or wrongly, that I had to suppress those parts of my cultural background and blend in. So, what my firm allowed me to do was show the best of myself in an environment that I was most comfortable with. I am not sure whether I would have gained the confidence I did through my law firm if I had been in mainstream. So, I think that is the biggest challenge for the legal profession.[167]

For female District Court judge number three, a law firm environment that enabled her to express her qualifications, helped her to be successful in the appointment process. However, it was not the mainstream culture of the legal profession. The issues and barriers that women face in the legal profession suggest that the increase in the proportion of female lawyers from 6.9% in 1980 to 52.5% in 2020[168] has not changed the legal career working culture to make it more compatible for women.

Therefore, I argue that there is an unequal distribution of resources between men and women in the legal profession because the senior positions of the legal profession are male-dominated, and the working culture impedes women's progress. As a result of unequal distribution of resources, some gender status beliefs are constructed in the legal profession that favour male lawyers. As Cecilia Ridgeway argues, when gender status beliefs are salient, people implicitly expect men to be more competent than women in an equal situation.[169] Thus, it becomes more difficult for female lawyers to show their competence and gain a reputation in the legal profession.

Having a reputation is an important factor to be selected for a judicial position in New Zealand. I argue that this factor disadvantages female candidates since it is more challenging for female lawyers to acquire a reputation in the male-dominated legal profession. Thus, the importance of having a reputation works as a social closure against diverse female candidates in the New Zealand judicial appointment process. Consequently, the gender diversity of the judiciary will be limited to some female judges with similar, traditional backgrounds who could overcome the legal profession barriers.

Conclusion

In this chapter, I have shown that appointing decision makers' lack of diversity is a reason for the unequal representation of women judges. All appointing authorities are senior people in the judiciary and legal profession who might not identify the competence of a high proportion of women lawyers from non-traditional career backgrounds, especially those who do not have senior positions. Consequently, the issue of inadequate diversity among appointing decision makers can perpetuate lack of diversity in judicial appointments, further exacerbating the underrepresentation of women in the judiciary.

This chapter demonstrates how efforts to structure appointing authorities' discretion can have a negative impact on women's representation in the judiciary. Appointing authorities must assess candidates against gender-blind criteria that disadvantage women more than men. For instance, a competent candidate must hold a practicing certificate for at least seven years while, in practice appointing authorities select candidates with more than seven years' practicing experience. A high

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[167] Interview with a female District Court judge (25November 2021)
[168] Adlam (n 32).
[169] Ridgeway (n 148).

percentage of women do not meet even the minimum requirement of seven years practicing experience.

Furthermore, the Attorney-General sets out additional criteria to structure the discretionary power of appointing authorities involved in candidates' assessment. However, the additional criteria have been interpreted and applied in a way that disadvantages most female candidates. For example, I have discussed that the appointing decision makers tend to identify excellence in candidates from senior ranks of law firms. This understanding of merit and overall excellence disadvantages most female candidates working as law firm employees, in-house lawyers, or barrister employees. In addition, there is a risk that gender bias and gender stereotypes influence candidates' evaluations. Appointing authorities might not identify qualities such as the ability to work hard or resilience in female candidates. These types of criteria can disadvantage women with part-time or flexible working arrangements. Hence, the judicial appointment process can be open to gender-biased views in the absence of ongoing training on unconscious bias.

This chapter has shown that diverse candidates do not have equal opportunities to become informed of the required skills and qualities for taking judicial positions because appointing authorities tend to assess candidates based on characteristics not included in the official documents. For instance, general legal experience for senior court candidates and trial experience for District Court are important factors not mentioned in the Attorney-General's judicial appointment booklets.

I have noted that interviewing candidates without setting a specific structure is a gender-blind practice. The unstructured nature of interview processes ensures considerable discretion for the interview panel to evaluate candidates based on different sets of questions leading to subjective and potentially unfair candidates' assessment. In a lack of structure, the interview processes and post-interview assessment of candidates can be influenced by gender biases and stereotypes.

Finally, I have highlighted that appointing authorities mostly rely on candidates' reputations to assess their skills and qualities. Evaluating candidates based on their reputation is a gender-blind practice because gaining a reputation is more difficult for women lawyers than for men. To sum up, the appointment process might negatively impact women's representation in the judiciary because it entails some gender-blind practices and criteria that have a negative influence on female candidates.

Chapter five
Challenges for women as judges: factors post-appointment process

Introduction

The previous chapter focused on factors during the judicial appointment process that can decrease the proportion of female judges in New Zealand. It outlined how appointing authorities' lack of diversity can limit the diversity of judicial appointments. In addition, gender-blind appointment criteria disproportionately disadvantage female candidates, particularly those with non-traditional career backgrounds. I have noted that appointing authorities assess candidates against broader criteria than those explained in the judicial appointment booklets and relevant statutes, which are unknown to the candidates lacking strong networks in the profession and judiciary who are mostly women. I have also shown how the unstructured nature of interviews and the importance of candidates' reputations undermine the potential for a more diverse judiciary.

In this chapter, I elaborate on the factors limiting women's representation after the judicial appointment process. The first section looks at mechanisms for holding appointing authorities accountable to ensure women's representation in the judiciary. I explain three accountability mechanisms for structuring appointing authorities' discretions. Then in the second section, I focus on the consequences of taking a judicial position. I point out the advantages and disadvantages of a judicial career and argue that the inflexible working practices in the judiciary create an impression that a judicial career is incompatible for people with childcare responsibilities, who are mostly women, and, in turn, decrease the percentage of female candidates for judicial positions.

I. Appointing authorities' lack of accountability

In chapter two, I explained that authorities with broad discretionary power must be accountable for their decisions. People should be involved in the process of exercising discretion and be informed of the reasons for making a decision.[1] In this way, the public can engage in a dialogue with the appointing authorities and hold them accountable for their decisions. In this section, I show that there are insufficient mechanisms to hold appointing authorities accountable for improving women's representation in the judiciary. The literature on judicial appointment systems suggests that an appointment process should entail some measures to enhance the public accountability of the decision makers.[2] This section indicates that the judicial appointment system in New Zealand lacks effective accountability mechanisms. The political accountability of the Attorney-General, public scrutiny, and providing feedback for unsuccessful candidates are three accountability mechanisms of the judicial appointment system. In the following, I discuss each of these mechanisms in turn.

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[1] Lorne Sossin, 'Redistributing Democracy: An Inquiry into Authority, Discretion and the Possibility of Engagement in the Welfare State' (1994) 26 Ottawa law review 1.

[2] Rachel Paine Caufield, 'How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions' (2007) 34 The Fordham urban law journal 163.

First, I explore the accountability of senior judges and Solicitor-General. All appointing authorities are accountable to the Attorney-General. For example, female senior judge number six, who is involved in interviewing and shortlisting candidates, explained that she had to provide some reasons for recommending a candidate to the Attorney-General. She stated,

> We have to justify to the Attorney-General twice in the current appointment process. As I said, I get all the applications and make a shortlist of say five or six [candidates]. That list is sent to the Attorney-General with the CVs to say these are the people we want to interview, and he can say at that stage I do not want you to interview that person... or I would like to interview this other person that did not apply, but I think you should interview them. Then, when we have done the interviews, we write him a paper which sets out each candidate in what we think are the qualities they have or have not got, and we must rank them as highly appointable or appointable or not appointable.[3]

According to female senior judge number six, the Attorney-General can eliminate a candidate from being interviewed and can ask the panel to interview a candidate who did not apply for the judicial position. This practice suggests that diverse candidates might not have equal opportunities to be shortlisted for an interview to demonstrate their competence. In addition, the significant discretion of the Attorney-General means that, in effect, the judicial appointment process is similar to a tap on the shoulder system. That is, the Attorney-General's unstructured discretion can hide behind the facade of an open application process. The interview panel is effectively accountable to the Attorney-General while the Attorney-General enjoys unfettered discretion in the appointment process.

Male senior judge number one, who has been a member of the interview panel, noted that after the interview, the panel provides a report to the Attorney-General, which explains the reasons for or against a candidate's appointment.[4] Thus, the interview panel and senior judges who shortlist candidates are accountable to the Attorney-General, but who is the Attorney-General accountable to?

In theory, the Attorney-General is accountable to Parliament for judicial appointments. However, as Philip Joseph suggests, the Attorney-General acts as the first Law Officer of the Crown in the judicial appointment processes.[5] Therefore, the Attorney-General may not have a ministerial responsibility regarding his or her appointing decisions, and Parliament cannot hold the Attorney-General accountable for the judicial appointments. In fact, Parliament has never held an Attorney-General accountable in relation to judicial appointments.[6] Moreover, the involvement of Parliament in holding the Attorney-General accountable for judicial appointments might undermine the independence of the judiciary and compromise the principle of separation of powers.[7] Therefore, in practice, the Attorney-General does not have political accountability regarding the judicial appointment system and increasing the proportion of female judges.

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[3] Interview with a female senior judge (21 October 2021)

[4] Interview with a male senior judge (30 November 2021)

[5] Philip A Joseph, 'Appointment, Discipline and Removal of Judges in New Zealand', *Judiciaries in Comparative Perspective* (Cambridge University Press 2011).

[6] BV Harris, 'A Judicial Commission for New Zealand: A Good Idea That Must Not Be Allowed to Go Away' [2014] New Zealand law review 383.

[7] ibid.

The second accountability mechanism is providing feedback to unsuccessful candidates. By providing feedback, the appointing authorities can demonstrate that they assessed a candidate objectively and have compelling reasons for rejecting them. In addition, constructive feedback may help unsuccessful candidates upskill in the future.[8] My interview findings indicate that unsuccessful candidates can ask for and thereby receive feedback. Female coroner number seven stated,

> ...Through the Ministry of Justice, for any position, you are allowed to ask for feedback...It is part of the process.... You would never get back the full interview panel notes or anything nitty gritty. Because you can challenge. You can go back to say, well, I would like someone else to review the interview panel's decisions. That can happen. So, it is part of the process that you are entitled to, and you can ask for feedback.[9]

As female coroner number seven explained, appointing authorities provide general feedback so that candidates have fewer grounds for challenging their decision. Moreover, female senior judge number six, who is an appointing authority, explained that sometimes it is difficult to provide constructive feedback. She stated,

> They [unsuccessful candidates] do ask for feedback and explanations, and it is generally given by the Judicial Appointments Unit in Wellington. It is really hard to give feedback. I mean sometimes you were able to give quite specific feedback like you just do not have the court experience that we think is necessary for a judicial role... But very often it is just like we had 80 candidates and you came fourth. There are three people who we thought were better suited. [10]

According to female senior judge number six, the appointing authorities often provide general feedback that may not directly refer to a candidate's competence. Instead, they might generally state that other candidates were more suitable for the judicial position without further explanation relating the interview performance of the applicant.

The practice of providing general rather than specific feedback grants the appointing authorities freedom from providing compelling reasons for their decisions, thereby diminishing the accountability and responsiveness of the appointment system. In each case, the appointing authorities have absolute discretion to give feedback. They may even actively avoid accountability by providing general and broad feedback without explaining or justifying their decision. Consequently, a candidate would not understand the reasons why they have been rejected and cannot improve their skills to apply again.

Public scrutiny is the third accountability mechanism of the judicial appointment system. According to female senior judge number 11, public scrutiny is the main accountability mechanism of the judicial appointment processes. However, I argue that public scrutiny may be an ineffective method for monitoring the judicial appointment system. Relying on public scrutiny requires a great extent of judicial appointment transparency, while, as I have explained in chapter three, the judicial appointment processes are not transparent. Although the literature suggests that publishing the name of the selected candidates and a brief explanation of their backgrounds can improve judicial appointment

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[8] Anne Kanerva, Johanna Lammintakanen and Tuula Kivinen, 'Experiences of the Fairness of Recruitment from Unsuccessful Applicants in the Field of Nursing: Experiences of the Fairness of Recruitment' (2010) 18 Journal of nursing management 293.

[9] Interview with a female coroner (17 October 2021)

[10] Interview with a female senior judge (21 October 2021)

transparency,[11] in practice it has had a limited impact on judicial transparency. The New Zealand government publishes the names and backgrounds of judges on its official website[12] and interested individuals can investigate the background of judges and assess the quality of judicial appointments based on this publicly available information. Having said that, this information is not categorised based on judges' characteristics such as gender or ethnicity. Thus, it might be challenging for the public or interested people to collect all the data, analyse them, and assess women's representation in the judiciary.

In a transparent judicial appointment system, some information on judicial diversity such as gender, race, religion, and career background of judges is publicly available.[13] I observed that there is a lack of data on various aspects of judicial diversity in New Zealand. Recently, the Office of the Chief Justice published a report on judicial diversity. The report provided some statistics on judges' characteristics such as judges' ethnicities, genders, career backgrounds, and religions.[14] Although the report offers valuable information on judicial diversity, it fails to provide intersectional data on the proportion of, for example, Asian female judges. Therefore, it is significantly difficult to assess women's representation in the judiciary with the lack of sufficient data on judicial diversity; this reduces the ability of the public to hold the appointing authorities to account for the unequal representation of women.

In chapter two, I noted that a purposive statutory framework is needed to set out values and priorities for authorities[15] based on which people can evaluate the authorities' exercise of discretion. There is a lack of legal rules setting out goals and values for appointing authorities. Hence, people cannot evaluate the authorities' use of discretion and participate in a dialogue with appointing authorities to hold them accountable for ensuring women's representation in the judiciary.

II. How working practices in the judiciary influence the proportion of female judges

Indeed, all candidates consider the consequences of taking a judicial position and evaluate its influence on their life before participating in the judicial appointment process. This section shows how taking a judicial position can negatively impact the personal life of a person with care responsibilities. I should note that the issues discussed in this section can affect both men and women with care responsibilities. However, I emphasise their impact on women because women take more care responsibilities than men.[16]

Most interview participants stressed that family commitments and child-rearing responsibilities impact the proportion of female candidates.[17] According to female District Court judge number two, most

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[11] Jeffrey D Jackson, 'Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System' (2007) 34 The Fordham urban law journal 125.

[12] www.beehive.govt.nz

[13] ibid.

[14] The Office of the Chief Justice, 'Annual Report' (2022).

[15] Sossin (n 2).

[16] Deloitte and Westpac New Zealand Limited, *Westpac New Zealand Sharing the Load Report* (Westpac New Zealand 2021).

[17] Interview with a female coroner (17 October 2021); Interview with a female senior Judge (19 October 2021); Interview with a female coroner (19 October 2021); Interview with a female senior Judge (21 October 2021);

female judges have care responsibilities. She noted, 'Most women [who] are appointed to the District Court bench, are between the ages of approximately 45 and 55. Typically in that age band, many of the women who are seeking appointment will have still school-aged children.'[18] There is a lack of data on judges' age bracket.[19] Therefore, I cannot assess the average age of judges. Having said that, I argue that more young female lawyers might apply for a judicial position if they believe that they can maintain a work-life balance after appointment.

The interview findings show that taking a judicial position has some advantages and disadvantages for female judges. On the one hand, a judicial role guarantees more consistent and predictable working hours. In addition, judges can take adequate annual leave during the school holidays. These advantages make a judicial role more appealing for female lawyers. On the other hand, the lack of flexibility, the challenges of taking part time work, and the requirement of moving to another city are major challenges for women.

In this section, I explain the advantages and disadvantages of a judicial career for female judges with child-care obligations. I am aware that these challenges mainly impact people with care responsibilities. Hence, the challenges discussed in this section may not influence the proportion of female candidates who do not have care responsibilities. However, since women take more care responsibilities than men,[20] compatibility of a judicial career with care responsibilities encourages more women to apply for a judicial position and consequently enhances the proportion of female judges.

A. Advantages of taking a judicial position

Data collected from my research interviews demonstrate that regular working hours is a significant advantage of taking a judicial position that attracts female lawyers to the judiciary. Regular working hours can encourage female lawyers with care obligations to apply for a judicial position. As I explained in chapter three, long and unpredictable working hours and the strong culture of presenteeism are significant barriers for women lawyers, steering them to change their career. Two female judges noted that consistent working hours is an important advantage of a judicial career over practicing in the legal profession.[21] Female senior judge number six noted,

> …as a partner in a law firm there is a lot of evening work and weekend work [to] prepare for court. So, from my experience, women who have young families or even obviously men often see the judicial appointment as being one that they can actually guarantee some stable hours so that they know that they can leave at 5:30 in the evening or whatever.[22]

Interview with a male District Court Judge (18November 2021); Interview with a female District Court Judge (25November 2021); Interview with a female senior judge (18November 2021); Interview with a female District Court Judge (22November 2021)

[18] Interview with a female District Court Judge (25November 2021)

[19] Based on section 133 of the Senior Courts Act 2016 and section 28 of District Court Act 2016, judges must retire at the age of 70 years.

[20] Stats NZ, 'Unpaid Activities (Total Responses) by Age Group and Sex, for the Census Usually Resident Population Count Aged 15 Years and over, 2006, 2013 and 2018 Censuses' (*Stats NZ*, 2022) <https://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE8452#> accessed 23 May 2022.

[21] Interview with a female senior Judge (21 October 2021); Interview with a female coroner (19 October 2021)

[22] Interview with a female senior Judge (21 October 2021)

According to female senior judge number six, regular work hour is an important advantage of taking a judicial position that can encourage some female lawyers to participate in the judicial appointment process. The District Court website explains that regular sitting hours of the District Court starts from 8:30 and 'two thirds of adult criminal court hearings finish after 4pm, leaving follow-up matters to be dealt with in what little remains of the working day.'[23] This suggests that judges have standard work hours. The literature shows that it is significantly challenging to maintain work and life balance for people with irregular work hours. Having control on work hours would increase work-life balance.[24] Therefore, the judicial roles' regular work hours are considerably beneficial for people with care responsibilities, who are mostly women, [25] and would attract more women to apply for judicial positions.

B. Unappealing working conditions decrease the percentage of female candidates

Women often choose not to be judges.[26] There are three reasons why female lawyers are reluctant to apply for a judicial position. The data collected from my research interviews indicate that a lack of flexibility, challenges of taking part time work, decreased annual leave, and an obligation to move to another city are some of the main issues of female judges. These challenges can discourage female lawyers who are considering applying for a judicial position and consequently decrease the proportion of female candidates.

1) Lack of flexibility

A lack of flexibility is a challenge for both High Court and District Court female judges with care responsibilities. Female senior judge number 11 noted that judicial positions in the senior courts are inflexible[27] and not suitable for women with care responsibilities. In addition, some of the District Court judges emphasised that the lack of flexibility is an important issue for female judges. [28]

Here, I provide two reasons for the lack of flexibility of judicial positions. First, it is difficult for judges to reschedule their working arrangements. Male District Court judge number ten noted that working as a lawyer is much more compatible with women's lifestyles because it is easier for lawyers to change their appointments (with clients). He stated that it is extremely difficult for judges to adjust their working arrangements with family responsibilities, particularly for women with school-age children.[29]

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[23] 'Day-to-Day Work of a District Court Judge' (*District Court of New Zealand*) <https://www.districtcourts.govt.nz/about-the-courts/day-to-day-work-of-a-district-court-judge/> accessed 11 April 2023.

[24] Julia R Henly and Susan J Lambert, 'Unpredictable Work Timing in Retail Jobs: Implications for Employee Work–Life Conflict' (2014) 67 Industrial & labor relations review 986; Anna Arlinghaus and others, 'Working Time Society Consensus Statements: Evidence-Based Effects of Shift Work and Non-Standard Working Hours on Workers, Family and Community' (2019) 57 Industrial health 184.

[25] Stats NZ, 'Unpaid Activities (Total Responses) by Age Group and Sex, for the Census Usually Resident Population Count Aged 15 Years and over, 2006, 2013 and 2018 Censuses' (*Stats NZ*, 2022) <https://nzdotstat.stats.govt.nz/wbos/Index.aspx?DataSetCode=TABLECODE8452#> accessed 23 May 2022.

[26] Interview with a female senior judge (19 October 2021)

[27] Interview with a female senior judge (19 October 2021)

[28] Interview with a female District Court judge (25November 2021); Interview with a female District Court judge (22November 2021)

[29] Interview with a male District Court judge (18November 2021)

Female District Court judge number four explained that judges must prepare their working schedule for the upcoming months, while young mothers cannot predict the family issues that might happen and adjust their schedules accordingly. She stated, 'If your child has got school swimming pool, or they changed the date of the final assembly or anything like that, there is absolutely no flexibility. So, I missed a lot of things that I would have liked to have gone to.'[30]

The inflexibility of working schedules poses challenges for women with caregiving responsibilities, who often encounter unpredictable situations, making a judicial position less adaptable for them. Therefore, some women with school-aged children may postpone applying for a judicial position until their children grow up.

Second, the working culture of the judiciary does not encourage flexible working arrangements. There is an expectation that judges should be at the workplace during working hours. Female District Court judge number four noted that even when she finished her work, she did not feel comfortable to leave her workplace before 5pm.[31] This suggests that there is an assumption that a productive person is physically present in the workplace.[32] This assumption is associated with a stereotypically masculine work culture;[33] spending unnecessary time at work makes it hard for people to undertake care responsibilities[34] and might discourage female lawyers to apply for a judicial position.

2) Inadequate annual leave

The interview findings show that judges can arrange their annual leave so that they can spend time with their family during the school holidays. Female senior judge number 11 stated that providing the possibility of scheduling holidays is a step to make a judicial role more compatible for women.[35] Although taking leave during school holidays was appealing for female judges with caring obligations, some judges noted that, recently, sabbatical leave for District Court judges has decreased. As female District Court judge number four stated'

> Indeed, part of the appeal of being a judge is those holidays that you can have…But for those that have appointed from last year onwards, their sabbaticals have been cut back, so they have got less again. So, the same as what I was when I was appointed but less than what judges have had. So, it becomes slightly less appealing again in terms of calculating how much [of] the school holidays you can have with your children.[36]

It is necessary for judges to have adequate leave so that they can maintain a balance between work and life. The interview findings suggest that the changes in sabbatical leave may pose additional challenges

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[30] Interview with a female District Court judge (22November 2021)

[31] Interview with a female District Court judge (22November 2021)

[32] Sarah Taylor, 'Valuing Our Lawyers: The Untapped Potential of Flexible Working in the New Zealand Legal Profession' (New Zealand Law Society 2017); Stacey Shortall, 'Turning the Tide to Make More Women Law Firm Partners in New Zealand' (NZLS CLE 2016).

[33] Margaret Thornton, 'The Flexible Cyborg: Work-Life Balance in Legal Practice' (2016) 38 The Sydney law review 1.

[34] Joyce K Fletcher and Lotte Bailyn, 'The Equity Imperative: Redesigning Work for Work-Family Intergration', *Work and life integration: organizational, cultural, and individual perspectives* (Lawrence Erlbaum Associates, Publishers 2005).

[35] Interview with a female senior judge (19 October 2021)

[36] Interview with a female District Court Judge (22 November 2021)

for female judges in maintaining a healthy work-life balance. Increasing judges' annual and sabbatical leave might attract and encourage more female lawyers to apply for a judicial position.

3) Challenge of relocating to a new city

Relocating to another city is a significant challenge for families. Yet, it is a common requirement for an appointment to the District Court. Male senior judge number one noted that candidates are often required to move to a new city to take a judicial position. For example, if a candidate aims to become a judge in New Plymouth, he or she should not have been living in New Plymouth. [37]

Similarly, male District Court judge number ten stated that sometimes the advertised judicial position is in a city far from where a candidate lives. If a candidate is selected for the position, she has to uproot the family and move to a new city. Thus, lawyers considering applying for a judicial position in District Court should be willing to move to a different city. This is a major change that can cause some problems for female candidates and their families.[38] Relocating to a new city can impact male and female candidates with child-care responsibilities. However, I particularly highlight the challenges of women with child-care responsibilities, because women take more unpaid care responsibilities. [39] Thus, relocating to a new city can be more challenging for them.

In addition, children's age is an important factor that can influence women's decision to move to another city. Female District Court judge number two noted that a considerable percentage of women who are selected for a judicial position are between the ages of approximately 45 to 55 who have school-age children.[40] Female District Court judge number four stated that relocating for women with teenage children can be stressful because peers are very important for teenagers, so moving to a different city is a challenging decision. Female lawyers consider the potential negative impacts of moving to a new city particularly with teenage children. Thus, they may become reluctant to apply for a judicial position in another city.[41] This can be a significant barrier for female lawyers interested in taking a judicial position and can consequently decrease the proportion of female judges.

4) Difficulties of working part time

Taking part time judicial positions is a challenge for female judges that in turn makes a judicial position less appealing for women lawyers. Providing part time working arrangement is a common strategy to enhance work flexibility. In New Zealand, all judges have a legal right to seek part time working arrangements. My interview participants had various views about the availability of part time judicial positions. Some of my interview participants noted that judges can work part time to reconcile their work and care responsibilities. According to female senior judge number 11, there are some part time judicial positions that make a judicial career more compatible for female judges with family obligations.[42] In addition, female District Court judge number three stated that the legal provision for judges to sit part time is a solution to enhance the flexibility of the judicial career. She recalled working with colleagues who sat as a part time judge when they had child-care responsibilities and then came

[37] Interview with a male senior judge (30 November 2021)
[38] Interview with a male District Court Judge (18 November 2021)
[39] Deloitte and Westpac New Zealand Limited (n 16).
[40] Interview with a female District Court Judge (25 November 2021)
[41] Interview with a female District Court Judge (22November 2021)
[42] Interview with a female senior judge (19 October 2021)

back to full time work when they had fewer family responsibilities.[43] However, I argue that in practice, part time working arrangements are neither common nor available for all judges. I advance this argument by referring to the statutory requirement of judges' part time working and my interview findings.

Both District Court Act 2016 and Senior Courts Act 2016 prescribe that judges have a right to request a part time position. Section 106 of Senior Courts Act 2016 requires that,

> Attorney-General may authorise Judges to sit part time
>
> (1) Judges (other than Supreme Court Judges) and Associate Judges may seek the authorisation of the Attorney-General to sit part time for a specified period.
>
> (2) The Attorney-General may grant an authorisation sought by a Judge or an Associate Judge under subsection (1) only with the agreement of—
>
> (a) the President of the Court of Appeal, if the Judge is a Court of Appeal Judge:
>
> (b) the Chief High Court Judge, if—
>
> (i) the Judge is a High Court Judge but not a Court of Appeal Judge; or
>
> (ii) the Judge is an Associate Judge.
>
> (3) An authorisation may take effect from—
>
> (a) the date the Judge or Associate Judge commences office; or
>
> (b) any other date specified in the authorisation.
>
> (4) A Judge or an Associate Judge may be authorised to sit part time for a specified period on more than 1 occasion.
>
> (5) A Judge or an Associate Judge authorised to sit part time for a specified period resumes sitting on a full-time basis at the end of that period.

Section 30 of the District Court Act 2016 provides that the Attorney-General can authorise a permanent District Court judge to work part-time. It states,

> [The] Attorney-General may authorise permanent Judge to sit part time
>
> (1) The Attorney-General may, on application by a permanent Judge, authorise the Judge to sit on a part time basis for a specified period.
>
> (2) The Attorney-General must not authorise a Judge to sit part time unless the Chief District Court Judge agrees and, in considering whether to agree, the Chief District Court Judge must have regard to the need to ensure the orderly and efficient conduct of the court's business.
>
> (3) In the case of an Environment Judge, the Chief District Court Judge must first consult the Principal Environment Judge before agreeing to the Judge sitting part-time.

[43] Interview with a female District Court Judge (25November 2021)

(4) The Attorney-General may authorise a Judge to sit part time with effect from—

(a) the date on which the Judge takes up office; or

(b) any other date.

(5) The Attorney-General may authorise a Judge to sit part time for a specified period on more than 1 occasion.

These statutes confirm that judges have a right to seek a part time position. However, the right to request a flexible working arrangement has a symbolic function.[44] In practice, the Attorney-General and other senior judges can decide to authorise a judge to sit part time or deny it. Thus, the statutes do not ensure a right of part time work for judges.

The interview findings show that, in practice, taking a part time work is difficult. For example, female District Court judge number four stated,

> When I went on the bench, one of the judges said to me I am happy with you doing this job. I said, well, you know it is cool, but I am not interested. I have got young children. She said they are looking to bring in part-time. I wanted the school holidays off, and with part-time, I could. In fact, it took them a number of years before that actually came in… And once it became part-time, I could have all the school holidays off whilst I missed out be[ing] with them [her children] during term time, they always knew that I will be there for the school holidays.[45]

Based on female District Court judge number four's experience, it takes some years to get a part time judicial position. Therefore, although the statutes and official documents indicate that judges can work part time, in practice taking part time work is challenging for judges.

Moreover, the working culture of the judiciary does not encourage women to seek part time working arrangements. This issue was raised by some of the female District Court judges. Female District Court judge number four noted, 'I do not think part time working has been advertised enough. I do not think it is pushed enough.'[46] In addition, female District Court judge number two stated,

> …Although, it is possible to request part time working and there is an ability to have part time working through the statutes…it is quite hard to achieve. There have been some experiences and examples of where women judges have been able to secure part time work in the sense of having extra time during school holidays, but it is not common, and it is not encouraged. So, there is no structural option there.[47]

According to female District Court judge number two, part time judicial positions are uncommon. This suggests that there is a work culture in the judiciary that discourages taking part time work. The lack of availability of part time judicial positions is a gender-blind practice that mostly disadvantages women

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[44] Amanda Reilly and Annick Masselot, 'A Precarious Work and Work-Family Reconciliation: A Critical Evaluation of New Zealand's Regulatory Framework, Work Life Balance' (2017) 98 Bulletin of Comparative Labour Relations 285.
[45] Interview with a female District Court Judge (22November 2021)
[46] Interview with a female District Court Judge (22November 2021)
[47] Interview with a female District Court Judge (22November 2021)

judges, who are more likely to have care responsibilities. This leads to the unequal representation of women in the judiciary.

In summary, I have argued that the lack of flexibility, challenges of taking part time work, and the requirement of moving to another city limits the proportion of female candidates. These challenges have a push and pull impact.[48] They push those with care responsibilities out of the judiciary while pulling in those who do not have family obligations. As I discussed in this section, women take more care responsibilities. Hence, the push and pull impact disadvantages women more than men.

Conclusion

In the first chapter, I noted that the low representation of women in the judiciary is a wicked problem caused by multiple interdependent and interconnected factors. This chapter has highlighted factors after the judicial appointment processes that cause the wicked problem of the unequal proportion of men and women judges in New Zealand. I have argued that there is a lack of effective mechanisms to hold the Attorney-General accountable for equal representation of women in the judiciary. The political accountability of the Attorney-General, public scrutiny, and providing feedback to unsuccessful candidates do not structure the discretion of the Attorney-General. Therefore, the Attorney-General has unstructured discretion to increase judicial diversity.

Furthermore, I have shown how undertaking a judicial career can negatively influence a person's personal life. The requirement of relocating to a new city, inflexible working arrangements, difficulties of taking part time judicial positions, and decreased annual and sabbatical leaves make a judicial position unappealing for people with care responsibilities who are mostly women. As a result, the stereotypically masculine working condition in the judiciary might deter female lawyers from applying for a judicial position and, in turn, lead to unequal representation of women in the judiciary.

[48] Margaret Thornton, 'Work/Life or Work/Work? Corporate Legal Practice in the Twenty-First Century' (2016) 23 International Journal of the Legal Profession 13.

Chapter six
Gender-sensitive initiatives in New Zealand

Introduction

In the previous chapter, I explored post-appointment issues that impact women's representation in the judiciary. I discussed the lack of accountability of appointing decision-makers and evaluated whether judicial positions are adjustable for people with care responsibilities and how this factor might disproportionally impact female candidates.

In this chapter, I analyse various initiatives and policies developed in New Zealand to increase the proportion of women judges. In the first chapter of this thesis, I noted that the unequal representation of women in the judiciary is a wicked problem, and different stakeholders have offer multiple strategies to improve the representation of women in the judiciary. The Chief Justice has recently established a judicial diversity committee, Te Awa Tuia Tangata.[1] Female senior judge number five, a member of the Judicial Diversity Committee, explained that the committee implemented some measures to improve judicial diversity.[2] Women lawyers' associations and the Judicial Diversity Committee have also adopted various initiatives to support women lawyers and achieve greater diversity in the judiciary. By outlining these initiatives, in this chapter, I aim to shed light on the progress made in achieving greater diversity in the judiciary. This chapter proceeds in two sections.

In the first section, I outline six gender-sensitive initiatives, including mentorship and training programmes, networking events, sharing information about the appointment process, advertising expressions of interest, and flexible working arrangements. I discuss each of the gender-sensitive initiatives in turn and show how they support female candidates.

In the second section, I examine the impact of these gender-sensitive initiatives on gender parity in the judiciary. While there appears to be a correlation between these initiatives and an increase in the proportion of women judges, it is worth noting that most of the female judges share similar career backgrounds. As a result, the gender-sensitive initiatives may have only supported a limited proportion of women in the legal profession, despite their overall positive impact.

[1] The Office of the Chief Justice, 'Annual Report' (2022).

[2] Interview with a female senior judge (19 October 2021)

I. Attempts to increase the percentage of women judges

A. Mentorship programmes

Women lawyers' associations organise mentorship programmes that can increase the percentage of female candidates for judicial positions. [3] A mentor is an acknowledgeable person who can support their mentee' personal and career growth. Mentors support a mentee to advance in their career and gain a reputation. They can also provide psychosocial support by making interpersonal bonds with the mentee.[4] In chapter three of this thesis, I explained the importance of mentoring in facilitating female lawyers' progress in the legal profession and encouraging women to apply for judicial positions and yet the difficulties of many female lawyers in finding mentors to support them in the legal profession. Reasons explaining these difficulties range from the low representation of women in senior positions, to negative gender stereotypes, and to the impact of care responsibilities. [5] A knowledgeable mentor would help women progress in the legal profession, prepare for the judicial appointment processes, and apply for a judicial position. For example, female coroner number eight stated that her mentor's support and encouragement motivated her to apply for a judicial position. She noted that without the support of her mentor, who is a senior member of the legal profession, she might not have applied for a judicial position.[6]

Mentorship programmes help female lawyers find a proper mentor who would encourage and prepare them to compete with others.[7] In New Zealand, women lawyers' associations offer some mentorship programmes. Some associations, such as the Auckland Women Lawyers' Association and Wellington Women Lawyers' Association, run mentoring programmes to find suitable mentors for female lawyers. Female District Court judge number seven, who once was a member of Auckland Women Lawyers' Association, explained a mentorship programme. She stated,

> Auckland Women Lawyers' Association had a mentor programme. So, we would encourage junior lawyers to apply each year, to send in the application (and explain) what they were looking for in a mentor... Then we would go through the process of peering and trying to identify a suitable mentor for the junior lawyer. So, we had that system up and running which worked quite well…I know a lot of regional law associations will have an aspect of mentoring that they try and provide as part of their association back to the junior community. I think when I was in the Auckland Association, there were other regional ones, the Waikato, and the Wellington woman associations. There is a lot of good work in that regard. [8]

According to the female District Court judge, mentorship programmes facilitate the process of finding a mentor by connecting junior lawyers to suitable senior mentors. Furthermore, mentorship programmes have the potential to address the lack of transparency in the judicial appointment criteria and level the playing field for women. The New Zealand Law Society | Te Kāhui Ture o Aotearoa runs some

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[3] Interview with a female coroner (17 October 2021)

[4] Belle Rose Ragins and KE Kram, 'The Roots and Meaning of Mentoring' [2007] The Handbook of Mentoring at Work 3.

[5] Stacey Shortall, 'Turning the Tide to Make More Women Law Firm Partners in New Zealand' (NZLS CLE 2016).

[6] Interview with a female coroner (19 October 2021)

[7] Carol Lee Bacchi, *The Politics of Affirmative Action: 'women,' Equality and Category Politics* (Sage Publications 1996).

[8] Interview with a female coroner (17 October 2021)

mentorship programmes for all lawyers. In response to the question, 'What is your advice to a candidate who wants to prepare for the judicial appointment process?' female District Court judge number two stated,

> I would strongly recommend that they enter an informal mentorship. The Law Society, particularly the Māori Law Society, has an informal mentorship programme. So that judges will informally mentor people who are interested in considering becoming a candidate, and through that informal mentorship they can get a sense of what qualities the appointment committee might be looking for. So, mentorship is really important. Speaking with recent candidates and getting to really know how the appointment process played out and what sort of questions were asked and what sort of challenges were put up during the interviews is the most direct way of preparing people.[9]

According to female District Court judge number two, judges are involved in the mentorship programmes offered by The Law Society and the Māori Law Society. They inform interested individuals about different aspects of the appointment process, such as the important factors of being selected for judicial positions. Potential female candidates can gain valuable information about the judicial appointment process by participating in mentorship programmes.

B. Networking opportunities

In chapter three, I discussed that making strong networks in the legal profession is challenging for some female lawyers. This issue may decrease the proportion of female judges because having a reputation and being well-known are important factors to being selected for judicial positions.[10] To address this issue, various women lawyers' associations organise events to facilitate networking between women in different parts of the legal profession. For example, female coroner number seven stated,

> I had been previously working for a firm as a lawyer, and then I went out on my own as a barrister. I knew I would need to maintain social networking and professional networking because I had been working for myself. So, I basically just went on the internet, and I was looking for an organisation or association that would make sure that I continue to network with a professional woman doing law and I basically just found [a women lawyers' association] and applied to be a member.[11]

This shows that women lawyers' associations provide suitable and accessible networking opportunities for female lawyers with diverse career backgrounds. Moreover, women lawyers' associations connect junior and senior female lawyers. According to female coroner number eight, joining a women lawyers' association is a convenient way of networking with senior lawyers and judges. She stated,

> I probably joined ours when I was a summer clerk at the law firm because everybody was a member and the law firm paid the subscriptions. I just found a good way to network with others and to get exposure to more senior lawyers. For years, the Otago Women Lawyers Society has organised an annual [event], the Ethel Benjamin Address. So, we had got internationally important women to speak at that. It was quite cool being a part of that event because we

[9] Interview with a female District Court Judge (25November 2021)
[10] See chapter 4.
[11] Interview with a female coroner (17 October 2021)

> invited the Supreme Court judges and all sorts of people... so I think that sort of networking amongst more senior lawyers and judges was really valuable.[12]

Based on the female coroner's experience, the women lawyers' associations provide an opportunity for junior female lawyers, who are at early stages of their legal career, to connect with senior lawyers and judges. Thus, they can build social networks with senior people in the legal profession and judiciary. In addition, female lawyers may discover available judicial positions through networking. For instance, female coroner number seven emphasised the importance of networking to become aware of judicial vacancies. She stated,

> I think if I had not had that internal contact or knowledge of what was going on within that system, I would not have known about the role. I would not have just randomly been looking for roles. It was purely word of mouth ... I think that is quite important because if you hear things, you become aware of positions that are available or someone says, oh, have you seen that advertised? I think that is how sometimes you end up finding roles rather than purposely going out and looking and thinking, well, what am I going to do?[13]

Lawyers with stronger social networks in the judiciary are more likely to discover vacancies and apply for a judicial position. Therefore, running networking programmes is an indirect way to inform women of available judicial positions and improve the proportion of female candidates.

In addition, female lawyers can make a reputation by giving presentations at different events. According to female senior judge number 11, women can show their competence by engaging in different events. She noted, 'They may demonstrate their excellence in court or other professional contexts. They may write articles, give presentations in different seminars or conferences and generally be active in the law society.'[14] So, by participating in various events, female lawyers can gain a reputation which is an important factor in being successful in the judicial appointment process.[15]

C. Training programmes

Running training programmes to prepare women for the appointment process is one of the strategies for improving the proportion of female judges. My interview findings show that women lawyers' associations sometimes run events to upskill women and prepare them for appointment interviews. At these events, women acquire techniques to effectively demonstrate their abilities and improve their performance when going through the appointment process. For example, female coroner number seven shared her positive experience at a training programme. She noted,

> It was more about networking…having guest speakers to provide us with the tools needed for interviews. So, I found that really beneficial because we all were feeling the same things. We, not all women, tend to undervalue ourselves when we go for interviews. You need to basically just talk about yourself and all that good stuff. So, it was helpful because it made us realise that

[12] Interview with a female coroner (19 October 2021)
[13] Interview with a female coroner (17 October 2021)
[14] Interview with a female senior judge (19 October 2021)
[15] See chapter 4.

> there are things we need to do to promote ourselves that perhaps we were not doing in the past.[16]

According to the female coroner, the training programme was tailored to the needs of most female lawyers. It focuses on teaching interview skills to help women demonstrate their skills and abilities during an appointment interview. Running events to teach interview strategies prepares women for the appointment processes. Using job interview skills directly impacts a candidate's success[17] and increases the chances of being selected for a judicial position.

In addition, some women might feel more comfortable discussing their issues in a training programme where all the attendees are women. In chapter three, I discussed how women often encounter gender discrimination and are unfairly perceived as less qualified than their male counterparts. Some women may be reluctant to discuss their challenges due to the fear of being seen as incompetent. Female coroner number seven noted that the events were a safe environment for female lawyers to discuss their issues and challenges. She stated,

> I found it a very good environment. It felt like a safe environment to talk about this stuff openly without feeling that it was showing a sign of weakness. I think a lot of women are scared to voice these things. [Women lawyers] think about all these concerns because they could be perceived as a weakness. But actually, by being together and making it women only, you felt that you were in a safe environment where you could actually say: well, when I go to interviews, this is how it makes me feel… without feeling that you were making yourself vulnerable. So, I think these organisations are good if you can get yourself involved in them.[18]

Women lawyers' associations provide an environment where women feel comfortable discussing their issues openly. The training programmes tailored to women lawyers can mitigate the negative impact of gender prejudice on women by helping them to overcome their imposter syndrome and prove their competence in the judicial appointment processes.

D. Sharing information about the appointment process

As I discussed in chapter three, the judicial appointment processes in New Zealand lack transparency. This disadvantages female candidates and might impact negatively the proportion of women judges. A number of women lawyers' associations collaborate with female judges to inform women lawyers about the appointment processes. My interview findings show that women lawyers' associations, such as the Otago Women's Law Society, run events in which judges share useful information about the appointment processes and judicial roles. For example, female senior judge number six noted, 'I have talked to New Zealand women lawyers' groups … Probably the main way we have tried to increase the diversity is just getting out there and talking with people.'[19]

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[16] Interview with a female coroner (17 October 2021)

[17] Riya Rupani, 'Job Interview Skills and Techniques - A Practice Set in Communication' (2013) 4 Journal of commerce and management thought 719; Joel R Barbee and Ellsworth C Keil, 'Experimental Techniques of Job Interview Training for the Disadvantaged: Videotape Feedback, Behavior Modification, and Microcounseling' (1973) 58 Journal of applied psychology 209.

[18] Interview with a female coroner (17 October 2021)

[19] Interview with a female senior judge (21 October 2021)

According to female District Court judge number two, holding events for women lawyers is an informal strategy for increasing diversity. She stated, 'Over the years we have had a practice of meetings, discussion groups, encouraging women throughout New Zealand to see that the role is suitable for them and to learn about it in a more informal way, so that encourages them to put their names forward.' [20] According to her, female judges from different courts collaborate with the women lawyers' associations and inform female lawyers about the requirements of a judicial role and encourage them to apply. Female coroner number eight recalled attending an event about women in the judiciary. She noted,

> I remember about three years ago, they had a sort of lunch presentation where a couple of women who were, I think, District Court judges... answered questions and explained how they have got on their career path... So again, [the event was] giving the opportunity to women who had particular roles to talk about how they have got appointed, and what they did, what their days looked like.[21]

Female lawyers may consider female judges as their role models and be inspired to consider taking a judicial position. By attending these events, women can develop the necessary skills to become qualified for a judicial position in the future. In addition, women gain information about the requirements of a judicial role that are not included in the official documents and learn from female judges' experiences of applying for a judicial position.

On the 23rd of November 2021, I attended a virtual meeting entitled 'Meet the Manukau District Court Judges' to gain a better understanding of these types of events. The panel discussion included three recently appointed Manukau District Court Judges and was hosted by the Auckland Women lawyers' association. The judges talked about their challenges in the legal profession, their motivation to apply for a judicial position, important factors for being selected for a judicial position, and the challenges and advantages of a judicial role. The event included a question-and-answer session where the audience could send anonymous questions. As female senior judge number five noted, the possibility of being anonymous in a virtual platform encourages some women to join the meeting without being worried about what others might think about them.[22] Some women lawyers have imposter syndrome, meaning that they do not perceive themselves as qualified;[23] a virtual event is a safe environment for them to ask questions and learn about the judicial appointment process.

In addition, different lawyers' associations, such as the Māori Law Society, collaborate with the judiciary to encourage lawyers from diverse social backgrounds to apply for a judicial position. Male senior judge number nine noted that one of the mechanisms to improve gender diversity is collaborating with lawyers' associations. He stated,

> Part of that is to approach various law societies, the Māori Law Society, the Asian law society, and the New Zealand Law Society and have discussions with them as to how we as a community can influence persons from more diverse backgrounds to put forward expressions of interest to join whatever court they wish to join.[24]

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[20] Interview with a female District Court Judge (25November 2021)
[21] Interview with a female coroner (19 October 2021)
[22] Interview with a female senior judge (18November 2021)
[23] See chapter 3.
[24] Interview with a male senior judge (19 October 2021)

As I discussed in chapter two, the presence of women judges shows that women have equal opportunity to take a judicial position.[25] Running events with female judges from diverse backgrounds may inspire and motivate a high percentage of female lawyers to apply for a judicial position. The presence of diverse female judges at such events would show women lawyers with similar backgrounds that taking a judicial position is an achievable career path.

E. Advertising expressions of interest

Advertising vacant positions on platforms accessible to everyone, including underrepresented groups, is a measure to enhance the candidate pool's diversity. Widespread advertisements can inform diverse people of vacant positions.[26] My interview findings show that some judges were chosen in a tap on the shoulder system. Male district court judge number ten stated,

> I [had] been a lawyer for 25 years. So, I guess I was known to a lot of judges, and [before] I was appointed, I got a telephone call from the Principal Judge. He asked me if I would apply for a position, and I told him that I did not want to and would not. But he kept pestering me. He said that he would stop calling me if I would talk to my wife first about it. So, I agreed to do that. [My wife] said, 'you should apply', so I did.[27]

Therefore, in the previous appointment system, only lawyers who were offered a judicial position could become judges. It seems the judiciary was staffed by people known by appointing decision makers. Male District Court judge number ten explained that the appointment process has changed in New Zealand. He noted, 'It used to be just the principal or Chief Judge shoulder tapping people and saying would you like to become a judge? And if they said yes, then they were appointed, and that tended to be very often males.'[28] This shows that a tap on the shoulder system for judicial appointments is not conducive to enhancing women's representation in the judiciary. In such a system, appointing decision makers have significant discretionary power to select judges. The appointing decision makers in New Zealand tended to offer judicial positions disproportionately to male lawyers because, as I explained in the previous chapter, gaining a reputation is easier for male lawyers than women. As a result, the tap on the shoulder system has led to a male-dominated judiciary.

Female District Court judge number four was appointed through a tap on the shoulder system. Based on her experience, although there was a formal judicial appointment process in 2000, in practice, judges were still approached and offered a judicial position. She noted,

> I did not prepare at all, and it was a very haphazard thing. I was approached by someone to see if I would take on this position, and I said no. I thought I was too young, and I had little children. Then my husband at the time wanted to move to Auckland… I said if I could go to Auckland, yes, I would do the job. So, things were always shoulder tapping then. They had criteria for applying, but I did not even apply for the position, except I think when I said yes, they said could you

[25] Rosemary Hunter, 'More than Just a Different Face? Judicial Diversity and Decision-Making' (2015) 68 Current Legal Problems 119.
[26] James P Sterba, *Affirmative Action for the Future* (1st edn, Cornell University Press 2009).
[27] Interview with a male District Court Judge (18November 2021)
[28] Interview with a male District Court Judge (18November 2021)

> quickly put on an application. So, it was very different back in 2000 from what it would be now. So, I did not prepare at all.[29]

Her experience shows that although everyone could formally apply for a judicial position, in practice, judicial positions were offered to potential appointees. Therefore, people did not have an equal opportunity to learn about judicial vacancies and apply for them.

The interview findings show that at least from 2021 the appointment system, particularly the appointment process for District Court judges, has a formal structure, and judicial vacancies are broadly advertised. Female senior judge number five explained that different courts, such as the District Court, Environment Court, and Employment Court, advertise vacant judicial positions. [30] Hence, interested individuals from diverse backgrounds can apply for a judicial position by submitting an expression of interest.

Advertising expressions of interest is a method to inform diverse female lawyers of judicial vacancies. Female coroner number eight pointed out that she became aware of the judicial vacancy through an advertisement. She noted, 'Those positions were actually advertised. I must have seen it in the New Zealand Law magazine or one of those notices. So, there was a formal advertisement asking for people who are interested in an appointment to make an application.'[31] The widespread advertisement in lawyers' associations would inform diverse female lawyers about judicial vacancies. According to male senior judge number nine, the judiciary advertises expressions of interest for judicial positions in different law associations. He noted,

> We normally send the expressions of interest advertisement to all those law societies, so they have them. At this stage, we do not deal with them directly in terms of a meeting or telephone call, but they certainly receive the advertisement. So, they can discuss, and they do. I am aware, they discussed amongst their members [regarding] the advertisement and whether or not any of their members wish to apply for the job.[32]

Advertising a judicial position in different law associations, such as women lawyers' associations, is essential to informing female lawyers about vacant judicial positions. It is a weak outreach policy to ensure that candidates from underrepresented groups are aware of vacancies.[33] Advertising a vacant position is a weak gender-sensitive policy because although it makes female lawyers aware of a judicial position, it fails to motivate or encourage them to apply. It only informs them about vacancies. Female coroner number eight noted,

> I had worked in this area previously as a lawyer, so my contact with the coronial jurisdiction was already in place. I knew they were looking for coroners, or there was a coroner position available... So, when it was advertised, I applied. I think if I had not had that internal contact or

[29] Interview with a female District Court Judge (22November 2021)
[30] Interview with a female senior judge (18November 2021)
[31] Interview with a female coroner (19 October 2021)
[32] Interview with a male senior judge (19 October 2021)
[33] Sterba (n 26).

knowledge of what was going on within that system, I would not have known about the role, I would not have just randomly been looking for roles. It was purely word of mouth.[34]

Therefore, advertising a vacancy in the judiciary is a weak gender-sensitive measure to increase the percentage of female judges. It should be accompanied by other forms of gender-sensitive measures, such as holding events to encourage female lawyers to apply for judicial positions and inform them about the appointment processes and the requirements of a judicial role.

F. Flexible working arrangements

Increasing working flexibility makes a judicial role more compatible for people with care responsibilities. In the previous chapter, I showed that some women lawyers do not apply for judicial positions because it is challenging to adjust requirements of a judicial position with family responsibilities. This section highlights the initiatives for addressing this issue.

The flexible working arrangements include the possibility of taking annual leave during school holidays and part time working arrangements for judges. These policies contribute to substantive equality between judges. As I discussed in chapter one, based on substantive equality, resources must be allocated to marginalised people to enhance their proportional representation and redress past and present discrimination against them.[35] Providing flexible working arrangements for women may enhance the proportional representation of women as they make a judicial position more adjustable for women with care responsibilities.

The interview findings show that flexible working arrangements are becoming more common in the judiciary, even encouraged as pointed out by different senior judges. For example, female senior judge number five noted that she encourages judges to maintain work-life balance and take flexible and part time working schedules.[36] The interview findings show that the judiciary offers flexible working arrangements. Judges can arrange their annual leave to spend time with their families during the school holidays. This policy makes a judicial position more suitable for female lawyers with school-aged children. According to female senior judge number 11, providing the possibility of scheduling holidays is a step towards making a judicial role more compatible for women.[37] Hence, the knowledge that such flexibility exists may motivate a higher proportion of female lawyers to apply for judicial positions.

Taking leaves during school holidays is a significant advantage that may encourage female lawyers with school-aged children to apply for a judicial position. It arguably contributes to increasing the gender diversity of the candidate pool. Male District Court judge number 10 explained that some female judges take all their annual leave during the school holidays.[38] Moreover, female District Court judge number four stated that in her experience, the possibility of taking leave during school holidays was a significant advantage of taking a judicial role. She stated,

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[34] Interview with a female coroner (17 October 2021)

[35] Annick Masselot and Timothy Brand, 'Diversity, Quotas and Compromise in the Boardroom: Tackling Gender Imbalance in Economic Decision-Making' (2015) 26 New Zealand universities law review 535.

[36] Interview with a female senior judge (18November 2021)

[37] Interview with a female senior judge (19 October 2021)

[38] Interview with a male District Court Judge (18November 2021)

> I could have all the school holidays off... they [her children] always knew that I will be there for the school holidays. I remember when they became adults, I was too scared to ask the question what it was like having a working mum... They said we always knew we had the holidays, and we had the weekends with you... So, it was an enormous relief for me.[39]

Providing flexible working arrangements in the judiciary is a gender-sensitive measure. It makes a judicial role more adjustable for women with caring responsibilities.

II. The impact of gender-sensitive initiatives on the New Zealand judiciary

In section 1, I showed a network of gender-sensitive policies that aim to improve the proportion of qualified female candidates for a judicial position. It is impossible to evaluate the influence of each gender-sensitive policy because each indirectly impacts judicial diversity. Regardless, the statistics indicate an increasing trend in the percentage of female judges in New Zealand. The percentage of female judges improved from 34% in 2019[40] to 40% in 2021.[41] This suggests a correlation between gender-sensitive initiatives and the increase in the proportion of women judges.

Although the percentage of female judges has increased over time, the statistics show that female judges are selected from a very narrow social background. The majority of judges are Pākehā, straight and able individuals. As of 2021, only 3.5% of judges identify as lesbian, gay, or bisexual and only 12% of judges have some form of disability. Pākeha make up the majority of judges, with the second most represented group being Māori, albeit with a large gap between the two groups. There is a very low percentage of Samoan, Middle Eastern, Chinese, Tongan, and Indian judges.[42] This suggests that women with diverse racial and ethnic backgrounds, disabilities, or non-conforming sexual orientations may not be well-represented in the judiciary.

In this section, I argue that gender-sensitive initiatives failed to change the appointing authorities' understanding of merit; and, therefore, only advantaged a limited proportion of women. In chapter two, I explained that greater judicial diversity improves the quality of the judiciary. A diverse judiciary represents various views[43] and benefits from the qualities and skills of diverse judges.[44] In this section, I show that the judiciary does not benefit from the qualities and skills of people from non-traditional career backgrounds because most judges are chosen from senior parts of the legal profession. To advance my argument, I first show that people with non-traditional career backgrounds have the required skills and qualities for a judicial position. Then, I refer to the findings of my research on judges' career backgrounds to show that in New Zealand, most judges are former senior lawyers. Therefore, the judiciary does not benefit from the valuable ideas and skills of people with non-traditional career backgrounds who are mostly women. This limited understanding of merit disadvantages a significant

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[39] Interview with a female District Court Judge (22November 2021)
[40] Geoff Adlam, 'New Zealand's Judiciary at 14 March 2019' [2019] Lawtalk 24.
[41] AIJA, 'AIJA Judicial Gender Statistics Number and Percentage of Women Judges and Magistrates at June 2021' (The Australasian Institute of Judicial Administration 2021).
[42] The Office of the Chief Justice (n 1).
[43] Erika Rackley, *Women, Judging and the Judiciary* (Taylor & Francis Group 2012).
[44] Erika Rackley and Charlie Webb, 'Three Models of Diversity', *Debating judicial appointments in an age of diversity* (Routledge 2017).

proportion of women with diverse career backgrounds and leads to the unequal representation of women in the judiciary.

A. Unlocking the potential: The value of selecting judges with non-traditional career backgrounds

In chapter four, I showed that appointing decision makers tend to select candidates with a senior position in the legal profession. As Jessica Kerr points out, 'Competence in appearing before judges has, in other words, been taken as a substitute for competence *to judge*.'[45] This narrow understanding of merit disadvantages most female lawyers working in different parts of the legal profession.

One might ask if it is possible to change the understanding of merit in the judicial appointment processes. A traditional understanding of merit defines it as a technological quality that is universal and neutral.[46] In a strict merit-based system, the criteria for each position should be determined based on the job description. Hence, the most qualified candidate is a person who can fulfil the responsibilities and functions of a position effectively.[47] However, Kate Malleson argues, 'the construction of merit is a dynamic process which can only be carried out with reference to the qualifications of the potential candidate pool.'[48] She explains that the definition of merit depends on the functions of a position and the features of potential candidates.[49] My research shows that by taking this approach to merit, the appointing decision-makers might define merit in a way that would be achievable for a limited proportion of candidates from a narrow socio-cultural backgrounds. In the following, I show that candidates with non-traditional career backgrounds, such as academic lawyers, can be highly competent appellate and trial court judges.

Academic and in-house lawyers might encounter challenges when they take a judicial position in trial courts. As Kerr points out, a lawyer who lacks litigation experience will encounter technical and cultural challenges.[50] Similarly, female District Court judge number four explained,

> So, the judiciary mostly comes from litigation lawyers who are appearing in court regularly. So, you get a bias away from females because a lot of females go into government departments more than men... But if you appoint someone who has not had a lot of exposure to court, it is actually quite a difficult task to pick up this job and run with it... I sort of felt like I was doing the same job. I just turned around to a different position on the court. I was sitting here, and I was prosecuting, and I knew exactly what the process was. I knew about everything, and I turned around, and I had a different role, but it was all very familiar to me. It was like being on a stage, and they say, look, you know how you have been doing Mary for the last nine years, you are now going to do Jane. But you know the script, you know where you stand, you know what it is supposed to look like. So, that is an easy swap.[51]

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[45] Jessica Kerr, 'Turning Lawyers into Judges Is a Public Responsibility' [2020] Australian Public Law.
[46] Hilary Sommerlad, 'The "Social Magic" of Merit: Diversity, Equity, and Inclusion in the English and Welsh Legal Profession' (2015) 83 Fordham law review 2325.
[47] Kate Malleson, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 Journal of Law and Society 126.
[48] Kate Malleson, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 Journal of Law and Society 126, P138.
[49] ibid.
[50] Kerr (n 45).
[51] Interview with a female District Court Judge (22November 2021)

Female District Court judge number four notes that it might be challenging for academic or in-house lawyers to take a judicial position in trial courts and learn to manage the court. While it is easier for a litigation lawyer to become a trial judge because they are familiar with the practice of court. Male senior judge number one has the same view. He stated,

> I think it is hard for them because the in-house role would generally be quite specific to a particular government department or a particular… commercial undertaking. So that if they have been in that role for…20 years, it is difficult for them to show that they could have the breadth of experience necessary to cope with the breadth of the stuff that is coming into the court. Not to say it is impossible, because somebody who is highly competent and with high abilities in the law can usually turn themselves to other activities and perform really well and we know some candidates who have been in the commercial area of law, being partners in commercial firms, never been in a courtroom, never done a jury trial, but got appointed and came into the District Court…because of the inherent ability, they are able to do that, and I know that we have had two women who are partners in law firms, big commercial firms, who became…extraordinarily good criminal court judges and Jury trial judges so it does not mean it cannot be done, but it needs a special competence level to achieve them...[52]

Male senior judge number one explained that judges with non-traditional backgrounds might have more challenges when taking a judicial position in trial courts. However, judges with non-traditional backgrounds provide important professional experiences that a senior barrister might lack.[53] As female senior judge number five demonstrated, judges with diverse career backgrounds have views and perspectives different from judges who are former litigation lawyers. She explained, 'I think that we ought to be looking at a broader pool of people generally, but also from broader backgrounds, because if you do that, you are getting broader perspectives and your access in greater diversity, which has to be better for the judiciary.'[54]

The interview findings show that some appointing authorities seek competent District Court judges from non-traditional legal career backgrounds. As female District court judge number three noted,

> It is obviously relevant how much court time you have had, but it is not an exclusion if you are an in-house lawyer. Absolutely not. Recently a seminar has been held with in-house lawyers to encourage them to think about judicial life. So, the District Court is actively looking in spaces where you traditionally would not think to look for a judicial appointment. So, we are very open and mindful of the very valuable skills that in-house counsel has and how it is possible to translate those skills into the courtroom.[55]

According to her, authorities involved in the appointment of District Court judges are considering skills and knowledge of in-house lawyers and actively look for competent candidates who are former in-house lawyers. Ongoing training programs can help trial court judges with non-traditional backgrounds overcome the challenges of taking a judicial position. As Murray Gleeson discusses, it is essential to have sufficient resources and opportunities for judicial training and ongoing professional development to

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[52] Interview with a male senior judge (30 November 2021)
[53] Kerr (n 45).
[54] Interview with a female senior judge (18November 2021)
[55] Interview with a female District Court Judge (25November 2021)

expand the pool from which judges are selected from. He notes that a training program that includes serving and retired judges, as well as professional teachers, would be beneficial for all judges.[56] The program can help judges with non-traditional backgrounds attain necessary skills and qualities. As Rosalind Dixon stated, by providing continuing education for judges, objections against the broader appointment model will not be well founded.[57]

Regarding appellate court judges, the literature and interview findings offer some examples of highly competent female judges who are former academic lawyers.[58] The interview findings show that in appellate courts, judges' legal knowledge is more important than their trial experiences. While, as I showed in chapter five, most New Zealand High Court judges are chosen from senior parts of the legal profession, particularly law firm partnerships. Hence, it appears that the appointing decision makers, who have considerable discretionary power in the appointment of High Court judges, tend to choose litigation lawyers from a narrow career background. This practice would disadvantage most female lawyers who do not have senior position in law firms and, in turn, decrease the proportion of female judges in appellate courts. As I discussed in chapter two, the 'quality of the judiciary' argument provides that a diverse bench represents a variety of perspectives[59] because judges with diverse backgrounds are more likely to consider and reflect various views and cultural experiences in their judicial decisions. A diverse bench in an appellate court is more likely to frame the facts of a case by considering social diversity and thus reach a judicial decision that reflects social diversity.[60] Thus, it is important to select appellate court judges from diverse career backgrounds to improve women's representation in senior courts.

There are anecdotal examples, which support this view. Brenda Hale, one of the most influential judges in the United Kingdom, started her legal career as a lecturer at the University of Manchester while she was a part-time barrister. In 1994, she was appointed to the Family Division of the High Court and adopted a feminist approach to decide cases.[61] Another famous example is Justice Marcia Neave of the Court of Appeal in Victoria who was the dean of law at the University of Adelaide and a professor at Monash and the Australian National Universities. Similar to Hale, she is a feminist judge who considers women's experiences in her legal reasoning.[62] Hale and Neave are two examples of well-known and influential appellate court judges from legal academic backgrounds who did not appear in courts frequently before attaining their judicial positions.

In addition, my interview findings indicate that legal academics can be exceptional appellate court judges. As professor Rosalind Dixon suggests, academic lawyers are most suitable for judicial positions in

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[56] Murray Gleeson, 'Judicial Selection and Training : Two Sides of the One Coin' (2003) 77 Australian law journal 591.

[57] Interview with Rosalind Dixon (20 July 2022)

[58] Rosemary C Hunter and Erika Rackley, *Justice for Everyone: The Jurisprudence and Legal Lives of Brenda Hale* (Cambridge University Press 2022); Rosemary Hunter, 'Justice Marcia Neave: Case Study of a Feminist Judge' in Ulrike Schultz and Gisela Shaw (eds), *Gender and judging* (Hart Publishing 2013).

[59] Elisabeth McDonald and others, 'Introducing the Feminist and Mana Wahine Judgments', *Feminist judgments of Aotearoa New Zealand: te rino: a two-stranded rope* (Hart Publishing, an imprint of Bloomsbury Publishing Plc 2017).

[60] ibid.

[61] Hunter and Rackley (n 58).

[62] Hunter (n 58).

intermediate appellate courts where their legal knowledge is at a premium rather than their procedural knowledge. She noted,

> Here is the paradox that one aspect of being a trial judge is being familiar with court practice and procedure. The people who are most familiar with practice and procedure are barristers. Many people who are risk averse about appointing solicitors, in-house lawyers, and academics want to appoint them to lower courts for them to prove themselves. But that is the kind of court to which they are least suited to the appointment because they are not practicing in the same way. Now, many solicitors who do litigation are equally capable of being appointed, they are very familiar, but say in-house or policy lawyers or academic lawyers are less so. So, if we are to make appointments, I think we have to be even bolder and appoint them straight to intermediate appellate courts where their legal knowledge is at a premium rather than their procedural knowledge.[63]

Interestingly, my interview findings support Dixon's argument. Three interview participants provided examples of successful appellate judges in New Zealand and Victoria who had academic or in-house roles before their appointment. For example, former female senior judge number 15 noted,

> It is not wise to take an individual who is, for example clever at property law and has never ever had trial experience, to put them straight into the criminal jurisdiction and have that person doing nothing but criminal trials. In my view, that is quite wrong...Because of specialisation, it is possible to take a candidate for appointment, for example, a woman who is a member of the academy. It would be difficult in all likelihood for her to go into criminal trials, but she would be able to sit in the Court of Appeal, depending on her area. Indeed, [there was an] express example in the Supreme Court of Victoria with the appointment of Justice Marcia Neave, who was an eminent highly regarded professor at Monash University who was appointed to the Court of Appeal and served on the court for nearly ten years. The academy does provide opportunities for that.[64]

According to former female senior judge number 15, the legal academy can offer potential competent appellate court judges. Hence, a lawyer who did not appear in courts frequently can be an eligible candidate for judicial positions in appellate courts. Similarly, when I asked whether academic and in-house lawyers can be competent judges, male District Court judge number ten provided some examples of High Court judges in New Zealand from diverse legal career backgrounds. He stated,

> The short answer is, yes, they can be very competent. I can think of some High Court judges, one of them in particular, who I know personally, never appeared in court. He basically retired as a commercial lawyer and was the Dean of a law school, and he got employed as a High Court judge and is a very good High Court judge…I know of other High Court judges who have worked in offices, in-house, for example, or academia, and have been appointed as judges and [are] very good judges.[65]

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[63] Interview with Rosalind Dixon (20 July 2022)
[64] Interview with a former female senior judge (27 April 2022)
[65] Interview with a male District Court Judge (18November 2021)

Thus, the trial experience is not of the utmost importance for High Court judges who appeal cases heard in lower courts. In response to the same question about academic and in-house lawyers' competence, female District Court judge number two noted,

> I personally think it is an untapped pool of expertise and particularly a pool of expertise that would increase diversity, both gender, and cultural diversity… So yes, there is a high percentage [of women who are] in-house [lawyers]. There is also a good percentage of women who are academics and who have proven ability in the law and could certainly make the transition from academic life onto the judiciary. I guess the history of going from court practice onto the bench is so ingrained that it takes imagination and confidence to be able to say, actually we can look at a pool in an academic world and draw on that. For sure, that would make a big difference in the High Court.[66]

According to her, appointing judges from diverse career backgrounds can improve various aspects of judicial diversity, such as gender and cultural diversity. In turn, judges who are chosen from non-traditional career backgrounds can change the practice of the judiciary. In the next part, I show that currently, appointing decision makers overlook the competence of a significant proportion of women working as in-house lawyers and academic lawyers.[67]

B. From bar to bench: Most New Zealand judges are former senior lawyers

My research on the career backgrounds of District and High Court judges shows that most judges are chosen from the senior parts of the legal profession. In general, there is a lack of data on career backgrounds of judges. To gain some information about District Court judges, I compiled a dataset of the backgrounds of 155 District Court judges. I collected publicly available information from different websites, such as the official website of the New Zealand Government.[68] The official website of the New Zealand Government has announced judicial appointments since 1996 and provided a brief description of the appointees' career backgrounds. For each judicial appointment, I collected the judge's name, gender, year of appointment, and career background. I uncovered their gender by referring to their names and the pronouns that have been used to describe them. Then, I analysed the data and identified some mutual features in judges' backgrounds, as discussed in the following.

The data indicates that having a senior position in the legal profession significantly increases the chance of being selected for a judicial position in District Courts. 63% of all District Court judges are former associates, senior associates, or partners. To be more specific, 55% of District Court judges are former law firm partners. This suggests that appointing decision makers have a traditional understanding of merit that, according to Sophie Turenne, is restricted to experienced lawyers of senior ranks,[69] while the senior ranks of the legal profession are mostly staffed by men. In 2020, only 34% of law firm partners were women.[70] A considerable percentage of women who are working as law firm employees (62.3%), barrister sole employees (62%), and in-house lawyers (66.2%) are less likely to be selected over a

[66] Interview with a female District Court Judge (25November 2021)
[67] Geoff Adlam, 'Snapshot of the Profession 2020' [2020] Lawtalk 26.
[68] https://www.beehive.govt.nz/
[69] Sophie Turenne, *Fair Reflection of Society in Judicial Systems: A Comparative Study*, vol 7 (Springer 2015).
[70] Adlam (n 67).

candidate with a senior rank.[71] Hence, most women lawyers are systematically excluded from the judicial appointment processes.

In addition, research on the New Zealand legal profession indicates that female lawyers with care responsibilities may prefer flexible working arrangements.[72] However, a minority of District Court judges are selected from legal careers that offer more flexible and predictable working arrangements. Only 3% of District Court judges were former members of different tribunals, and only one of them was a former university lecturer. It appears that there is an informal precedent of selecting judges from legal careers with inflexible and long-hours cultures. This practice may only benefit a limited proportion of female judges with senior positions. Hence, increasing the proportion of female judges did not result in diversity in judges' career backgrounds.

In addition, I investigate the backgrounds of senior judges to identify whether there is any preference regarding the career background of candidates for judicial positions in appellate courts. I compiled a dataset for 39 High Court judges and all of the Court of Appeal and Supreme Court judges. To do so, I obtained the profile of current judges from the Courts of New Zealand website.[73] I collected the name, gender, year of appointment, and career background of judges. As I explained in chapter three, all the Court of Appeal and Supreme Court judges are chosen from the judiciary. To be more specific, all Court of Appeal judges are former High Court judges, and all Supreme Court judges are former Court of Appeal judges. Thus, I only analysed the data on the career background of High Court judges and identified some mutual features in judges' backgrounds, discussed in the following.

The data shows that the majority of the High Court judges were chosen from male-dominated senior positions in the legal profession. 80% of High Court judges were former law firm partners, while only 34% of law firm partners are women.[74] Besides, 29.2% of High Court judges were former King's Counsels. As of 2021, 76% of King's Counsel were men and only 24% were women.[75] Therefore, most appellate court judges in New Zealand are chosen from male-dominated parts of the legal profession. This is consistent with my interview findings: as I have discussed in chapter 4, some appointing decision makers stated that seniority often reflects overall excellence. Hence, they have a traditional understanding of merit that disadvantages a high percentage of women in different parts of the legal profession. This narrow understanding of merit puts a significant number of women with diverse professional experiences at a disadvantage and contributes to the underrepresentation of women in the judiciary.

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[71] ibid.

[72] Judith K Pringle and others, *Women's Career Progression in Auckland Law Firms: Views from the Top, Views from Below* (Gender & Diversity Research Group 2014).

[73] The Courts of New Zealand, 'Judges' (*The Courts of New Zealand*) <https://www.courtsofnz.govt.nz/the-courts/high-court/judges/> accessed 22 September 2021; The Courts of New Zealand, 'Judges' (*The Courts of New Zealand*) <https://www.courtsofnz.govt.nz/the-courts/supreme-court/judges/> accessed 28 July 2022; The Courts of New Zealand, 'Judges' (*The Courts of New Zealand*) <https://www.courtsofnz.govt.nz/the-courts/court-of-appeal/judges/> accessed 28 July 2022.

[74] Adlam (n 67).

[75] Email from Crown Law office (26 January 2021)

Conclusion

In this chapter, I showed a correlation between gender-sensitive initiatives to support female lawyers and the increase in the percentage of women judges. Initiatives such as mentorship and training programmes would increase the proportion of female lawyers familiar with the necessary strategies to demonstrate their competence in judicial appointment processes. Networking programmes connect women from diverse legal career backgrounds. For example, networking events are a good opportunity for female in-house lawyers to connect with senior women lawyers and judges and become aware of the available judicial positions. Furthermore, female judges share their experiences of applying for their judicial positions, which benefits female lawyers in their own preparation for the judicial appointment processes. Additionally, the judiciary strives to make judicial positions more flexible for those with care responsibilities, who are mostly women. These initiatives focus on women's barriers before and after judicial appointment processes.

Most gender-sensitive initiatives in New Zealand are upstream measures applied by women lawyers' associations. Women lawyers' associations voluntarily run various programmes, such as mentorship, networking, and training programmes. Only some women lawyers' associations run these types of events, and they do so inconsistently. In addition, only a limited proportion of female lawyers may benefit from gender-sensitive initiatives of women lawyer's associates because each of the women lawyer's associations might run a different number of programmes in a year. For example, a female lawyer in Auckland may have more chances to take advantage of gender-sensitive initiatives than a female lawyer in Invercargill, say. Hence, there is a lack of nationwide and consistent gender-sensitive policies to improve women's representation in the judiciary.

Furthermore, in chapter four, I outlined aspects of the judicial appointment processes that significantly disadvantage female candidates. However, none of the gender-sensitive initiatives addresses those factors or reform the appointment processes. Rather, they focus on women's challenges before and after taking a judicial position. This limited approach might not significantly change the outcome of the appointment process. Therefore, only women with strong social networks and similar backgrounds might be selected for judicial positions. In this chapter, I have shown that the gender-sensitive initiatives failed to change the appointing authorities' understanding of merit. Therefore, most female lawyers are selected from senior parts of the legal profession. This suggests that the gender-sensitive initiatives had a limited impact on increasing women's representation in the judiciary, mostly advantaging senior women lawyers who overcame the obstacles in the legal profession and judicial appointment processes.

Chapter seven
Is setting a target an effective alternative solution?
Lessons from Victoria

Introduction

The previous chapter focused on gender-sensitive initiatives used in New Zealand to increase women's representation in the judiciary. I identified six initiatives to encourage more women to apply for judicial positions and showed a connection between these initiatives and the gradual increase in the proportion of women judges in New Zealand. I explained that the gender-sensitive initiatives failed to address women's issues during the judicial appointment processes and did not change the appointing authorities' views about merit.

In this chapter, I aim to identify an effective alternative strategy to increase the percentage of female judges in New Zealand. I explore a result-based gender-sensitive initiative applied in Victoria to enhance the appointment of women judges. The first section shows that the numerical representation of women in Victoria is higher than in New Zealand and outlines the similarities and differences between the court system of the two jurisdictions.

In the first chapter, I explained the importance of exploring the sociolegal context of a jurisdiction and carefully identifying the similarities and differences between the home jurisdiction and the foreign jurisdiction. Section two of this chapter highlights the differences between the appointment processes of the County Court and Supreme Court judges in Vitoria, which is based on a 'tap on the shoulder system', with an open application system in New Zealand.

Section three sheds some light on the interconnections between the two jurisdictions. I explain that in both jurisdictions, the judicial appointments are at the discretion of the Attorney-General. In addition, both jurisdictions have the same problem of the low percentage of women in senior positions in the legal profession.

After exploring the sociolegal context of Victoria, in the last section, I focus on the result-based gender-sensitive policy to increase the percentage of women judges. I refer to my interview findings and statistics to show how the gender-sensitive policy was implemented and analyse its impact on women's representation in the judiciary.

I. The numerical representation of women in the Victorian courts

This thesis focuses on the numerical representation of women in the judiciary. In this section, I show that Victoria has a higher proportion of women judges compared to New Zealand and may serve as a

valuable case study for implementing strategies to increase the percentage of women judges in New Zealand.

I should note that in Victoria, there are two types of courts: Commonwealth Courts and State Courts, as illustrated in Figure three. While this thesis is limited to the State Courts of Victoria, I provide a brief explanation of the jurisdiction of each Commonwealth Court to provide a comprehensive overview of Victoria's court system.

A. Commonwealth Courts and State Courts

The Commonwealth Courts of Australia include the Federal Circuit and Family Court, Federal Court, and High Court of Australia.[1] In 2021, only 39.5% of the Commonwealth Court's judges were women.[2] The High Court of Australia, established by section 71 of the Australian Constitution, is the highest court in the Australian court system with appellate and original jurisdiction. The appellate jurisdiction of the High Court can hear appeals from all judgments, decrees, orders, and sentences,

i. of any Justice or Justices exercising the original jurisdiction of the High Court;
ii. of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;
iii. of the Inter-State Commission, but as to questions of law only;
and the judgment of the High Court in all such cases shall be final and conclusive.[3]

In addition, the High Court has original jurisdiction in any matter

i. arising under any treaty;
ii. affecting consuls or other representatives of other countries;
iii. in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
iv. between States, or between residents of different States, or between a State and a resident of another State;
v. in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.[4]

The Federal Court's jurisdiction includes 'almost all civil matters arising under Australian federal law and some summary and indictable criminal matters.' Generally, it hears matters such as taxation matters, complex area of intellectual property, and maritime claims.[5] The Federal Circuit and Family Court of

[1] RA Hughes, GWG Leane and Andrew Clarke, *Australian Legal Institutions: Principles, Structure and Organisation* (2nd edn, Lawbook Co 2003).
[2] AIJA, 'AIJA Judicial Gender Statistics Number and Percentage of Women Judges and Magistrates at June 2021' (The Australasian Institute of Judicial Administration 2021).
[3] The Australian Constitution, s73
[4] The Australian Constitution, s76
[5] the Federal Court of Australia, 'The Court's Jurisdiction' (2022) <https://www.fedcourt.gov.au/about/jurisdiction> accessed 25 October 2022.

Australia, established in 2021, hears issues such as divorce applications, the majority of first instance family law applications, and complex parenting disputes.[6]

I focus on the proportional representation of women in the Victorian State Courts because Victoria has the highest percentage of female judges in Australia (46.9%), compared to Commonwealth Courts and other State Courts.[7]

In general, the state courts of Victoria include three generalist courts and some specialist courts. The courts with general jurisdiction are the Supreme Court, the County Court, and the Magistrates' Court. The specialist courts are courts with special jurisdiction, such as the Children's Court, and the Koori Court.[8] Since my research centres on female judges in the courts with general jurisdiction, in this part, I explain the structure, jurisdiction, and gender diversity of the Supreme Court, the County Court, and the Magistrates' Court.

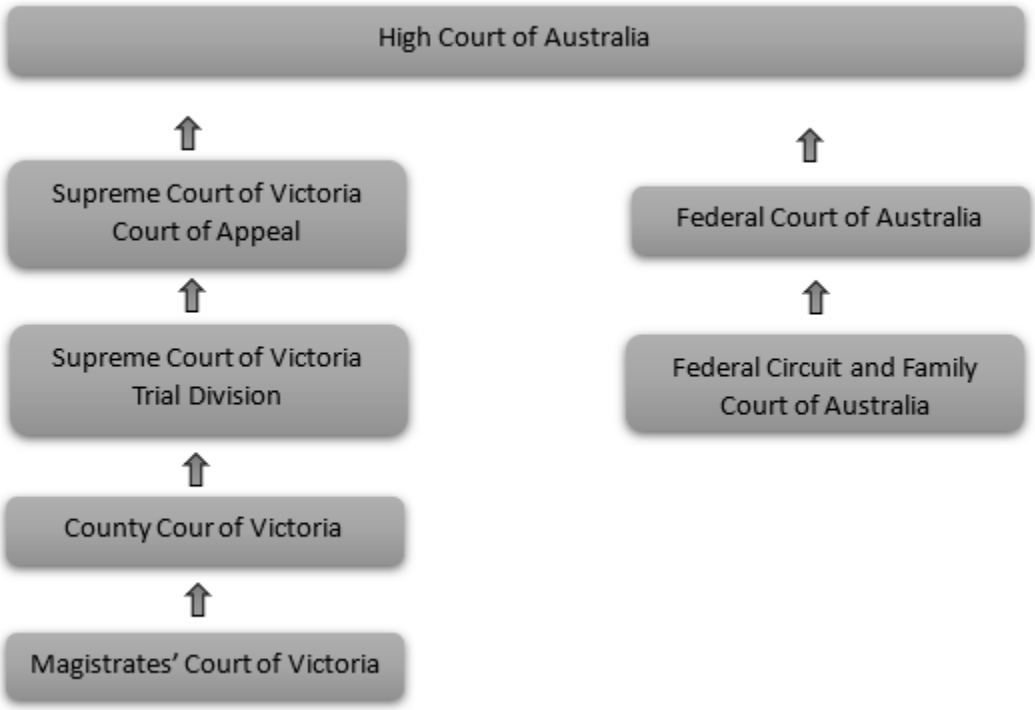

Figure 3 The Victorian Court System

[6] National Domestic and Family Violence Bench Book, 'Jurisdiction of FCFCA' (2022) <https://dfvbenchbook.aija.org.au/foundational-information/jurisdiction-of-fca-fcca/#:~:text=Under%20the%20legislation%2C%20the%20Family,commenced%20on%201%20September%202021.> accessed 25 October 2022; Federal Circuit and Family Court of Australia Act2021, s132 (1).

[7] AIJA (n 2).

[8] State of Victoria, 'Courts and Tribunals' (2022).

B. Magistrates' Court of Victoria

The Magistrates' Court is the first instance court of Victoria with general jurisdiction.[9] The Magistrate's Court has the highest percentage of women in the Victorian judiciary. In 2021, 52.8% of all the Magistrates were women.[10] Sitting in 51 locations,[11] the Magistrate's Court hears approximately 90 percent of all cases in Victoria.[12] The court hears criminal, civil, and family matters.[13] There is no jury in the Magistrates' Court. Therefore, one judicial officer, called the Magistrate, hears different cases.[14]

Although generally the Magistrates' courts of Victoria and the District Court of New Zealand are the first-instance courts[15] in the two jurisdictions, they do not have similar functions. The Magistrates' court's jurisdiction is more limited than the District Court of New Zealand. For example, the Magistrates' Court must hear civil cases up to the value of $100,000,[16] and property matters up to the value of $20,000 or unlimited value if the parties agree with the court hearing the matter or they agree about the division of the property,[17] while the New Zealand District Court hears property matters up to the value of $350,000.[18]

Regarding the criminal jurisdiction, the Magistrates' court hears all summary offences, some indictable offences, and conducts committal proceedings.[19] Summary offences refer to less serious offences. They are simple offences, such as disorderly conduct, some assault offences, driving offences, and wildlife damage to property.[20] Indictable offences are more serious offences. Some examples of indictable offences are homicide, rape, sexual assault, robbery, and criminal damage to property.[21] The Magistracies' Court can hear some of the indictable offences within its jurisdiction. Based on the Sentencing Act 1991, the Magistrates' court can impose a maximum total sentence of two years imprisonment for a single offence,[22] five years imprisonment for multiple offences,[23] and/or fines of up to 500 penalty units for individuals[24] and up to 2,500 penalty units for corporations.[25] Hence, offences

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[9] Kathy Mack and Sharyn Roach Anleu, 'Entering the Australian Judiciary: Gender and Court Hierarchy' (2012) 34 Law & policy 313.

[10] AIJA (n 2).

[11] Court Services Victoria, 'About Us' (*Magistrates' Court of Victoria*, 2022) <https://www.mcv.vic.gov.au/about-us> accessed 27 April 2022.

[12] Ian L Gray, 'The People's Court : Into the Future' (Institute of Judicial Administration 2003).

[13] Court Services Victoria, 'The Court System' (*Magistrates' Court of Victoria*, 24 March 2022) <https://www.mcv.vic.gov.au/court-system> accessed 24 March 2022.

[14] Court Services Victoria, 'About Us' (n 11).

[15] I should note that in some cases, the County Court of Victoria and the High Court of New Zealand are the first-instance courts. For more information, see chapter 1.

[16] Court Services Victoria, 'Civil Matters' (*Magistrates' Court of Victoria*, 24 March 2022) <https://www.mcv.vic.gov.au/civil-matters> accessed 24 March 2022.

[17] Court Services Victoria, 'Family Law' (*Magistrates' Court of Victoria*, 24 March 2022) <https://www.mcv.vic.gov.au/family-matters/family-law> accessed 24 March 2022.

[18] ibid, s 74.

[19] Magistrates' Court Act 1989, s25.

[20] Court Services Victoria, 'Summary Offences' (*Magistrates' Court of Victoria*, 24 March 2022) <https://www.mcv.vic.gov.au/criminal-matters/criminal-offences/summary-offences> accessed 24 March 2022.

[21] The Crimes Act 1958.

[22] The Sentencing Act 1991, s113.

[23] ibid, 113b.

[24] ibid, a112A.

that have higher imprisonment and maximum fines must be heard by higher courts. For example, murder, rape, armed robbery, and serious drug offences must be heard by higher courts. The Magistrate's Court proceeds indictable offences the same way as summary hearings.[26] It means that one judicial officer, without a jury, hears the case. Meanwhile, the New Zealand District Court has a broader criminal jurisdiction, because it can hear category 1, 2, and 3 offenses[27] and holds 90% of jury trials in New Zealand.[28]

C. County Court of Victoria

The County Court has a lower percentage of female judges compared with the Magistrates' Court. Nevertheless, it is still relatively diverse. There is almost a 5% gap between the proportion of men and women County Court judges, as 45.8% of County Court judges are women.[29]

The Victorian County Court was established in 1852. Until 1969, the County Court had only civil jurisdiction, but since then it hears serious civil and criminal cases and appeals of some criminal cases.[30] The Criminal Division of the County Court has jurisdiction to hear and determine more serious offences, including all indictable offences[31] except murder, murder related offences, and treason.[32] A judge and jury hear and decide criminal cases.[33] In addition, the County Court appeals criminal cases from the Magistrates' Court[34] and the Criminal and Family Divisions of the Children's Court.[35] It appears that the County Court's jurisdiction is more similar to the New Zealand District Courts because the New Zealand District Court has criminal jurisdiction to hear category 1, 2, and 3 offences that include crimes, such as aggravated assault and dangerous driving.[36]

The County Court has unlimited civil jurisdiction. It has two divisions, including Commercial and Common Law divisions[37] that hear cases over the value of $100,000.[38] The Commercial Division hears cases relating to contracts, debt recovery, property, and trust. The Common Law Division hears cases

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[25] ibid, 113D 1B.

[26] Court Services Victoria, 'Indictable Offences' (*Magistrates' Court of Victoria*, 24 March 2022).

[27] Criminal Procedure Act 2011, s 71-73.

[28] District Court of New Zealand, 'Jury Trials' <https://www.districtcourts.govt.nz/reports-publications-and-statistics/annual-reports/page-2342/jury-trials/#:~:text=A%20defendant%20has%20the%20right,judges%20hold%20jury%20trial%20warrants.> accessed 25 October 2022.

[29] AIJA (n 2).

[30] The County Court of Victoria, 'History of the Court' (*County Court Victoria*, 2021) <https://www.countycourt.vic.gov.au/learn-about-court/history-court> accessed 28 April 2022.

[31] County Court Act 1958, 36A.

[32] Russell Smyth and Vinod Mishra, 'The Publication Decisions of Judges on the County Court of Victoria' (2009) 85 The Economic record 462.

[33] The County Court of Victoria, 'Court Divisions' (*County Court Victoria*, 2022) <https://www.countycourt.vic.gov.au/learn-about-court/court-divisions> accessed 25 March 2022.

[34] The County Court of Victoria, 'Criminal Division' (*County Court Victoria*, 2022) <https://www.countycourt.vic.gov.au/going-court/criminal-division> accessed 25 March 2022.

[35] The County Court of Victoria, 'Court Divisions' (n 33).

[36] Criminal Procedure Act 2011, s 71-73.

[37] The County Court of Victoria, 'Court Divisions' (n 33).

[38] Victoria Legal Aid, 'Victoria's Courts and Tribunals' (*Victoria Legal Aid*, 2022) <https://www.legalaid.vic.gov.au/find-legal-answers/courts-and-legal-system/victorias-courts-and-tribunals> accessed 25 March 2022.

about damages and compensations. In the Commercial and Common Law divisions, one judge hears all the cases, unless one of the parties requests that a jury also hears the case.[39]

Although the County Court's jurisdiction has some similarities with the New Zealand District Court, they do not have similar functions. The New Zealand District court hears civil cases that the amount claimed or the value of the property in dispute is up to $350,000.[40] In addition, the court deals with cases related to family law statutes and serious criminal cases except for murder and manslaughter when an offender is a young person aged 12 to 17 years old,[41] whereas, in Victoria, the Federal Circuit and Family Court of Australia deal with the majority of first instance family law applications.[42] Therefore, The County Court of Victoria is not functionally equivalent to the New Zealand District Court.

D. Supreme Court of Victoria

The Supreme Court of Victoria has the lowest percentage of female judges in the Victorian court system. In 2021, only 31.3% of Supreme Court judges were female.[43] Thus, women are not well represented in the Supreme Court.

The Supreme Court of Victoria has two parts, including the Court of Appeal and the Trial Division.[44] There is a particular hierarchy of judges in the Supreme Court. Section 78B of the Constitution Act specifies the judges' precedence. Based on this section, judges have the following order: The Chief Justice, the president of the Court of Appeal, the judges of the Court of Appeal, and the judges of the Trial Division. The Chief Justice is a member of both divisions.[45] The below diagram shows the Supreme Court structure.

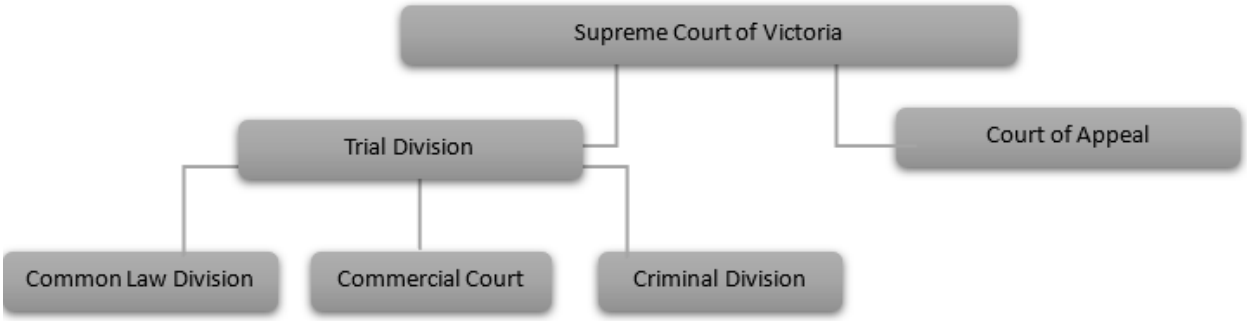

Figure 4 The Supreme Court Structure

[39] The County Court of Victoria, 'Court Divisions' (n 33).
[40] ibid, s 74.
[41] Ministry of Justice, 'Youth Court/Te Kōti Taiohi o Aotearoa'.
[42] National Domestic and Family Violence Bench Book, 'Jurisdiction of FCFCA' (2022) <https://dfvbenchbook.aija.org.au/foundational-information/jurisdiction-of-fca-fcca/#:~:text=Under%20the%20legislation%2C%20the%20Family,commenced%20on%201%20September%202021.> accessed 25 October 2022; Federal Circuit and Family Court of Australia Act2021, s132 (1).
[43] AIJA (n 2).
[44] ibid, 75A (1).
[45] Greg Taylor, *The Constitution of Victoria* (Federation Press 2006).

1) Trial Division

The Trial Division of the Supreme Court consists of three divisions, including the Common Law Division, the Criminal Division, and the Commercial Court.[46] It seems that the Trial Division of the Supreme Court has a jurisdiction similar to the New Zealand High Court. The Criminal Division of the Trial Division has original jurisdiction to hear some serious criminal cases, such as murder, manslaughter, and treason. A judge and jury hear criminal cases when the accused person does not plead guilty.[47] The Trial Division's criminal jurisdiction is similar to the New Zealand High Court that hears the most serious criminal cases,[48] such as the category four offenses.[49]

In addition, the Trial Division hears complex civil cases involving any amount of money. Civil cases may be heard either by a judge or by a judge and jury. When a judge and jury hear the case, the jury considers if the plaintiff established a claim and decides how much money should be awarded to the plaintiff.[50] Similarly, the New Zealand High Court has original civil jurisdiction over civil cases that involve amounts more than $350,000.[51]

The Common Law Division has original jurisdiction to hear cases related to matters such as tort, contract law, claims about wills and estates, and breaches of employment.[52] The Commercial Court covers a diverse range of complex commercial cases, such as claims related to technology, engineering, insurance, banking, intellectual property, and taxation.[53]

Furthermore, the Trial Division has appellate jurisdiction. It appeals civil cases form the Magistrates' Court and the Children's Court.[54] Similarly, the New Zealand High Court appeals the decisions of the civil and criminal decisions of the District Court[55] and the Family Court and the Youth Court.[56] Therefore, it appears that Trial Division of the Victorian Supreme Court has similar function to the High Court of New Zealand.

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[46] Supreme Court of Victoria, 'How the Court Works' (*Supreme Court of Victoria*, 2022) <https://www.supremecourt.vic.gov.au/about-the-court/how-the-court-works> accessed 6 April 2022.

[47] Supreme Court of Victoria, 'Criminal Division' (*Supreme Court of Victoria*, 2022) <https://www.supremecourt.vic.gov.au/law-and-practice/areas-of-the-court/criminal-division> accessed 7 April 2022.

[48] The Office of the Chief Justice, 'Annual Report' (2022).

[49] ibid, s 74.

[50] Supreme Court of Victoria, 'How the Court Works' (n 46).

[51] Grant Morris, *Law Alive: The New Zealand Legal System in Context* (4th edn, Thomson Reuters (Professional) Australia Pty Limited 2019).

[52] The County Court of Victoria, 'Common Law Division' (*County Court Victoria*, 2022) <https://www.countycourt.vic.gov.au/going-court/common-law-division> accessed 25 March 2022.

[53] Supreme Court of Victoria, 'Commercial Court' (*Supreme Court of Victoria*, 2022) <https://www.supremecourt.vic.gov.au/law-and-practice/areas-of-the-court/commercial-court> accessed 7 April 2022.

[54] Supreme Court of Victoria, 'How the Court Works' (n 46); Taylor (n 45).

[55] the District Court Act 2016, S124.

[56] Morris (n 51).

2) Court of Appeal

The Court of Appeal appeals civil and criminal cases from the County Court, the Trial Division of the Supreme Court, and some cases of the Victorian Civil and Administrative Tribunal.[57] The Court of Appeal usually consists of three judges[58] without a jury. 75A (2) of the Constitution Act 1975 regulates the structure of the Court of Appeal,

> 'The Court of Appeal consists of — (a) the Chief Justice, who is the senior member of the Court of Appeal; (b) the President of the Court of Appeal; (c) the other Judges of Appeal; (d) the additional Judges of Appeal appointed or acting under section 80B.' The Supreme Court's decisions can be appealed at the High Court of Australia.[59]

It appears that the Court of Appeal is functionally equivalent to the New Zealand Court of Appeal that consists of three judges[60] and hears appeals from the High Court[61] and in serious criminal cases directly from the District Court.[62] It is important to note that although there are similarities between the New Zealand Court of Appeal and the Victorian Court of appeal, they do not have identical functions. For example, the New Zealand Court of Appeal hears appeals from the Employment Court and the Māori Appellate Court.[63]

II. Differences between Victoria and New Zealand

To achieve the aim of comparative research, it is essential to thoroughly explore the specific context of the compared jurisdiction. This enables a deeper understanding of that jurisdiction, which allows for a more comprehensive comparison.[64] In this section, I explain the judicial appointment processes in Victoria to provide sufficient context for the comparative analysis of gender-sensitive policies in Victoria and their impact on women's representation in the judiciary. I demonstrate the notable distinctions between the tap on the shoulder method of appointing County Court and Supreme Court judges in Victoria and the open application system used for appointing judges in New Zealand.

I should note that in Victoria, the process for the appointment of Magistrates differs from County Court and the Supreme Court judges. Therefore, I explain the judicial appointment processes in two parts.

A. Appointment of Magistrates

I start this part by explaining the appointment criteria for Magistrates. The legal appointment criteria for magistrates are set out in section 7 (3) and 7 (4) of the Magistrates' Court Act 1989.

Section 7 (3) of the Magistrates' Court Act 1989 requires that,

> A person is not eligible for appointment as a magistrate unless he or she —
>
> (a) is or has been a judge or magistrate of —

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[57] Supreme Court of Victoria (n 26), Supreme Court Act 1986, s10.
[58] Supreme Court Act 1986, s 11(1).
[59] Commonwealth of Australia Constitution Act 1977, S 73 (ii).
[60] ibid, s47.
[61] Senior Courts Act 2016, s56.
[62] Morris (n 51).
[63] ibid.
[64] See chapter 1.

(i) the High Court of Australia or of a court created by the Parliament of the Commonwealth; or

(ii) a court of Victoria or of another State or of the Northern Territory or the Australian Capital Territory; or

(b) is an Australian lawyer of at least 5 years' standing

Therefore, an eligible candidates must have at least 5 years of work experience in the legal profession. Moreover, based on section 7 (4) of the Magistrates' Court Act 1989, an eligible candidate should not be over the age of 70 years. In addition to the legal criteria for judicial appointments, the Judicial College of Victoria published a framework of qualifications and abilities of Victorian judges and Magistrates. The framework is publicly available for the potential candidates and interested people at the Victoria State Government website.[65]

All potential candidates who meet the required criteria can submit an expression of interest. To do so, they should register at www.boards.vic.gov.au to be notified of the judicial vacancies.[66] The government seeks expressions of interest whenever a vacancy arises in the Magistrates' Court, followed by the establishment of an advisory panel.[67] According to female judge number 12,[68] the panel consists of the Chief Magistrate, a representative of the Department of Justice, and the Crown Counsel. The panel evaluates the expressions of interest, interviews short-listed candidates and contacts the candidates' referees. Finally, the panel presents a report to the Attorney-General, including candidates' assessments and a list of recommended candidates for the appointment. It is worth noting that the panel's report is not binding on the Attorney-General. The Attorney-General selects his or her preferred candidate and seeks approval from the Cabinet. Following the approval of the Cabinet, the Attorney-General officially recommends the candidate to the Governor in Council that appoints judges.[69]

B. Appointment of County Court and Supreme Court judges

The minimum appointment criterion for County Court and Supreme Court judges is 5 years of working experience as an Australian lawyer, set out in the Constitution Act 1975 and the County Court Act 1958. In addition, the eligible candidates must be under the age of 70 years.[70]

Section 75B of the Constitution Act 1975 governs the appointment criteria for Supreme Court judges. It requires that,

(1) A person is not eligible for appointment as a Judge of the Court unless he or she —

(a) is or has been a judge of —

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[65] State of Victoria, 'Judicial Appointments' (*Justice and Community Safety*, 2020) <https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/judicial-appointments> accessed 20 April 2022.

[66] ibid.

[67] The Victorian Government Department of Justice, 'Reviewing the Judicial Appointments Process in Victoria, Discussion Paper' [2010].

[68] Interview with a female Judge (1 April 2022)

[69] The Victorian Government Department of Justice, 'Reviewing the Judicial Appointments Process in Victoria, Discussion Paper' [2010].

[70] Nina Hudson, 'Appointment, Role and Powers of Judges' [2019] County Court of Victoria, Fact Sheet 13.

(i) the High Court of Australia or of a court created by the Parliament of the Commonwealth; or

(ii) a court of Victoria or of another State or of the Northern Territory or the Australian Capital Territory; or

(b) has been admitted to legal practice in Victoria, another State, the Northern Territory or the Australian Capital Territory, or has been enrolled as a legal practitioner of the High Court of Australia, for not less than 5 years.

In addition, division 3 (1A) of the County Court Act 1958 states that,

A person is not eligible for appointment as Chief Judge or a judge unless the person —

(a) is or has been a judge or magistrate of —

(i) the High Court of Australia or of a court created by the Parliament of the Commonwealth; or

(ii) a court of Victoria or of another State or of the Northern Territory or the Australian Capital Territory; or

(b) is an Australian lawyer of at least 5 years' standing

The official website of the Victorian Government notes that the government seeks expressions of interest from qualified candidates for judicial positions in the Magistrates' Court, County Court, and Supreme Court.[71] However, all the Victorian judges interviewed stated that, in practice, the Attorney-General does not seek expressions of interest.[72] Therefore, the appointment processes for County Court and Supreme Court judges are based on the tap on the shoulder system.

The official website of the Department of Justice and Community Safety does not explain the process of appointing County Court and Supreme Court judges. Therefore, I refer to my interview findings and a discussion paper published in 2010 to explore the appointment process.[73] First, the Attorney-General consults with the head of the jurisdiction of the vacant judicial position. They discuss important skills and qualities for the judicial position and the needs of the court. Then, the Attorney-General evaluates the people who have been identified as potential candidates. He or she consults with diverse individuals and bodies, including 'the Victorian Bar, the Law Institute of Victoria, Victoria Legal Aid, and the Victorian Government Solicitor.'[74] According to former female senior judge number 15,[75] the scope of consultation depends on the Attorney-General. An Attorney-General may do a broad consultation with diverse associations and individuals, while another one may consult only a limited number of people or bodies. Then, the Attorney-General considers the feedback and comments from the consultations and

[71] State of Victoria (n 65).

[72] Interview with a female Judge (1 April 2022); Interview with a female Judge (28 March 2022); Interview with a female senior judge (8 April 2022); Interview with a former female senior judge (27 April 2022); Interview with a former senior authority (26 July 2022)

[73] The Victorian Government Department of Justice, 'Reviewing the Judicial Appointments Process in Victoria, Discussion Paper' [2010].

[74] ibid, 8.

[75] Interview with a former female senior judge (27 April 2022)

the results of probity checks. In addition, the Attorney-General arranges an in-person meeting with the chosen candidate before making a final decision to recommend the candidate for the appointment.[76]

Finally, the Attorney-General chooses and presents a candidate to the Cabinet.[77] It is uncommon for the Cabinet to overrule the Attorney-General 's recommendations.[78] When the Cabinet approves the candidate, the Attorney-General officially recommends him or her to the Governor in Council.[79]

The Governor, as the King's representative and the Head of State in Victoria, appoints County Court and Supreme Court judges.[80] In the state of Victoria, the Attorney-General plays a pivotal role in the judicial appointment processes. They have the authority to offer eligible lawyers judicial positions in the County Court and Supreme Court and may even encourage them to take the position. In contrast, in New Zealand, the process is more open, as all interested individuals are required to apply for a judicial position and are then assessed by senior judges and the Attorney-General. This ensures equal opportunity for all to apply for judicial positions, as opposed to a tap on the shoulder system, which could potentially exclude certain individuals who are not offered a position.

III. Similarities between New Zealand and Victoria

In this section, I point out two similarities between the judicial appointment processes in New Zealand and Victoria. In both jurisdictions, the Attorney-General has a significant discretionary power to appoint judges. Therefore, achieving equal representation of women depends on the views of the Attorney-General. Moreover, in both jurisdictions, judges are chosen from male dominated parts of the legal profession; this leads to similar challenges in increasing the proportion of women judges in the two jurisdictions. This section elaborates on these two issues.

A. The discretion of the Attorney-General in Victoria

In Victoria, the Attorney-General plays a central role in appointing judges. The Department of Justice and Community Safety manages all the judicial appointments for the Attorney-General.[81] In this section, I show that the judicial appointment process, and therefore improving the proportion of female judges, depends on the views of the Attorney-General. I show that the Attorney-General has considerable discretionary power in the appointment processes. Moreover, the Attorney-General as a cabinet minister has strong connections with the executive. Therefore, the Attorney-General's political perspectives can impact the proportional representation of women in the judiciary. This is a similar issue in New Zealand.[82]

The Attorney-General enjoys a significant discretion in the judicial appointment processes. As I explained in the previous section, there is a formal process for the appointment of Magistrates that consists of advertising expressions of interest and establishing a panel to interview and assess the

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[76] The Victorian Government Department of Justice (n 67).

[77] The Victorian Government Department of Justice, 'Reviewing the Judicial Appointments Process in Victoria, Discussion Paper' [2010].

[78] Taylor (n 45).

[79] The Victorian Government Department of Justice, 'Reviewing the Judicial Appointments Process in Victoria, Discussion Paper' [2010].

[80] Hudson (n 70).

[81] State of Victoria (n 65).

[82] See chapter 2.

candidates. The panel provides a report to the Attorney-General which is not binding on him or her.[83] Therefore, the Attorney-General can select a candidate who was not suggested by the panel.

Furthermore, I explained that there is a tap on the shoulder system for the appointment of County Court and Supreme Court judges. The Attorney-General consults with the head of jurisdiction and other associations to identify potential candidates. The scope of the consultation depends on the Attorney-General.[84] Hence, the Attorney-General has significant discretion to conduct a consultation and select his or her preferred person to offer a judicial position. In the absence of a formal appointment process, the Attorney-General enjoys a significant discretionary power to select County Court and Supreme Court judges.

I should note that although the Attorney-General must introduce a candidate to the cabinet;[85] in practice, it is uncommon for the Cabinet to overrule the Attorney-General 's recommendations.[86] Thus, it seems that the Attorney-General has unstructured discretionary power in judicial appointment processes.

The Attorney-General, as the main appointing decision maker has strong connections with the executive. In fact, the Attorney-General has six distinct functions. He or she has 'the usual ministerial/ administrative functions, political functions as a cabinet minister, functions relating to the judiciary, the chief legal representative of the State, the chief legal advisor to the government, and miscellaneous public interest functions.'[87] Therefore, the Attorney-General as a cabinet minister has a political role in the legal system. He or she is an elected member of parliament and provides legal advice on government policies, developing the legal system, and law reforms.[88]

The Attorney-General as a cabinet minister has a political role in the legal system.[89] Meanwhile, he or she, as the first law officer of Victoria appoints judges.[90] Thus, the Attorney-General has schizophrenic positions of both a law officer and a politician, similar to the political and apolitical roles of the Attorney-General in New Zealand. Thus, although by convention, the Attorney-General should not be influenced by the government's policy considerations,[91] there is a risk that improving numerical representation of women depends on the political perspectives of the government. My interview findings indicate that in Victoria the political perspectives of the government have a significant impact on improving the representation of women in the judiciary. According to former female senior judge number 15, judicial appointment is in fact a political process and improving judicial diversity depends on the Attorney-

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[83] The Victorian Government Department of Justice, 'Reviewing the Judicial Appointments Process in Victoria, Discussion Paper' [2010].

[84] Interview with a former female Chief Judge (27 April 2022)

[85] The Victorian Government Department of Justice, 'Reviewing the Judicial Appointments Process in Victoria, Discussion Paper' [2010].

[86] Taylor (n 45).

[87] ibid, 177.

[88] Victoria Law Foundation, 'Government Institutions' (2022) <https://victorialawfoundation.org.au/for-the-community/learn-about-victorias-legal-system/explaining-victorias-legal-sector/government-institutions> accessed 26 October 2022.

[89] ibid.

[90] The Victorian Government Department of Justice (n 67).

[91] LJ King, 'The Attorney-General, Politics and the Judiciary' (2000) 74 Australian law journal 444.

General.[92] Likewise, female senior judge number 14 explained the impact of political perspectives of the government on the percentage of female judges. She stated,

> In the Supreme Court of Victoria, the appointments are made by the Governor in Council, on the recommendation of the Attorney-General. So, a significant component of the appointment decisions rest with the Attorney's own view, and certainly that has varied depending on the political party who's been in power. If you look at the appointments of both younger people and women, you can tell something of what the government of the day views as its priorities. [93]

According to female Supreme Court judge number 14, the political views and perspectives of the Attorney-General has a distinct impact on judicial diversity. It appears that improving the percentage of women judges depends on the preferences of the government. Female barrister number 19 stated,

> Why are there so many women judges in Victoria? I think it is the will of the government. We have had a Labour government in Victoria for a long time. I just think that it is a political thing...the Labour government is devoted to gender diversity, and other diversity. It is not just mouthing the word of diversity; it is actually wanting it to happen and making it happen. Whereas the conservative side of politics just do not feel comfortable appointing women.[94]

According to female barrister number 19, political considerations of the government and Attorney-General impact the proportional representation of women in the judiciary. This implies that improving women's representation in the judiciary is contingent upon the political views of the Attorney-General. Similarly, in chapter two, I explained that in New Zealand, the judicial appointments are at the discretion of the Attorney-General. Consequently, it can be concluded that the Attorney-General is a key actor who can influence women's representation in the judiciary in both jurisdictions.

B. Judges are chosen from the legal profession

As previously discussed, taking a judicial position in Victoria requires a minimum of five years of standing as a lawyer. This means that candidates must be drawn from the Victorian legal profession, and the gender diversity of this profession can significantly impact the proportion of female judges. In this section, I show that there is a low percentage of women lawyers with senior positions in Victoria, similar to New Zealand. This suggests that the lack of gender diversity in the senior ranks of the legal profession is a barrier to achieving gender parity in the judiciary in both jurisdictions.

The majority of Victorian barristers, 68%, are male.[95] Barristers are independent lawyers whose specialty is dispute resolution and advocacy before the court. Victorian lawyers become barristers by joining the Victoria Bar. They must pass the Bar's entrance examination and take the Bar Readers' Course. In the course, they learn advocacy skills, ethics, and rules. In addition, they must practice in pupillage or 'Read' for nine months with a barrister who has at least 10 years' working experience.[96] Junior barristers

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[92] Interview with a former female senior judge (27 April 2022)

[93] Interview with a female senior judge (8 April 2022)

[94] Interview with a female barrister (5 July 2022)

[95] Victorian Legal Services Board + Commissioner, 'Delivering More Together' (2021) Annual.

[96] Victorian Bar, 'What Is a Barrister?' (*Victorian Bar*, 2022) <https://www.vicbar.com.au/public/about/what-barrister> accessed 8 April 2022.

can advance to senior barristers by gaining experience and reputation. Eventually, they can progress to become King's Counsel (KC), known as 'taking silk.'[97] Each barrister must work independently. It means that they are not allowed to practice in partnership, as an employee, or as the employer of any legal practitioner.[98] In Victoria, a low proportion of female lawyers are practicing as barristers.[99]

The majority of lawyers in the Victorian legal profession work as solicitors.[100] Solicitors do general legal work, except advocacy before courts. For example, they provide matters for trial, legal advice, and undertake conveyancing work.[101] Solicitors directly contact and work with their clients and render legal services to them.[102] Traditionally, clients contact solicitors. Then if they need the expertise of a barrister, they may appoint a barrister.[103] Therefore, solicitors engage barristers to work on a case and appear in court on behalf of one of the litigants.[104] Solicitors can have a private practice or work in partnership with other lawyers. They can also work for the private sector or the government.[105]

As of 2021, the majority of solicitors, 55%, are women. However, a low proportion of them has senior positions in law firms. Only 36% of lawyers with a principal certificate are women, while a significant percentage of women, 44%, hold an employee certificate.[106] As previously discussed in chapter three, the legal profession in New Zealand faces a similar issue of low representation of women in senior positions. Therefore, it appears that both jurisdictions face a common challenge in ensuring equal representation of women in the judiciary, which requires addressing the issue of gender diversity in the senior ranks of the legal profession.

IV. Gender-sensitive policies in Victoria

The gender-sensitive initiatives and policies of New Zealand and Victoria are comparable as they share a common goal of addressing the issue of under-representation of women in the judiciary. This comparative analysis offers valuable insights into the effectiveness of gender-sensitive policies in promoting greater representation of women in the judiciary. The interview findings show that New Zealand and Victoria take significantly different approaches to enhancing judicial diversity. In the previous chapter, I outlined the connection between gender-sensitive initiatives in New Zealand and the gradual increase in the proportion of women judges. New Zealand gender-sensitive initiatives are upstream measures mostly offered by women lawyers' associations. These upstream gender-sensitive initiatives are in stark contrast to downstream gender-sensitive policies developed in Victoria that focus on the outcome of the appointment process and are offered by the government.

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[97] Ruth Bird, 'Legal Research and the Legal System in Australia' (2000) 28 International journal of legal information 70.
[98] Victorian Bar (n 98).
[99] Victorian Legal Services Board + Commissioner (n 97).
[100] Campbell, Charlesworth and Malone (n 95).
[101] Hughes, Leane and Clarke (n 1).
[102] Campbell, Charlesworth and Malone (n 95).
[103] Koli Ori Akpet, 'The Australian Legal System:The Legal Profession and the Judiciary' [2011] Ankara Bar Review 71.
[104] GT Pagone, 'Australia: Employment Practices and Awareness of Diversity' (1997) 22 International legal practitioner.
[105] Akpet (n 105).
[106] Victorian Legal Services Board + Commissioner (n 97).

I have noted that in practice, only the Magistrates Court of Victoria advertises expressions of interest for the appointment of new Magistrates. My interview findings show that there is a lack of gender-sensitive initiatives to prepare women for the appointment process of the Magistrates Court. In Victoria, most judges are selected from the bar.[107] However, the Women Barristers' Association does not offer any plans or initiatives to encourage and prepare female barristers to apply for a judicial position in the Magistrates Court. Female barrister number 19 noted,

> The women Barristers' Association is a very small organisation. I think there is only less than 1000 women barristers. I have not checked the statistics lately, but the membership of the Women Barristers' Association is relatively small. We have no finances, so we have no ability to run any sort of training [to prepare women for the appointment processes].[108]

According to the female barrister, the association has limited number of members and lacks any finances and thus has had limited ability to organise programmes to prepare women for the judicial appointment processes. Women Barristers' Association mainly focuses on promoting women barristers' progress in the legal profession. As I explained earlier, in this chapter, there is a tap on the shoulder system for the appointment of County Court and Supreme Court judges in Victoria. Female barristers who progress in the legal profession might have a higher chance of being offered a judicial position. Hence, promoting female barristers' progress can indirectly enhance the proportion of female judges. Female barrister number 19 explained that the association runs seminars to help female barristers prepare an application for being appointed as a King's Counsel. In addition, she noted, 'The other thing we do is that we run moot courts in the Court of Appeal for women. It is a sort of a safe place for barristers to practice their advocacy skills and get feedback from the bench… It is fairly small in scale.'[109] Organising seminars and moot courts for women barristers helps them improve their skills and progress in the legal profession.

In this section, I elaborate on two gender-sensitive policies because they have had a significant and assessable impact on women's progress in the legal profession and women's representation in the judiciary. First, the Victorian bar has applied a result-based gender-sensitive policy to facilitate women barristers' progress in the legal profession. Second, the Victorian Government adopted result-based gender-sensitive policies to enhance the gender diversity of the judiciary. These types of gender-sensitive policies are similar to strong affirmative action policies, such as targets and quotas.

A. Gender Equitable Briefing Policy (GEBP)

Most Victorian judges are chosen from the bar which is the male-dominated part of the legal profession.[110] In 2020, only 32% of Victorian barristers were women.[111] Besides, the rate of female barristers' appearance in court is extremely low compared to the proportion of women in the Bar.[112] Thus, judges are chosen from a male-dominated part of the legal profession where the rate of male barristers' appearance in courts is disproportionately more than women. It is essential to increase the

[107] See section five of this chapter.
[108] Interview with a female barrister (5 July 2022)
[109] Interview with a female barrister (5 July 2022)
[110] See section five of this chapter.
[111] Kylie Weston-Scheuber, 'Appearances by Gender in the Victorian Supreme and County Courts 2017-2019' (Women Barristers Association (WBA) and Victorian Women's Trust 2020).
[112] ibid.

briefing rate of women and improve their progress in the legal profession to increase the proportion of women selected for a judicial position. The Victorian Bar adopted the gender equitable briefing policy to achieve this goal, and it was adopted in two phases.

The first phase began in 2004 when the Victorian Bar Council adopted the equality of opportunity briefing policy. This policy was drafted by the Law Council of Australia,[113] which represents the Australian legal profession at the national level: 16 Australian State and Territory law societies, law firms, and bar associations in Australia, including the Victorian Bar.[114] The equality of opportunity briefing policy aims to improve women lawyers' progress in the legal profession. One of the policy's objectives is to 'play an important role in the progression of women in the law, the judiciary, and the wider community.'[115] Based on this policy, 'Where there are equally capable male and female counsel available, arbitrary and prejudicial factors should not operate to exclude the engagement of female counsel.' The policy requires that,

> In selecting counsel, all reasonable endeavours should be made to:
>
> (a) identify female counsel in the relevant practice area; and
>
> (b) genuinely consider engaging such counsel; and
>
> (c) regularly monitor and review the engagement of female counsel; and
>
> (d) periodically report on the nature and rate of engagement of female counsel.[116]

The Victorian Government has adopted the equality of opportunity briefing that is a voluntary policy to encourage briefing entities, such as government agencies and law firms, to brief more female barristers.[117] In 2015, then Attorney-General Martin Pakula stated that the Andrews Labour Government is committed to improving gender equity in the legal profession and will publish reports about women barristers' briefing.[118]

The first version of the equality of opportunity briefing policy generally encouraged briefing entities to brief more women barristers without setting a specific numerical goal. The second version of the policy, the Gender Equitable Briefing Policy (GEBP), sets a numerical target for women barristers' briefing.

In 2016, the Victorian Bar endorsed the Law Council of Australia's Gender Equitable Briefing Policy (GEBP). GEBP is an updated version of the Model Briefing Policy adopted in 2004. The policy encourages all briefing entities 'to brief or select senior women barristers accounting for at least 20% of all briefs and/or 20% of the value of all brief fees paid to senior barristers and to brief or select junior women

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[113] The Victorian Bar Equality of Opportunity Briefing Policy 2004.
[114] Law Council of Australia, 'Equitable Briefing Policy2019-2020 Financial Year' (2020).
[115] The Victorian Bar Equality of Opportunity Briefing Policy.
[116] ibid.
[117] ibid.
[118] The State of Victoria, 'Labor Government Committed To Equality In The Legal Profession' (*Premier of Victoria*, 2015) <https://www.premier.vic.gov.au/labor-government-committed-equality-legal-profession> accessed 21 June 2022.

barristers accounting for at least 30% of all briefs and/or 30% of the value of all brief fees paid to junior barristers.'[119]

In 2020, Dr. Kylie Weston-Scheuber examined the impact of GEBP on equal briefing in the Supreme Court and County Court of Victoria. The research shows that although women barristers encounter considerable discrimination in the briefing by private entities, especially in civil matters, adopting GEBP improved the briefing rate of women barristers.[120] The briefing rates of women barristers, specifically in criminal law practice, have improved over time. The research indicates that government entities briefed a considerable percentage of women barristers.[121]

GEBP is a result-based gender-sensitive policy. It sets a numerical target and encourages different briefing entities to meet the target. This result-based gender-sensitive policy enhanced the overall briefing rate of women barristers. GEBP is an important step to improve women barristers' progress in the legal profession because it enhances women's appearance in courts. Hence, women barristers have more opportunities to show their competence in courts and gain a reputation in the legal profession and the judiciary.

B. Gender-sensitive policy for judicial appointments

The government of Victoria adopted a result-based gender-sensitive policy to increase the numerical representation of women in the judiciary. Result-based gender-sensitive policies aim to impact the outcome of the appointment process. In 2015, the Premier of Victoria, Daniel Andrews, announced that 'no less than 50 percent of all future appointments to paid Government boards and Victorian courts will be women.' He required all ministers to meet the 50% gender target for the appointments of government boards and the Supreme, County and Magistrates' courts.[122] In this section, I first explore the cultural and legal context of the Victorian legal profession and the judiciary. My interview findings show that an Attorney-General radically reformed the judicial appointment process before 2015. As a result, the legal culture of the judiciary and legal profession altered over time. I then explain the result-based gender-sensitive policy adopted in 2015 and evaluate its impact on the proportion of women judges in Victoria.

I interviewed a former senior authority to explore the legal culture of Victoria before 2015. The former senior authority number 20 noted,

> When I became […], I realised that the legal profession was dominated by male, pale, and stale people. Nearly all of the judiciary were men, usually with private school backgrounds. I thought the way that the legal profession fails to reflect the broader community has to change. So, I consulted widely with Heads of Jurisdictions about judicial nominees, and usually they put forward just male names.[123]

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[119] Equitable Briefing Policy 2016.

[120] Weston-Scheuber (n 113).

[121] ibid.

[122] State Government of Victoria, 'Balanced Boards Make Better Decisions' (*Premier of Victoria*, 28 March 2015) <https://www.premier.vic.gov.au/balanced-boards-make-better-decisions/> accessed 19 September 2022.

[123] Interview with a former senior authority (26 July 2022)

According to the former senior authority, the Victorian legal profession and judiciary had a male-dominated work culture consisting of male lawyers from upper-class backgrounds. Based on gender construction theory, building a reputation in the masculine legal profession is easier for male lawyers than for women.[124] It appears that in Victoria, men had a high chance of being selected for judicial positions because the heads of jurisdictions suggested only male lawyers to the Attorney-General. As a result, female lawyers were disproportionately disadvantaged in the legal profession and the judiciary. The former senior authority number 20 exercised his discretionary power to make some drastic changes in the judicial appointment process to improve the proportional representation of women in the judiciary. He explained,

> So, I decided to advertise for a judicial position for the first time. I advertised in the newspapers, seeking expressions of interest from people who want to be appointed to the bench, and made it quite clear that, in particular, I was encouraging women to apply. I was vilified by the male-dominated legal profession for going down this path, but I made a conscious decision that the judiciary has to better reflect the community that it serves. I started to send a message to the Heads of Jurisdictions and senior people in the legal profession that I was serious about this, and then they started to put forward names of women. I also consulted with the Women's Bar Association.[125]

Advertising expressions of interest was a significant change that evoked some negative reactions from men in the legal profession because the former senior authority challenged the power structure by reforming the appointment process. The former senior authority number 20 explained some of the negative reactions. He stated,

> I remember that once I got a phone call in my office after I advertised expressions of interest. It was a male, very senior barrister, who said, '[…], I just wanted to let you know that on behalf of the bar, we are horrified by the fact that you have advertised these positions. They have never been advertised before. It is not appropriate. We are a profession that should not be subjected to the same sorts of job advertisements as other parts of the economy. So pursuant to those advertisements, I will not be applying for a judicial post. However, if you thought it appropriate to appoint me to the bench, I would be more than happy to accept.' Needless to say, I did not appoint him.[126]

Advertising expressions of interest increased the representation of women in the judiciary because according to the former senior authority number 20, people from diverse career backgrounds, such as academic lawyers, could apply for judicial positions, and some of them were appointed to the judiciary. In general, the former senior authority used two appointment systems. He advertised expressions of interest and used a tap on the shoulder system to appoint judges from diverse backgrounds. Furthermore, he established an independent committee to assess the candidates for judicial positions in the Magistrates' Court. He stated,

> I would look at the pool of people who had applied. There might be 300 people on the list who have applied to be a magistrate. I would consult pretty widely with people that I trusted. So, if

[124] See chapter 4.
[125] Interview with a former senior authority (26 July 2022)
[126] Interview with a former senior authority (26 July 2022)

> there were two vacancies, I would say I want the best ten people on that list to be interviewed for those two vacancies. Then I would set up an independent panel, including the Chief Magistrate, someone from my department, and a few others who would independently assess these people. Then, they would put forward recommendations to me…. and usually, they would say, for example, 'Raana would be a good magistrate or an excellent magistrate'. They would make an assessment then I would make the final decision. [127]

The former senior authority reformed the appointment processes to improve the judicial diversity. Arguably, the new appointment processes were still open to gender biased views. According to the former authority, he shortlisted candidates for judicial positions in Magistrates Court by consulting with a broad range of people. The criteria that he used to shortlist candidates are unclear. In addition, as I explained in chapter four, the diversity of appointing decision makers in the judicial appointment processes can enhance judicial diversity. However, the former senior authority was the only person who shortlisted candidates and made a final decision to appoint the preferred candidate for a judicial position. Thus, he had a limited ability to identify competent candidates from diverse social backgrounds. In the absence of clear criteria and diverse appointing authorities, the gender biased views could impact on the shortlisting of the candidates.

Moreover, former senior authority number 20 noted that he made a conscientious decision to consult with a view to inclusion. To do this, he consulted with a wild range of different people and groups including some who specially served women, such as the Women Barristers' Association. Furthermore, he consulted with the independent panel for candidates' assessment. This practice could improve the proportion of female judges because Women Barristers' Association recommended women for judicial positions. Moreover, the interview participant mentioned that he consulted wildly with some trustworthy people. However, it is unclear whether he consulted a diverse range of people from various backgrounds, such as academic and in-house lawyers, or only consulted those from a narrow background. If the latter, he was less likely to identify and select competent female candidates with diverse social backgrounds.

Furthermore, former senior authority number 20 used a tap on the shoulder system to appoint County Court and Supreme Court judges. He noted,

> If there was a vacancy on the Supreme Court or the County Court, I would go to the Head of the Jurisdiction, and I would say what sort of person you are looking for... Are you looking for a person specialised in criminal law or a person specialised in civil law? So, the Head of the Jurisdiction might want someone with civil or criminal expertise. Then I would say, who do you have in mind? Usually, it was a bloke... I would also mention other names recommended by the female barristers. Ultimately, it was my decision. I did not want somebody that the Head of the Jurisdiction would totally reject because they have to work together as a team, but they knew that ultimately it was my decision. [128]

In a tap on the shoulder system, interested individuals cannot submit an expression of interest. Thus, the heads of the jurisdiction play a critical role in the appointment of County Court and Supreme Court

[127] Interview with a former senior authority (26 July 2022)
[128] Interview with a former senior authority (26 July 2022)

judges because only people suggested by them might be selected for a judicial position. For example, female judge number 12 noted,

> The actual process is really opaque, and it is really a question of having been on the radar or noticed by the certain people that make [judicial appointment] decisions. The way that I was appointed was because I was a judicial registrar in the Supreme Court… for four years, and presumably some people thought that I was doing a good job and would make a good judge. Then the head of the Common Law County Court division at the time had heard good things about me. A couple of other judges that I knew from when they were barristers knew me. I know that the head of the division that I worked in the Supreme Court thought well of me. So it was just a kind of… Oh yes, she would be good. Let's put her name up and then the Attorney agreed.[129]

It appears that although the percentage of female judges increased due to the Attorney-General's commitment to judicial diversity, the appointment system was only open to women who were known by the heads of jurisdiction and the Attorney-General. Moreover, female barrister number 19 explained that a tap on the shoulder system leads to the selection of people from similar backgrounds. She noted,

> I suppose that the underlying problem with a tap on the shoulder system is that it tends to have like replicate like. For example, when … was Attorney-General in Victoria, he was from Monash University. So, the people he tended to appoint were also from Monash University rather than from Melbourne University. I have noticed the law firm of the current Chief Justice was Allens Linklaters and her appointees also tend to be from Allens. So, the problem is that you tend to confine your appointment pool to those that you know.[130]

In a tap on the shoulder system, the candidate pool for judicial positions is limited to people known by the Attorney-General. Hence, people do not have equal opportunities to apply for judicial positions. In addition, this practice entails the risk of selecting people from a narrow background who cannot reflect the diversity in society. Therefore, a tap on the shoulder system might result in cosmetic changes in judicial diversity, meaning that even if the proportion of female judges increases, most would have similar social backgrounds.

Furthermore, in a tap on the shoulder system, the Attorney-General has considerable discretionary power, and improving women's representation depends on the Attorney-General's views. Therefore, if the Attorney-General does not consider judicial diversity, he or she might not appoint a high proportion of female judges. As the former senior authority number 20 explained, 'After I left office, the new Attorney-General changed the appointment process. He removed the panel that I set up to interview people and often just tapped on the shoulder of his mates.'[131] This shows that there is a lack of safeguards to ensure judicial diversity regardless of an Attorney-General's personal views and preferences.

The Attorney-General's awareness of and commitment to judicial diversity changed the culture of the legal profession and the judiciary over time. The former senior authority number 20 stated,

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[129] Interview with a female Judge (1 April 2022)
[130] Interview with a female barrister (5 July 2022)
[131] Interview with a former Attorney General (26 July 2022)

> As time went on, when I had those consultations, I asked, who do you think might fit this position? They [the heads of jurisdiction] started to put forward women's names because they knew that I was really serious about changing the culture. So, in the early days, they only put forward male names. I was [in my position] for ten years or so, and more often than not, they started to put forward female names as well.[132]

This suggests that the culture of the legal profession and judiciary changed because of the appointing authority's commitment to judicial diversity and applying a gender-sensitive policy for a substantial period of time, over ten years. The consistency of the gender-sensitive policy gradually changed the masculine culture. Consequently, women had more opportunities to be chosen for judicial positions in the County Court and Supreme Court.

The former senior authority number 20 adopted a result-based gender-sensitive policy without setting a specific target for the women's appointment in the judiciary. He appointed female judges to achieve a balance between the percentage of men and women in the judiciary. He explained,

> I do not know that I had a specific quota, but I knew that women make up 51% of our population generally, and there were very few women on the bench, and I found that quite ridiculous. So, I consciously made it clear that our judiciary had to better reflect the community, and the best and brightest were not just white, Anglo-Saxon men from private schools. We had to broaden the pool to pick the best and brightest, and by ignoring women for so long, we were ignoring some of the best and brightest minds in the legal profession. While I never set a quota of 50% or 51%, I made a conscious decision to seek out, encourage and appoint more women to senior positions within the legal profession, including the judiciary.[133]

The result-based gender-sensitive policy and reforms in the appointment process changed the legal culture in Victoria. It appears that people in the legal profession and judiciary noticed that increasing judicial diversity is an important concern for appointing decision makers. As female senior judge number 14 stated,

> 20 years ago, I suppose, there was a particular Attorney-General… he made it very clear that he wanted to appoint people who were not white males from private schools. He certainly made very great inroads. So, a lot of the County Court Judges who are now quite senior or even retired have been appointed in his time and that really was the first major shift.[134]

Therefore, reforming the appointment processes had a lasting impact on the judiciary because it provided opportunities for women to progress and take senior positions in the judiciary. Although the former senior authority number 20 denied applying specific quotas to improve gender diversity, some people in the legal profession assumed that there was a quota for appointing more female judges. For example, female judge number 13 noted,

> I was appointed 20 years ago and at that time the [appointing authority] made an absolutely crystal clear choice. He said when I am appointing, I will be appointing one of each gender and if I am only appointing one, then the next one will be the other [gender]. If I am appointing more

[132] Interview with a former Attorney General (26 July 2022)
[133] Interview with a former Attorney General (26 July 2022)
[134] Interview with a female senior judge (8 April 2022)

> than one, then it will be equal numbers. So, this was in 2001. Because of that policy which was not written anywhere and it was his own personal commitment, he completely changed the face of the County Court because so many women were appointed. So again, that was fantastic, but it is down to the individual, there is nothing set in concrete about the appointment process. The current Attorney-General is following very much in those footsteps. So, we are still having many women appointed… We actually got about 33 out of 73 judges, so it is pretty high. It is even close to 50%.[135]

Different Attorneys General of Victoria were committed to judicial diversity and strived to improve the percentage of women judges over a long period of time. Hence, the relatively high proportion of female judges in Victoria is a result of the collective effort of successive Attorneys General. Former female senior judge number 15 noted,

> Certainly, there have been times when an Attorney-General has made it clear that he or she wishes to see more women on the bench. But it is not a formal quota, nor is it so far as I know, an informal quota. It has never been conveyed to me that 50% of the bench should be female or a like figure. But numbers of successive Attorneys General have made it clear that they desirably wish to see a court bench that is more reflective of the community than has been the case in the past.[136]

As I noted earlier in this section, the Premier of Victoria, Daniel Andrews, followed the path of previous Attorneys General and announced a result-based gender-sensitive policy in 2015. It shows that improving women's representation changed form a personal initiative of the Attorney's General to a governmental policy. The government announced that 50% of judicial appointments will be women. According to former female senior judge number 15, the Andrews government's announcement was a political aspiration that guided the Attorney-General to achieve equal representation of women in the judiciary.[137] However, I maintain that the government set a result-based policy to achieve 50% appointment of women in the judiciary. In the next section, I show that the policy has made a marked difference in the percentage of female judges. Some interview participants pointed out the changes in the proportion of female judges. For example, female judge number 12 explained the impact of the policy on the gender diversity of the judicial appointments. She stated,

> The Andrews government, which is the current Victorian government, came in I think 2015, made it a policy that judicial appointments would be 50/50, 50% male, and 50% female. I did have a bit of a look at the statistics of appointments ... So, of the current people sitting in the Supreme Court trial division, those that were appointed before 2015, 3 out of 10 appointments were female and after 2015, 11 out of 21 appointments were female. So, that policy made a huge difference. In the Court of Appeal before 2015, 1 out of 5 appointments, and after 2015, 3 out of 8 [were women]. So not quite 50%, but nearly. I suspect that it would be very similar in the County Court, if not slightly tipped more heavily in favour of women. Over the last year,

[135] Interview with a female judge (28 March 2022)
[136] Interview with a former senior judge (27 April 2022)
[137] Interview with a former female senior judge (27 April 2022)

> there has probably been 10 appointments in the County Court. At least half of those would have been women. So, just having a policy like that has made an enormous difference.[138]

In addition, female senior judge number 14 explained the gradual changes in the proportion of women judges of different courts. She stated,

> Separately, I do think that as gender equality has become more a matter of public importance over the years, change has naturally come with it. I am a member of the Australian Association of Women Judges and as part of research conducted within this Association, I can attest to there being an increase in the prevalence of women judges across all jurisdictions. Based on statistics captured by the AAWJ [Australian Association of Women Judges], we have seen that women make up the majority of VCAT [Victorian Civil and Administrative Tribunal] – this seems to be somewhat consistent to tribunals in the other states and territories. There seems to then be a trend for numbers of women to lessen gradually as you ascend through to the higher courts (with the exception of the High Court of Australia in which 3 of the 7 High Court judges are female). Comparing the statistics of 2020/21 to 2010/11, we can see that the proportion of female judges is most certainly creeping up. Although this change can be glacial at times, I am confident that it will continue to grow.[139]

The interview participants pointed out a positive approach to result-based gender-sensitive policies in Victoria. For example, female judge number 13 stated,

> I have changed my view about this over a few decades thinking about it. Initially, I was concerned about the fear that even if you were of merit, you would not be seen to be of merit if you were part of a quota. I had the same view about affirmative action. But I have been the beneficiary many years ago, and at the beginning of my career. I have just seen that the numbers were so slow in increasing that there has to be some change, so my own personal view is that it is certainly something to be explored. There has been the informal quota by the Attorney-General, as I mentioned earlier, and nobody has said a thing about that. That is absolutely fine, so it is not written down anywhere, but everyone just knows that that is the way that it works. That means it is a good thing, and nobody is worrying about it.[140]

The female judge's view may not represent the general perspective of people in the legal profession and the judiciary. However, this shows that applying result-based gender sensitive policies can change the culture as well as increasing the proportion of women judges. In the next section, I analyse the impact of gender-sensitive policies on the proportion of women judges in Victoria.

V. The impact of gender-sensitive policies on the Victorian judiciary

In this section, I analyse the impact of the result-based gender-sensitive policy in Victoria.[141] I should note that I do not analyse the impact of the policy on the percentage of female Magistrates due to a lack

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[138] Interview with a female judge (1 April 2022)
[139] Interview with a female senior judge (8 April 2022)
[140] Interview with a female judge (28 March 2022)
[141] State Government of Victoria (n 124).

of data. I examine how the result-based gender-sensitive policy of the government changed the percentage of female judges in the County Court and Supreme Court.

The statistics show that the proportion of female judges in the County Court and the Supreme Court has significantly increased since 2015. The County Court published the list of judges and their date of appointment in the annual report 2020-21. The data show that from 2001 to 2015, only 11 out of 30 judges appointed were female, while after 2015 the appointment rate of female judges drastically increased: from 2015 to 2021, 21 out of 40 appointed judges were female.[142]

Moreover, the statistics show a marked boost in the number of female judges of the Supreme Court since 2015. The Supreme Court of Victoria consists of the Trial Division and the Court of Appeal. There are 11 judges in the Court of appeal. All four judges appointed before 2015 were men, while three out of seven judges appointed after 2015 were women.[143]

In addition, there are 34 judges in the Trial Division of the Supreme Court. Only three out of 10 judges appointed before 2015 were female, while 11 out of 24 judges appointed after 2015 were women.[144]

These statistics show that although different Attorneys General were committed to increasing judicial diversity, the proportion of women judges significantly improved only after the announcement of a numerical goal for the appointment of women judges. Therefore, result-based gender-sensitive policies that set a numerical goal can significantly increase the percentage of women judges. However, one might ask if the result-based gender-sensitive policies have improved the percentage of women judges from diverse social backgrounds.

To answer this question, I analysed the career background of Magistrates, County Court, and Supreme Court judges in Victoria. I compiled a dataset for 72 out of 121 magistrates in Victoria by collecting data from public websites. As of 2021, 33.3% of the magistrates are former barristers, and 30.5% are former solicitors with senior positions in law firms. In other words, the majority of the magistrates are former barristers and solicitors with senior positions in law firms, while only 32% of barristers and 36% of senior solicitors are women.[145] Hence, most magistrates are chosen from male-dominated parts of the legal profession.

Furthermore, I have reviewed the career background of 56 County Court judges and 42 Supreme Court judges.[146] As of 2021, 66% of County Court judges and 80.9% of Supreme Court judges are former barristers. Therefore, the majority of County Court and Supreme Court judges are chosen from the bar. This suggests that most women judges have similar career backgrounds. Female senior judge number 14 confirmed that most judges are former barristers. She stated, 'traditionally the judges in the Supreme Court have been appointed from the bar and generally, not universally, they are senior people at the bar who have taken silk, so they are QC's [now KC's] or SC's.'[147] Similarly, female judge number 13 explained

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[142] County Court of Victoria, 'Annual Report 2020–21' (2021).

[143] Supreme Court of Victoria, 'Judges' (2022) <https://www.supremecourt.vic.gov.au/about-the-court/our-judiciary/judges> accessed 28 April 2022.

[144] ibid.

[145] Victorian Legal Services Board + Commissioner (n 97).

[146] I searched each judge's career background on websites such as: https://www.vicbar.com.au/

[147] Interview with a female senior judge (8 April 2022)

that the majority of judges are chosen from the bar, however there are some judges with different career backgrounds. She noted,

> Most of the judges have come from the ranks of being barristers, but we have also had a handful of judges who were solicitors in both this [County Court] and the Supreme Court… The other pathway, which … has in fact been the pathway for two of our culturally diverse judges, is that we now have a position of judicial registrar... Two of our judges started off as judicial registrars and they were seen to be so completely exceptional that they were promoted. Even though that is not necessarily a pathway, they have been promoted now to judges, and they are fantastic. So that is also a bit of not a formal pathway, but another informal pathway that people can see.[148]

According to the female judge number 13, judges with diverse cultural backgrounds took alternative career paths to become judges, suggesting that people with diverse cultural backgrounds may tend to take non-traditional career paths. Therefore, selecting judges from non-traditional career backgrounds might enhance the judicial cultural diversity.

There are no statistics on different aspects of judicial diversity in Victoria, such as the cultural, ethnic, and sexual orientation diversity of judges. Therefore, I asked my interview participants on their views on different aspects of judicial diversity in Victoria. My interview findings indicate a lack of cultural diversity in the Victorian judiciary. Female judge number 12 stated,

> The diversity within the judiciary is not great. There are now a few people from what you would call culturally and linguistically diverse backgrounds... Appointments are still predominantly [of those who have a] European background. ... We have Judge Tran who is a Vietnamese Australian woman, Judge Pillay who is an Indian via South Africa Australian judge. There is also another Indian Australian judge who has just been appointed in the Criminal Division. But the fact that I can name them off the top of my head tells you how few there are out of 70 judges.[149]

Similarly, female judge number 13 confirmed a lack of cultural diversity in the judiciary. However, she noted that the cultural diversity of judges is improving. She stated,

> On the whole, it is still mainly white women who have been very successful as barristers. But we are getting better at that... We have a welcome ceremony next week for our first Indian born judge... I think that has been deliberately pursued by the government in keeping with its own policies.

Further research on judicial diversity in the future should examine if the government's policy for improving the cultural diversity of judges was successful in the long term. Moreover, although most interview participants in Victoria noted a lack of cultural diversity in the judiciary, I cannot assess the proportion of women judges with diverse social backgrounds. Future research is needed to examine different aspects of judicial diversity in Victoria. Having said that, my research findings on judges' career backgrounds shows that adopting result-based gender-sensitive policies may not improve the percentage of women judges with diverse career backgrounds.

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[148] Interview with a female Judge (28 March 2022)

[149] Interview with a female Judge (1 April 2022)

In summary, in this section, I have shown that the result-based gender-sensitive policies in Victoria increased the percentage of women judges more rapidly than the network of gender-sensitive initiatives in New Zealand. However, gender-sensitive policies in New Zealand and Victoria mainly benefited a limited proportion of women lawyers from narrow career backgrounds. As of 2021, 46.9% of Victorian and 40% of New Zealand judges are women.[150] However, the statistics[151] and my interview and research findings suggest that the two jurisdictions have a significant lack of judicial diversity regarding judges' social backgrounds, such as their ethnicity, religion, career, and sexual orientation. This indicates that women with diverse social backgrounds are disadvantaged in the judicial appointment process.

Conclusion

In this chapter, I explored a result-based gender-sensitive policy to examine if this type of policy is an effective alternative solution to improve the numerical representation of women in the New Zealand judiciary. To achieve this, I conducted comparative research, focusing on the experience of applying a result-based policy in Victoria.

This chapter highlights the similarities and differences between New Zealand and Victoria to provide sufficient sociolegal context for a comparative analysis of gender-sensitive policies. Specifically, I have outlined the differences between the judicial appointment processes in Victoria, where lawyers are offered a judicial position, and New Zealand, which has adopted an open application system. Additionally, I have explained the similarities between the two jurisdictions, namely the significant discretion of the Attorney-General and the low proportion of women in senior positions.

The findings of this chapter demonstrate that the result-based gender-sensitive policies (setting a target) implemented in Victoria led to a rapid increase in the percentage of female judges. This suggests that policies such as quotas and targets can accelerate the progress towards achieving gender parity in the judiciary faster than the upstream gender-sensitive initiatives that have been adopted in New Zealand. Therefore, a result-based gender-sensitive policy can be an effective solution to achieve gender equality in the judiciary.

This chapter shows that a result-based policy is a suitable solution for achieving an equal numerical representation of women, which is the main focus of this thesis. Having said that, I should note that although result-based policies can enhance the numerical representation of women, they may predominantly benefit only a limited proportion of female lawyers from senior ranks of the legal profession. My research on judges' backgrounds in Victoria has shown that most judges are chosen from male-dominated parts of the legal profession and have similar backgrounds. The experience of setting a numerical target for increasing the appointment of women judges in Victoria has also highlighted that this policy may not benefit women with non-traditional career backgrounds. It appears that the result-based gender-sensitive policy has failed to change the Victorian appointing authorities' views about merit. Therefore, adopting a result-based gender-sensitive policy is a partial solution to the wicked problem of women's unequal representation in the judiciary.

[150] AIJA (n 2).

[151] The Office of the Chief Justice (n 48).

Chapter eight
Conclusion

In this thesis, I have answered the question of how the judicial appointment processes and gender-sensitive initiatives impact women's representation in the judiciary. I have adopted a socio-legal approach to investigate the judicial appointment criteria, candidate assessment systems, and gender-sensitive initiatives for improving women's numerical representation in the New Zealand judiciary. I have shown that women encounter multiple barriers before, during, and after judicial appointment processes. In addition, I have conducted comparative research on result-based policies used in Victoria to assess whether these policies might resolve the problem of women's unequal representation in the New Zealand judiciary.

The thesis offers new perspectives on how appointment processes impact judicial diversity. In this chapter, I draw together the key findings of this thesis that can be used as the basis for reforming the judicial appointment processes to ensure a balanced representation of men and women in the judiciary. This chapter has three sections.

In the first section, I discuss issues in the judicial appointment processes that undermine women's representation in the judiciary. Specifically, I argue that the unstructured discretionary power of the appointing authorities can lead to unequal representation of women. Then, I contend that most women encounter indirect discrimination because they have unequal opportunities to prepare for judicial appointment processes. Then, I argue that there is a link between gender-blind criteria and practices that negatively impacts women's representation in the judiciary. Finally, I show the potential of result-based policies for ensuring equal participation of women in the judiciary.

In the second section, I provide practical recommendations to achieve equal representation of women in the judiciary. As I discussed in the first chapter, unequal representation of women is a wicked problem, and our understanding of it changes with the application of different solutions.[1] In this thesis, I have adopted the wicked problem framing to offer multiple partial solutions for addressing the complex social issues of low representation of women in the judiciary.

I recommend four reforms conducive to increasing women's representation in the judiciary. First, I argue for a legal provision to structure the Attorney-General's discretion and obligate appointing decision makers to contribute to judicial diversity. Second, I recommend that the Attorney-General set specific, clear, and transparent criteria to ensure equal opportunity between candidates. Third, I argue that structuring appointment interviews makes the assessment of candidates more objective and limits the influence of gender-biased views on judicial appointments. Fourth, I suggest that providing flexible working arrangements would assist women with care responsibilities to balance their families and work demands.

[1] Lorna Turnbull, 'The "Wicked Problem" of Fiscal Equality for Women' (2010) 22 Canadian journal of women and the law 213.

Finally, in the third section, I explain how my research fills a gap in the literature. I argue that implementing gender-sensitive policies without reforming the judicial appointment processes would likely fail to benefit women from diverse backgrounds. Therefore, I argue for adopting a systemic approach to address the wicked problem of women's unequal representation in the judiciary.

I. Obstacles to women's participation in the Judiciary: Examining factors in the judicial appointment processes

A. The Impact of unstructured discretionary power on women's representation in the judiciary

In this section, I make two arguments. First, the unstructured discretionary power of the appointing authorities can potentially decrease diversity; second, some attempts to structure authorities' discretionary power can disadvantage women.

My thesis's findings show that the unstructured discretionary power of the judicial appointing authorities can limit women's representation in the judiciary. I provide three reasons to advance my argument: the Attorney-General's discretion in consultations, the interview panel's discretion in choosing questions, and insufficient accountability mechanisms for appointing authorities.

First, the Attorney-General has significant discretion to consult a broad range of people and associations or avoid consultations altogether.[2] Based on the Attorney-General's judicial appointment booklets, the Attorney-General would make a decision 'after such consultation as he or she believes necessary.'[3] The Attorney-General has no legal obligation to consult various associations, organisations, or individuals that might provide valuable information on people with a non-traditional career background, who are mostly women.[4] Therefore, there is a risk that the Attorney-General avoids a broad consultation leading to a lack of diversity among appointing authorities. As I discussed in chapter four, the lack of diversity among appointing authorities limits women's representation in the judiciary. The literature shows that homogenous appointing authorities are more likely to select candidates like themselves who replicate the existing system.[5] In chapter four, I have shown that the appointing authorities are senior people in the judiciary and legal profession. In the absence of broad consultation with various individuals and associations, they may tend to select people with senior positions, who are mostly men. In other words, they are less likely to appoint competent lawyers from non-traditional career backgrounds, such as in-house lawyers whose majority are women. Hence, there is a risk that the significant discretion of the Attorney-General regarding the consultation process limits appointing authorities' diversity and, thus, disadvantages female lawyers from diverse career backgrounds.

The second reason is that the interview panel has a broad discretionary power in choosing what questions to ask candidates, which can disadvantage some female candidates. Two members of the

[2] See chapter 3.
[3] ibid, 5; Ministry of Justice, 'Judicial Appointments: Office of District Court Judge', 7.
[4] See chapter 3,
[5] Samuel Spáč, 'The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia' (2020) ahead-of-print Problems of post-communism 1.

appointment interview panel[6] explained that they have discretion to choose the type and number of questions they ask of candidates. Unstructured interviews ensure significant discretionary power for the interview panel to ask various questions and assess candidates based on their answers to different questions, while a robust body of scholarship indicates that lack of interview structure leads to subjective, biased, and unequal assessment of candidates.[7] Consequently, gender biased views can influence candidates' interview assessments.

Some members of the interview panel noted that in some cases they know a reputable candidate prior to the interview.[8] The literature shows that the pre-interview impression of interviewers influences various aspects of the interview process and candidates' assessment.[9] Unstructured interviews can disadvantage people working as law firm employees, in-house lawyers, and academic lawyers who may not have a reputation in the judiciary and legal profession. As I explained in chapter three, a high percentage of women are in-house and law firm employee lawyers. Therefore, the significant discretion of the interview panel during an unstructured interview can disadvantage women more than men.

The third reason to prove the unstructured discretionary power of the authorities focuses on the accountability mechanisms. Accountability mechanisms for appointing authorities fail to structure the appointing authorities' discretion towards improving women's representation in the judiciary. In chapter five, I explained that the political accountability of the Attorney-General, public scrutiny, and providing feedback for unsuccessful candidates are three accountability mechanisms of the judicial appointment system. First, in theory, Parliament can hold the Attorney-General accountable for ensuring equal representation of women in the judiciary. However, the Attorney-General acts as the first Law Officer of the Crown in the judicial appointment processes.[10] In other words, judicial appointments are not the Attorney-General's ministerial responsibility and thus, Parliament cannot hold him or her accountable for low proportion of women judges. In fact, Parliament has never held the Attorney-General

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[6] Interview with a male senior judge (30 November 2021); Interview with a female senior judge (18November 2021)

[7] John F Binning and others, 'Effects of Preinterview Impressions on Questioning Strategies in Same- and Opposite-Sex Employment Interviews' (1988) 73 Journal of applied psychology 30; Therese H Macan and Robert L Dipboye, 'The Effects of Interviewers' Initial Impressions on Information Gathering' (1988) 42 Organizational behavior and human decision processes 364.

[8] Interview with a female senior judge (21 October 2021); Interview with a female senior judge (18November 2021); Interview with a male senior judge (30 November 2021)

[9] Allen I Huffcutt, 'From Science to Practice: Seven Principles for Conducting Employment Interviews' (2010) 12 Applied H.R.M. Research 15; Robert C Liden, Talya N Bauer and Charles K Parsons, 'Person Perception in Employment Interviews' in Manuel London (ed), *How People Evaluate Others in Organizations* (Psychology Press 2001); Thomas W Dougherty, John C Callender and Daniel B Turban, 'Confirming First Impressions in the Employment Interview: A Field Study of Interviewer Behavior' (1994) 79 Journal of applied psychology 659; Liviu Florea and others, 'From First Impressions to Selection Decisions: The Role of Dispositional Cognitive Motivations in the Employment Interview' (2019) 48 Personnel review 249; Therese H Macan and Robert L Dipboye, 'The Relationship of Interviewers' Pre-Interview Impressions to Selection and Recruitment Outcomes' (1990) 43 Personnel Psychology 745; Brian W Swider, Murray R Barrick and T Brad Harris, 'Initial Impressions: What They Are, What They Are Not, and How They Influence Structured Interview Outcomes' (2016) 101 Journal of applied psychology 625; RL Dipboye, 'Structured and Unstructured Selection Interviews: Beyond the Job Fit Model' (1994) 12 Research in Personnel and Human Resources Management.

[10] Philip A Joseph, 'Appointment, Discipline and Removal of Judges in New Zealand', *Judiciaries in Comparative Perspective* (Cambridge University Press 2011).

accountable for judicial appointments.[11] The involvement of Parliament in overseeing the Attorney-General's responsibilities for judicial appointments could undermine the independence of the judiciary and weaken the principle of separation of powers.[12] Therefore, the Attorney-General's political accountability is neither an effective nor a desirable mechanism to hold him or her responsible for increasing the percentage of women judges.

The second accountability mechanism is public scrutiny of the appointment processes. A senior appointing authority noted that public scrutiny is the main accountability mechanism of the judicial appointment processes.[13] However, I argue that the public can neither scrutinise judicial appointment processes nor assess their influence on women candidates because of the lack of transparency. In chapter three, I have shown that the judicial appointment processes are shrouded in mystery. In a transparent judicial appointment process, the judicial appointment criteria and assessment process would be clear and appointing decision makers would justify their appointment decisions.[14] In addition, the public would have access to annual statistics on various aspects of judicial diversity.[15] However, the judicial appointment in New Zealand is not transparent because, as I discussed in chapter four, the appointment criteria are ambiguous, subjective, and broad. In addition, candidates' assessment processes are unclear.[16] The Attorney-General's judicial appointment booklets provide some basic information about the assessment processes that fail to clarify the judicial appointment processes for the public.[17] Therefore, the public can neither scrutinise the candidates' assessment system nor challenge gender-blind criteria and practices that may perpetuate gender disparities in judicial appointment.

Providing feedback to unsuccessful candidates is the third accountability mechanism. In chapter five, I explained that the appointing authorities can justify their decisions to reject a candidate by providing them feedback. However, an appointing decision-maker explained that in practice she and other appointing decision makers often provide general feedback that does not specifically justify their decision.[18] Appointing authorities can easily hide their unconscious gender-biased views by providing general comments and feedback to unsuccessful candidates. Hence, providing feedback is an ineffective accountability mechanism to ensure women's representation in the judiciary.

The second argument I make about the relation between discretion and diversity is that the attempts to structure authorities' discretion in some cases invite gender-biased views into the judicial appointment processes. In chapter four, I have shown that candidates are evaluated against three sets of criteria: statutory criteria, policy (Attorney-General's criteria), and other unwritten criteria. I have argued that appointing authorities enjoy significant discretionary power to interpret the Attorney-General's criteria.

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[11] BV Harris, 'A Judicial Commission for New Zealand: A Good Idea That Must Not Be Allowed to Go Away' [2014] New Zealand law review 383.

[12] ibid.

[13] Interview with a female senior judge (19 October 2021)

[14] Elizabeth Handsley and Andrew Lynch, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13' (2015) 37 The Sydney law review 187.

[15] Avner Levin and Asher Alkoby, 'Shouldn't the Bench Be a Mirror? The Diversity of the Canadian Judiciary' (2019) 26 International journal of the legal profession 69.

[16] See chapter 3.

[17] See chapter 3.

[18] Interview with a female senior judge (21 October 2021)

Some subjective appointment criteria, such as resilience, ability to work hard, and ability to inspire respect invite gender bias in a candidate's assessment. In chapter three, I discussed that most women with care responsibilities work part time. The appointing authorities may consider part time work as counter-indicative of the criterion of 'hard-working'[19] and 'resilience'. Hence, there is a lack of concrete and objective appointment criteria to structure the appointing authorities' discretion. In the absence of objective criteria, implicit gender-biased views can easily colour the appointing authorities' perspectives. Thus, they are more likely to assess female candidates as unsuitable for taking a judicial position.[20]

In addition, in chapter four, I have shown that appointing authorities tend to interpret some criteria in a way that disadvantages most female lawyers. For example, a candidate's 'overall excellence' is an appointment criterion interpreted as seniority in law firms, while a low percentage of female lawyers have senior positions in law firms in New Zealand.[21] Thus, this understanding of 'overall excellence' disadvantages a high percentage of female candidates.

In summary, in this thesis, I have shown how appointing authorities' discretion can disadvantage female candidates in different stages of the appointment processes, including in the application of judicial appointment criteria, assessment of a candidate's interview, and consultation about a candidate. Moreover, in the absence of effective accountability mechanisms, it is difficult to hold appointing authorities to account for improving women's representation in the judiciary. Therefore, I argue that the unstructured discretionary power of the Attorney-General and unsuccessful attempts to structure other appointing authorities' discretion in the judicial appointment processes results in the unequal representation of women in the judiciary.

B. Unmasking gender bias: Unequal opportunities disadvantage women candidates

In chapter two, I explained that an argument for judicial diversity relies on the importance of providing an equal opportunity for diverse people to take judicial positions. Based on this argument, judicial appointment processes must include anti-discrimination practices to ensure equal opportunities.[22] In this thesis, I contend that inequality between candidates in terms of gaining information about judicial appointment criteria and candidates' assessment system results in women's under-representation in the New Zealand judiciary. In this part, I discuss how the lack of transparency in the judicial appointment processes leads to indirect discrimination against most women and results in inequality between candidates. Equality of opportunity is a principle of distributive justice that requires equal distribution of resources.[23] In the case of judicial appointments, information about criteria and assessment systems are important resources for taking a judicial position. In the following, I develop my argument by showing that information about judicial appointment processes have been unequally distributed between

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[19] Barbara Hamilton, 'The Law Council of Australia Policy 2001 on the Process of Judicial Appointments: Any Good News for Future Female Judicial Appointees?' (2001) 1 Law and justice journal 223.

[20] See chapter 4.

[21] See chapter 3.

[22] Iyiola Solanke, 'Where Are the Black Judges in Europe?' (2019) 39 Connecticut Journal of International Law Summer.

[23] Giuseppe Pignataro, 'Equality of Opportunity : Policy and Measurement Paradigms' (2012) 26 Journal of economic surveys 800; Richard Arneson J, 'Equality and Equal Opportunity for Welfare' (1989) 56 Philosophical studies 77.

potential candidates, which particularly disadvantages female candidates and decreases the percentage of female judges.

The judicial appointment criteria are unclear and subjective.[24] My interviews with some appointing authorities have indicated that, in practice, appointing authorities assess candidates' competence against a broader set of criteria not mentioned in the official documents. For example, the Attorney-General's appointment booklets note that a competent candidate must have 'legal ability', while my interview findings show that appointing authorities have a specific understanding of candidates' legal ability. They value candidates' broad experience in various areas of legal practice. In addition, appointing authorities for District Courts tend to select candidates who have appeared in jury trials. These qualities are not included in the official documents. Therefore, those who solely rely on the official appointment criteria would fail to gain an accurate understanding of the requirements for a judicial position.

Furthermore, as I explained in the previous section, appointing authorities evaluate candidates against subjective characteristics, such as honesty, integrity, open-mindedness, impartiality, courtesy, patience, and social sensitivity. Candidates cannot gain a clear understanding of how they would be assessed against the subjective criteria that can be interpreted and applied in various ways. The criteria's lack of transparency means that candidates can only learn the actual criteria through their social networks in the legal profession and the judiciary. Two District Court judges interviewed in this thesis noted that candidates should contact judges or people who have recently applied for a judicial position to explore the actual criteria.[25] The criteria's lack of transparency systemically favours those with strong social networks in the judiciary and the legal profession.[26] As a result, candidates lack the same opportunities to learn the criteria and prepare for the judicial appointment processes. As discussed in chapter three, most women are law firm employees or in-house lawyers who are less likely to build networks in the legal profession and judiciary. Hence, the criteria's lack of transparency disadvantages a high percentage of women.

Some women cannot prepare for a judicial appointment process because the candidates' assessment system lacks transparency. The Attorney-General can choose whether interview candidates for a judicial position in Senior Courts or appoint a person without interviewing them.[27] Candidates who refer to the official documents fail to gain a clear understanding of the assessment system and, therefore, cannot prepare for the judicial appointment processes. Moreover, in chapter three, I explained that the Attorney-General's booklet for District Court judges and the Judicial Protocol for High Court judges have been published to enhance the transparency of the judicial appointment process.[28] However, the official documents fail to provide sufficient guidance about the assessment processes for candidates and interested individuals. My interview findings show how the appointment processes in practice differ from their official portrait. For example, according to two District Court judges, appointing authorities consult with the New Zealand Law Society about candidates. The New Zealand Law Society's comments

[24] See chapter 4.
[25] Interview with a female District Court Judge (25November 2021); [25] Interview with a male District Court Judge (18November 2021)
[26] See Chapter 3.
[27] Ministry of Justice, 'The Judicial Appointments Protocol' (n 3).
[28] Ministry of Justice, 'Judicial Appointments: Office of District Court Judge' (n 3); Ministry of Justice, 'The Judicial Appointments Protocol' (n 3).

on candidates have a significant influence on a candidate's success in the appointment processes.[29] However, the Attorney-General's appointment booklets broadly explain the consultation processes and fail to highlight the importance of consultations in the judicial appointments.

In a non-transparent appointment system, only candidates with strong connections and networks, who are mostly men, can learn about the processes and prepare for them. Hence, unclear appointment processes lead to indirect discrimination against women, which is discrimination arising from an apparently neutral practice.[30] The indirect discrimination against most female lawyers results in women's unequal representation in the judiciary.

C. Barriers created by gender-blind criteria and practices in appointments

As of 2022, most lawyers are women,[31] and the proportion of female judges is increasing.[32] However, in this thesis, I have argued that dominant norms and values in the judicial appointment processes still disadvantage female candidates. Moreover, I have shown that some apparently gender-neutral criteria and practices have strong gender implications leading to the unequal representation of women in the judiciary. I provide three reasons to support my argument.

First, some judicial appointment criteria are gender-blind. For example, in chapter four, I explained that based on section 15 of the District Court Act 2016 and section 95 of the Senior Courts Act 2016, candidates must hold a practicing certificate for at least seven years. However, data on the legal profession indicates that a high percentage of female lawyers lack the statutory requirement. The data shows that women have less working experience in the legal profession compared with men.[33] Therefore, a considerable percentage of female lawyers might not hold their practicing certificate for seven years. I have argued that a reason for women's less working expertise is a lack of legal frameworks to support female lawyers taking parental leaves. My interview findings have demonstrated that the period of maternity leave does not contribute to a lawyer's practicing time. In New Zealand, women take more parental leave than men.[34] Thus, a lack of parental leave policy mostly disadvantages female lawyers. Women who take parental leave may not hold their practicing certificate and hence, achieve the minimum requirement of taking a judicial position later than men. Therefore, the statutory requirement of holding a practicing certificate for seven years disadvantages female lawyers more than men.

Moreover, the interpretation of some subjective appointment criteria, such as the ability to work hard, can disadvantage female candidates. In the legal profession 'working hard' may be interpreted as

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[29] Interview with a female District Court Judge (25November 2021); Interview with a male District Court Judge (18November 2021)

[30] Colin Campbell and Dale Smith, 'Distinguishing Between Direct and Indirect Discrimination' [2022] Modern law review.

[31] See chapter 3.

[32] See chapter 6.

[33] Geoff Adlam, 'Snapshot of the Profession 2020' [2020] Lawtalk 26.

[34] Claire Breen, 'Fewer than 1% of New Zealand Men Take Paid Parental Leave – Would Offering Them More to Stay at Home Help?' (*The Conversation*, 14 April 2022) <https://theconversation.com/fewer-than-1-of-new-zealand-men-take-paid-parental-leave-would-offering-them-more-to-stay-at-home-help-180777> accessed 8 August 2022.

working long and inflexible hours. In turn, working part time can be counter-indicative of these criteria[35] and disadvantage a considerable percentage of women who work part time.[36] Thus, the dominance of norms suitable for people without care responsibilities can impact the interpretation of the broad and subjective appointment criteria and decrease women's representation in the judiciary.

Second, appointing authorities rely on candidates' reputations to assess their competence for judicial positions.[37] Appointing authorities and judges interviewed in this research noted that a candidate's reputation is an important consideration in judicial appointments.[38] The interview findings show that the judicial appointment processes provide insufficient opportunities for candidates to demonstrate their competence. Consequently, appointing authorities tend to rely heavily on the candidates' professional reputation as a lawyer to evaluate their suitability for a judicial position. However, I have argued that gaining a reputation is more challenging for female lawyers because of gender status beliefs in the legal profession. Based on gender status construction theory, access to resources facilitates gaining reputation and respect in society.[39] I have contended that because of the unequal distribution of resources in favour of men, female lawyers encounter more challenges to improving their status and gaining a reputation in the legal profession. To advance my argument, I have explained that most senior positions in the legal profession are staffed by men.[40] In 2020, female lawyers made up only 34% of directors and partners in multi-lawyer firms and under 23% of King's Counsels.[41] Women's segregation to low-status positions limits their access to valued resources to gain high status.[42] Thus, it is more difficult for women to make a reputation in the legal profession.

Furthermore, in chapter three, I have explored the general challenges female lawyers encounter in the legal profession. The barriers such as childcare responsibilities,[43] institutional gender bias in law firms,[44] long working hours,[45] lack of flexible working arrangements,[46] and gender stereotypes[47] impede

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[35] Judith K Pringle and others, *Women's Career Progression in Auckland Law Firms: Views from the Top, Views from Below* (Gender & Diversity Research Group 2014).

[36] Ministry for Women, 'Gender Inequality and Unpaid Work: A Review of Recent Literature' (2019).

[37] See chapter 4.

[38] Interview with a male senior Judge (30 November 2021); Interview with a female District Court Judge (22November 2021); Interview with a male District Court Judge (18November 2021)

[39] Cecilia L Ridgeway and James W Balkwell, 'Group Processes and the Diffusion of Status Beliefs' (1997) 60 Social psychology quarterly 14.

[40] Adlam (n 33).

[41] ibid.

[42] Matthew E Brashears, 'Sex, Society, and Association: R Cross-National Examination of Status Construction Theory' (2008) 71 Social psychology quarterly 72.

[43] Pringle and others (n 35); Jeannine Cockayne and Auckland District Law Society, *Women in the Legal Profession: The Report of the Second Working Party on Women in the Legal Profession* (Public Relations Dept of the Auckland District Law Society 1989).

[44] Frank Neill, 'Women Face Variety of Challenges' New Zealand Law Society 30 June 2016; Stacey Shortall, 'Turning the Tide to Make More Women Law Firm Partners in New Zealand' (NZLS CLE 2016); Cockayne and Auckland District Law Society (n 43).

[45] Josh Pemberton and New Zealand Law Foundation, 'First Steps: The Experiences and Retention of New Zealand's Junior Lawyers' (The Law Foundation 2016); Pringle and others (n 35).

[46] Pringle and others (n 35); Sarah Taylor, 'Valuing Our Lawyers: The Untapped Potential of Flexible Working in the New Zealand Legal Profession' (New Zealand Law Society 2017).

[47] Louise Grey, 'Reflections from a Young Woman Entering the Profession - Would a Female Partner Quota Address Gender Inequality within the New Zealand Legal Profession?' (2017) 1 New Zealand women's law journal 51.

women's career progress. The existence of these barriers suggests that the increase in the proportion of female lawyers from 6.9% in 1980 to 52.5% in 2020[48] has not altered the legal career work culture and there remains an unequal distribution of resources between men and women in the legal profession. The unequal distribution of resources results in gender status beliefs in favour of men. In turn, it becomes more difficult for female lawyers to show their competence and gain a reputation in the legal profession. Therefore, the seemingly neutral practice of assessing candidates based on their reputation disadvantages women more than men.

Third, in chapter five, I have explained that inflexible judicial positions are not adjustable for people with care responsibilities, who are mostly women. My interview findings have demonstrated that judicial positions in District and High courts are inflexible. For example, two District Court judges noted that their working schedule is inflexible and thus, not adjustable for people with care responsibilities.[49] In addition, the working culture in the judiciary does not encourage and support flexible working.[50] I have explained that although based on section 106 of Senior Courts Act 2016 and section 30 of the District Court Act 2016 judges can request for working part time, in practice, taking a part time position is difficult.[51] The inflexibility of judicial positions discourages some women from applying for judicial positions.

In this thesis, I have outlined gender implications of criteria and practices during the judicial appointment processes and in the judiciary leading to unbalanced representation of women and men. I argue that appointing authorities should modify the judicial appointment processes by adopting a gender-sensitive approach in designing the appointment processes. They should consider how judicial appointment processes impact women and men to provide substantive equality between candidates.

D. Gender-sensitive policies and initiatives increase women's participation in the judiciary

This thesis has shown that gender-sensitive policies and initiatives increase the numerical representation of women. As I explained in chapter two, a diverse range of policies and initiatives, such as quotas and soft affirmative action, enhance judicial diversity. In chapter six, I showed gender-sensitive initiatives in New Zealand gradually increased the proportion of female judges, who are mostly from similar backgrounds. In this thesis, I have conducted comparative research on the Australian State of Victoria's policies to explore whether a result-based gender-sensitive policy could rapidly increase the percentage of female judges. New Zealand and Victoria have taken different approaches to increasing the percentage of female judges in their respective judiciaries. The gender-sensitive initiatives in New Zealand are upstream measures that prepare female lawyers for judicial positions and make judicial positions more flexible for women with care responsibilities. In contrast, the gender-sensitive policies in Victoria are downstream policies that focus on the outcome of the appointment process. In this thesis, I argue that result-based gender-sensitive policies increase the percentage of female judges faster than

[48] Adlam (n 33).

[49] Interview with a male District Court Judge (18November 2021); Interview with a female District Court Judge (22November 2021)

[50] Interview with a female District Court Judge (22November 2021)

[51] See chapter 5.

gender-sensitive initiatives adopted in New Zealand. In the following, I briefly explain gender sensitive policies and initiatives and their impact on the percentage of female judges to advance my argument.

In chapter six, I explored six gender-sensitive initiatives designed to increase the proportion of female judges in New Zealand. These policies are of two types: those sponsored by the judiciary and those by women lawyers' associations. I have shown that women lawyers' associations hold sporadic mentorship and networking events to assist female lawyers to overcome the challenges of finding mentors and building a social network in the judiciary and legal profession. Moreover, the associations organise special events in which they teach skills, such as job interviewing skills, to help women demonstrate their competence in appointment interviews. As I have discussed, the judicial appointment processes and criteria are not transparent.[52] Women lawyers' associations sometimes invite female judges to share information about the appointment process and judicial roles and encourage more female lawyers to apply for judicial positions. I contend that the gender-sensitive initiatives are important measures to improve women's representation in the judiciary. They strive to address women's challenges in the legal profession and the judicial appointment processes, such as difficulties in networking and building mentorship relationships,[53] and the lack of information about the judicial appointment processes.

Furthermore, in chapter six, I explained that the New Zealand judiciary has taken steps to increase judicial diversity that can specifically benefit women. For one, they advertise expressions of interest on public websites and various lawyers' associations. This practice likely attracts diverse female lawyers to apply for a judicial position. Moreover, I have shown that the judicial diversity committee aims to adopt policies that actively support judges to take part time work, and the judiciary offers some flexible judicial positions compatible with people with care responsibilities, who are mostly women. For instance, judges can arrange their annual leave to spend time with their families during the school holidays. I have found that flexible working arrangements are becoming more common in the judiciary. However, I argue that the gender-sensitive policies of the judiciary would only benefit judges with care responsibilities. These initiatives may have no impact on female judges from diverse social and ethnic backgrounds who may encounter other challenges in their judicial position.

In chapter six, I noted that the gender-sensitive initiatives and policies in New Zealand have focused on addressing female lawyers' challenges before and after taking a judicial position. These measures have gradually enhanced the percentage of female judges over time, as the percentage of female judges improved from 34%, in 2019[54], to 40% in 2021.[55] However, the gender-sensitive policies do not reform the judicial appointment processes and cannot address the systemic issues discussed in chapters four and five. There is a lack of policies and initiatives that focus on structuring appointing authorities' discretionary power, providing equal opportunities for all candidates to become aware of appointment criteria and processes, and eliminating indirect discrimination and the influence of gender biased views in the judicial appointment processes. As a result, although the initiatives and policies has gradually improved the proportion of female judges, they failed to reform the structure of the appointment

[52] See chapter 3.
[53] See chapter 3.
[54] Geoff Adlam, 'New Zealand's Judiciary at 14 March 2019' [2019] Lawtalk 24.
[55] AIJA, 'AIJA Judicial Gender Statistics Number and Percentage of Women Judges and Magistrates at June 2021' (The Australasian Institute of Judicial Administration 2021).

processes. Therefore, female lawyers would still encounter multiple barriers during the appointment processes, and hence, only those who overcome the barriers would take judicial positions.

After identifying the shortcomings of gender-sensitive initiatives and policies in New Zealand, I have explored the impact of result-based gender-sensitive policies in Victoria to examine whether a result-based policy can be a viable alternative solution for women's unequal representation in the New Zealand judiciary. The Victorian government has adopted a result-based policy that set a 50% gender target for judicial appointments.[56] In chapter seven, I have shown that the proportion of female judges significantly improved only after the announcement of a numerical goal for the appointment of women and thus the result-based policy rapidly increased the percentage of female judges.

This thesis shows that result-based gender-sensitive policies effectively increased the numerical representation of women. In chapter two, I argued that judicial diversity would increase judicial legitimacy as it shows that diverse groups of people are represented in the judiciary. Here, result-based gender-sensitive policies can increase judicial legitimacy by showing the equal numerical representation of women. However, the result-based policies would not resolve the interconnected problems in the judicial appointment processes that disadvantage women candidates and, in turn, only benefit a limited percentage of women with similar backgrounds. Therefore, I suggest taking a holistic approach to address the wicked problem of women's underrepresentation in the judiciary.

II. Towards achieving equal representation of women in the judiciary

A. Judicial diversity must be an appointment criterion

As I discussed in this chapter, appointing authorities' unstructured discretionary power can potentially limit women's representation in the judiciary. I have shown that increasing judicial diversity depends on the preferences and views of the appointing decision makers, particularly the Attorney-General. Thus, as Brian Opeskin argues, 'An emboldened government might take inclusion to heart in making appointments that stray from the homochromatic practices of the past; or, in the absence of appetite or pressure for reform, atavistic habits might hold sway.'[57]

In chapter two, I explained that a purposive statutory framework that determines values and priorities can effectively structure the appointing authorities' discretion. Legal rules should set goal and values based on which people can evaluate the appointing authorities' performance and engage in a dialogue with them. [58] I recommend the adoption of a legislative provision for judicial diversity in New Zealand. Placing institutional value on judicial diversity is expected to encourage appointing decision makers to consider the importance of diversity when they make a judicial appointment.[59] I should note that the

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[56] State Government of Victoria, 'Balanced Boards Make Better Decisions' (*Premier of Victoria*, 28 March 2015) <https://www.premier.vic.gov.au/balanced-boards-make-better-decisions/> accessed 19 September 2022.

[57] Brian Opeskin, 'Dismantling the Diversity Deficit Towards a More Inclusive Australian Judiciary', *The judge, the judiciary, and the court: individual, collegial and institutional judicial dynamics in Australia* (Cambridge University Press 2021), P84.

[58] Lorne Sossin, 'Redistributing Democracy: An Inquiry into Authority, Discretion and the Possibility of Engagement in the Welfare State' (1994) 26 Ottawa law review 1.

[59] K.O. Myers, 'Merit Selection and Diversity on the Bench' (2012) 46 Indiana law review 43.

legislative provision must include different types of judicial diversity. In this way, the appointing decision makers will adopt an intersectional perspective to increase women's representation in the judiciary. As Dixon explained,

> The one thing I would say though is it is really important that the commitment be substantive, not just formally stick and include a notion of diversity that is beyond simply gender alone, but gender intersecting with culture, race, ethnicity, class, sexuality, disability... I think it is really important that if we do push, including through statute, we do it in a way that defines the goals in sufficiently inclusive intersectional and substantive terms.[60]

A legislative provision for judicial diversity might have two positive outcomes. First, this criterion would structure the executive discretion of appointing decision makers to contribute to gender diversity regardless of their personal or political preferences.

Second, A legislative provision for judicial diversity may encourage diverse female lawyers to attain the criteria and apply for a judicial position because they see a higher chance of success in the appointment processes. In chapter four, I explained that judicial diversity is an informal criterion and appointing authorities consider improving judicial diversity when they assess and select candidates. However, some women unaware of this criterion might perceive that there is unlikely for them to be selected for a judicial position. A legal provision to improve judicial diversity shows potential candidates that the judiciary is open to people with diverse backgrounds and characteristics. Therefore, women with different backgrounds might develop and invest in essential qualifications and skills for a judicial position. As a result, the gender diversity of the candidate pool is likely to increase, and in turn, the appointing decision makers can improve the percentage of female judges.

B. Appointment criteria must be transparent

Chapter four demonstrated that the appointment criteria for judicial positions are ambiguous and subjective. Certain important informal criteria, such as resilience and judicial diversity, are absent from the official list of formal criteria. Therefore, candidates who have strong social networks with judges are more likely to become aware of the criteria and prepare for the judicial appointment processes. In other words, lack of transparency of the appointment criteria systematically advantages individuals with strong social networks. As I explained in this thesis, most women lawyers lack equal opportunities to learn about the appointment criteria and show their competence during the judicial appointment process. I argue that the Attorney-General should set specific, clear, and transparent criteria to ensure equal opportunity between candidates. Some of the interview participants emphasised the need for modifying judicial appointment criteria. For example, female District Court judge number two noted,

> I think it is important for candidates to be confident that their applications are going to be treated well and that they are well prepared for them. So, the criteria should be much more specific. The criteria should be broader. The process should be clearer because the process is not very clear. There should be perhaps an appointment body set up to provide better information, to provide not only guidelines to what is required but also guidance on how to make those applications and prepare for a goal of being on the bench.[61]

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[60] Interview with a female academic lawyer (20 July 2022)

[61] Interview with a female District Court Judge (25 November 2021)

Hence, it is essential to set clear criteria that are most important to take a judicial position. I maintain that providing clear, specific, and transparent criteria that are publicly available may level the playing field among diverse candidates and address the challenge of preparing for judicial appointment processes that I discussed in chapter three. A transparent and broad set of appointment criteria would guide interested individuals to prepare for the appointment process. Therefore, women with diverse career backgrounds would have access to the appointment criteria and have an equal chance to prepare themselves for the appointment process. In addition, transparent criteria enhance the transparency of the appointment process. According to female senior judge number five, currently, some people have cynical views about the judicial appointment processes. Increasing transparency can advance public trust and support. [62] It is a fundamental requirement for the reliability of a public institute. [63]

C. Appointment interviews should have structure

In this chapter, I argued that unstructured judicial appointment interviews lead to subjective assessment of candidates. I suggest structuring the interview process by drafting an objective and clear job analysis, preparing a set of questions related to the job analysis, asking the same set of questions of all candidates, and evaluating candidates referring to their responses to these questions. A considerable number of studies show that structured interviews eliminate the influence of interviewers' impressions and their implicit biases about candidates' weight, gender, and race. It also eliminates discrimination and gender stereotyping during the interviews. [64] Structuring interviews minimises the subjectivity of the interview process and enhances the procedural justice, reliability, validity, and fairness of the process. [65] The structured interview process would increase the percentage of female judges by eliminating the influence of implicit biases and providing an equal opportunity to objectively assess all candidates.

In chapter four, I argued that the unstructured nature of the appointment interviews can disadvantage a high proportion of female candidates. The literature on employment interviews suggests methods to reduce the impact of interviewers' perceptions and increase the objectivity and reliability of the

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[62] Anoeska Buijze, 'Six Faces of Transparency' (2013) 9 Utrecht law review 3.

[63] Murat Jashari and Islam Pepaj, 'The Role of the Principle of Transparency and Accountability in Public Administration' (2018) 10 Acta Universitatis Danubius. Administratio 60.

[64] Stephan J Motowidlo and others, 'Studies of the Structured Behavioral Interview' (1992) 77 Journal of applied psychology 571; Eugene J Kutcher and Jennifer Denicolis Bragger, 'Selection Interviews of Overweight Job Applicants: Can Structure Reduce the Bias?' (2004) 34 Journal of applied social psychology 1993; Ellyn Brecher, Jennifer Bragger and Eugene Kutcher, 'The Structured Interview: Reducing Biases Toward Job Applicants with Physical Disabilities' (2006) 18 Employee responsibilities and rights journal 155; Swider, Barrick and Harris (n 18); Ekaterina Pogrebtsova, Denisa Luta and Peter A Hausdorf, 'Selection of Gender-incongruent Applicants: No Gender Bias with Structured Interviews' (2020) 28 International journal of selection and assessment 117; Ioana M Latu, Marianne Schmid Mast and Tracie L Stewart, 'Gender Biases in (Inter) Action: The Role of Interviewers' and Applicants' Implicit and Explicit Stereotypes in Predicting Women's Job Interview Outcomes' (2015) 39 Psychology of women quarterly 539; Dipboye (n 18); Sima Wolgast, Martin Bäckström and Fredrik Björklund, 'Tools for Fairness: Increased Structure in the Selection Process Reduces Discrimination' (2017) 12 PloS one e0189512; Julie M McCarthy, Chad H Van Iddekinge and Michael A Campion, 'Are Highly Structured Job Interviews Resistant to Demographic Similarity Effects?' (2010) 63 Personnel psychology 325.

[65] Laura Gollub Williamson and others, 'Employment Interview on Trial : Linking Interview Structure with Litigation Outcomes' (1997) 82 Journal of applied psychology 900; Michael A Campion, David K Palmer and James E Campion, 'A Review of Structure in the Selection Interview' (1997) 50 Personnel psychology 655; Kutcher and Bragger (n 64).

interview process. In the following, I recommend some of these methods to enhance the objectivity of the judicial appointment interviews.

There is an abundance of research that strongly recommends structuring job interviews.[66] In general, there are three types of interviews: unstructured, semi-structured, and structured. Unstructured interviews have no limitations or constraints on the questions and the interview process. Semi-structured interviews have some degree of constraint on questions. For example, interviewers must cover specific topics during the interview.[67] In structured interviews, interviewers should apply the same predetermined rules for all candidates and assess candidates' performance based on standardised guidelines.[68] Thus, interviewers' discretion is limited by some rules and guidelines in structured interviews.

According to Macan, structuring interviews is a multidimensional task.[69] Here, I suggest three ways of structuring the judicial appointment interviews. First, structuring job interviews starts with drafting a specific job analysis.[70] A job analysis includes the special skills, qualifications, and knowledge necessary for a job.[71] Drafting a job analysis is an important step of structuring an interview because it influences interview questions and the interviewers' assessments of candidates.[72]

The evidence suggests that the interview process is open to institutional gender biases.[73] To address this issue, I recommend decision makers draft a job analysis, including necessary skills and qualifications to fulfil a judicial role. As I discussed previously, the judicial appointment criteria for District Court and High Courts are subjective. However, the assessment criteria should be specific and objective to decrease the ambiguity and subjectivity of the final interview judgments.[74] Therefore, I strongly recommend modifying the appointment criteria to improve the objectivity of the interview process.

The second step is to draft a set of standard questions for all the candidates.[75] Interview questions should relate to the job analysis and aim to gain information regarding skills, qualifications, and attributes necessary for a job.[76] Standardisation of questioning is the most basic and important part of structuring interviews[77] because it eliminates the influence of interviewers' impression of candidates.

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[66] Florea and others (n 18); Motowidlo and others (n 64); Therese Macan, 'The Employment Interview: A Review of Current Studies and Directions for Future Research' (2009) 19 Human resource management review 203; Brecher, Bragger and Kutcher (n 64); McCarthy, Van Iddekinge and Campion (n 64); Michael A Campion, Elliott D Pursell and Barbara K Brown, 'Structured Interviewing: Raising the Psychometric Properties of the Employment Interview' (1988) 41 Personnel psychology 25; Kutcher and Bragger (n 64); Wolgast, Bäckström and Björklund (n 64).

[67] Florea and others (n 18).

[68] Motowidlo and others (n 64).

[69] Macan (n 66).

[70] Motowidlo and others (n 64).

[71] Brecher, Bragger and Kutcher (n 64); Dipboye (n 18).

[72] Dipboye (n 18); Campion, Pursell and Brown (n 66); Motowidlo and others (n 64); Huffcutt (n 18).

[73] See chapter 4.

[74] Williamson and others (n 65).

[75] Motowidlo and others (n 64); Campion, Palmer and Campion (n 65); Campion, Pursell and Brown (n 66); Dipboye (n 18).

[76] Dipboye (n 18); Huffcutt (n 18); Campion, Pursell and Brown (n 66).

[77] Campion, Palmer and Campion (n 65).

Moreover, interviewers cannot ask confirmatory questions because they must ask the same pre-drafted questions of all the candidates.[78]

A structured interview might include various types of questions such as past behaviour questions, situational questions, job knowledge questions, and background questions.[79] Situational questions ask a candidate what they would do if a hypothetical situation happened on the job. The past behaviour questions focus on the past behaviour of a candidate and ask what they did in their former jobs.[80] The past behaviour questions are based on the idea that the best predictor of future performance of a candidate is their past performance. Hence, by asking questions about candidates' past performance, an interviewer can predict their future performance.[81] Although some studies demonstrate that past behaviour questions are better than situational questions in assessing candidates' future performance,[82] I suggest that the situational questions might be more suitable to assess some female candidates with non-traditional backgrounds. Female candidates who did not appear in courts frequently might not be able to answer past performance questions if the questions are specifically about their past experiences in courts, while female candidates who do not have court experiences can show their competence and eligibility by providing appropriate responses to the situational questions. Thus, they will have a higher chance of being selected for a judicial position.

The literature on job interviews emphasises the importance of asking the same questions from all candidates.[83] While, as I previously discussed, the interview process for judicial appointments lacks a set of questions. Therefore, I recommend designing a set of questions for all the interviews. In this way, the interview process will be more objective and diverse candidates will be treated equally.

The last step of structuring an interview focuses on evaluating candidates. Improving the structure of interview evaluation limits interviewers' discretion.[84] It makes the evaluation process more objective and reliable. I suggest two methods to structure candidates' assessments. First, interviewers should review their notes and score candidates based on the job analysis.[85] Referring to the job analysis to evaluate and score candidates limits interviewers' discretion.[86] Interviewers can justify their judgments by referring to the job analysis.[87] Second, interviewers should rate and compare various candidates based on their responses to the same questions,[88] which would increase the fairness and objectivity of candidates' evaluations.

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[78] Binning and others (n 16).
[79] Campion, Palmer and Campion (n 65).
[80] ibid.
[81] Elalne D Pulakos and Neal Schmitt, 'Experience-Based and Situational Interview Questions: Studies of Validity' (1995) 48 Personnel psychology 289.
[82] ibid.
[83] Motowidlo and others (n 64); Campion, Palmer and Campion (n 65); Campion, Pursell and Brown (n 66); Dipboye (n 18).
[84] Allen I Huffcutt, Satoris S Culbertson and William S Weyhrauch, 'Moving Forward Indirectly: Reanalyzing the Validity of Employment Interviews with Indirect Range Restriction Methodology' (2014) 22 International journal of selection and assessment 297.
[85] Motowidlo and others (n 64); Huffcutt (n 18).
[86] Motowidlo and others (n 64).
[87] Kutcher and Bragger (n 64).
[88] Campion, Palmer and Campion (n 65).

D. The need for flexible working arrangements

I argue that increasing the flexibility of working arrangements in the judiciary would improve women's representation in the judiciary. As female District Court judge number two noted, '…more flexible working would open the door for a lot more women putting themselves forward.'[89] Therefore, courts with flexible working arrangements are more appealing for women. As Carrie Menkel-Meadow discusses, compatibility of some occupations with life cycle choices increases gender segmentation of the workforce.[90] For example, as of 2022, the majority of coroners are women.[91] My interview findings show that coroners have flexible working arrangements that can be appealing for women with care responsibilities. Female coroner number seven stated that she enjoys some extent of flexibility over her daily schedule, meaning that she has control over her working hours and workplace. For example, she can work either from home or her chamber, while a judge sitting in the Criminal Court has less flexibility and control over their daily schedule.[92] Similarly, female coroner number eight mentioned that the adaptability of the actual working condition with family responsibilities encouraged her to apply for the role.[93] This suggest that increasing the flexibility of the judicial positions in different courts makes them more suitable for female judges with care responsibilities. The knowledge of the possibility for flexible working in a position increases the proportion of female candidates.

In addition, I recommend that holding virtual hearings increases the judicial career flexibility, because female judges can choose whether to work from home or on the bench. During the interviews, some participants shared their reflections on the judiciary's experience during the Covid-19 pandemic. Specifically, they noted that in 2020 and 2021, all judges had to work from home and conduct virtual trials due to the Covid-19 restrictions. This experience proved that judges could work remotely.[94] Flexible working arrangements such as remote working help women reconcile their work and family demands.[95] Remote working increases the flexibility of judicial roles since judges can choose their workplace. They have the choice to either work from home or in their chambers. As male senior judge number nine noted,

> There is a degree of flexibility and especially with Covid that we have now, most of the judges are working from home, and most of our courts are done remotely……Prior to Covid, we used to travel around the country to deal with these applications. Since Covid, we have been dealing with them remotely, without traveling. [We were] dealing with everyone by way of zoom hearings. We have found that probably 90% of those hearings can be dealt with remotely.[96]

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[89] Interview with a female District Court Judge (25November 2021)

[90] Carrie Menkel-Meadow, 'The Comparative Sociology of Women Lawyers: The "Feminization" of the Legal Profession' (1986) 24 Osgoode Hall law journal (1960) 897.

[91] 'Contact the Coronial Offices' (*Coronial Services of New Zealand*) <https://coronialservices.justice.govt.nz/contact/> accessed 11 February 2022.

[92] Interview with a female coroner (17 October 2021)

[93] Interview with a female coroner (19 October 2021)

[94] Interview with a male senior judge (19 October 2021)

[95] Dirk Hofäcker and Stefanie König, 'Flexibility and Work-Life Conflict in Times of Crisis: A Gender Perspective' (2013) 33 International journal of sociology and social policy 613.

[96] Interview with a male senior judge (19 October 2021)

According to male senior judge number nine, the experience of holding virtual hearings showed that it is possible to work remotely.[97] Female District Court judge number two suggested that the possibility of remote work enhances the flexibility of a judicial career. She stated,

> It could certainly open up the possibility of more flexible work. For example, it could open up the possibility of having a certain proportion of other judges being scheduled to work from home ... But it is not being discussed at the moment. What we are discussing a lot is how we change our court attendances and court appearances to incorporate more remote appearances, more remote conferencing, more remote hearings. But we have not shifted the discussion onto well, does this open up the prospect for a more diverse workforce as well.[98]

The possibility of remote work might be appealing for some female judges. However, I am aware that working from home might be challenging as well. As female District Court judge number four stated,

> But in the judiciary that is very hard to do and the working from home when you are talking about being on a screen in court… working from home would change the boundaries and with little kids who do not understand that kind of thing it could be very stressful. So, I do not know if it actually would help judges.[99]

According to female District Court judge number four, it might be difficult for judges who work from home to set a boundary between their work and family needs. Thus, remote working might not help women to reconcile their work and family responsibilities. I should note that different female judges might have different experiences of working from home. Arguably, the possibility of working from home gives female judges a choice to adjust their workplace based on their needs. Moreover, as discussed in chapter four, relocating to a new city is a significant challenge for some women with school-aged children. Judges might not need to move to a new city if they can hold virtual trials. Providing remote working possibilities might resolve the considerable challenge of relocating to a new city.

Furthermore, I argue that the judiciary should adopt policies that actively encourage and facilitate part time work and job sharing for all judges. The literature on flexible work arrangements show that job sharing is an effective strategy to offer part time positions adjustable for women with care responsibilities.[100]

Job sharing involves two individuals undertaking tasks that are normally performed by one person in a full-time role. In such arrangements, each individual is equally accountable for the fulfilment of the job's requirements.[101] In general, there are three ways of job sharing. First, two individuals share all roles and responsibilities. Second, two individuals divide the workload and fulfil their tasks individually,[102] and

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[97] Interview with a male senior judge (19 October 2021)
[98] Interview with a female District Court Judge (25November 2021)
[99] Interview with a female District Court Judge (22November 2021)
[100] Emma Watton, Sarah Stables and Steve Kempster, 'How Job Sharing Can Lead to More Women Achieving Senior Leadership Roles in Higher Education: A UK Study' (2019) 8 Social sciences (Basel) 209; Rosalind Dixon, Jessie Zhang and Rose Vassel, 'Reimagining Job Sharing'.
[101] Mahima Thakur, Anjali Bansal and Rashmi Maini, 'Job Sharing as a Tool for Flexible Work Systems: Creating Opportunities for Housewives in the Indian Labor Market' (2018) 33 Gender in management 350.
[102] Barney Olmsted, 'Job Sharing: An Emerging Work-Style' (1979) 118 International labour review 283.

third, a mixture of the two approaches. [103] My interview findings show that it is possible to share a judicial position between two judges. As, female District Court judge number two explained,

> You have one judge hearing the case, but if you had two judges job sharing, it could in fact increase efficiency, because if that judge is not able to continue aspects of management of the case, it could be transferred to the other judge who can support the work that is being done through a job-sharing approach… Some options for part time work are informally available for judges towards the retirement end of their careers, and judges can sometimes secure an agreement that they can work, say, 50% of the time if they can demonstrate that there is another judge who wants to job share with them, so if it can be done at that end of a judicial life, it could be done at the start too.[104]

According to her, some judges currently divide the workload of a judicial position by sharing their job, which suggests that it is possible for two judges to share the responsibilities of a single position and effectively manage workload stress. As I explained in chapter two, women take more care responsibilities and thus, job sharing would be particularly beneficial for them. Job sharing would reduce women's stress levels because it helps them to arrange their work and family obligations.

To conclude, I have presented a set of recommendations that focus on several key areas, such as the importance of enacting a legal provision to obligate decision makers to improve judicial diversity and enhancing the transparency of the judicial appointment criteria. I have recommended structuring judicial appointment interviews to eliminate the influence of unconscious biases on women and providing flexible working arrangements for judges to encourage more women to apply for judicial positions. The recommendations are based on a thorough review of the literature and careful analysis of the data collected in this study.

III. The significance of the thesis: Towards more women judges in New Zealand

This research addresses the significant gap in the literature on the impact of judicial appointment processes on women's representation in the New Zealand judiciary. It has provided valuable information on how the appointment processes take place in practice through extensive qualitative interviews with various judges, appointing authorities, barristers, and academic lawyers. By doing so, this research adds to the existing body of knowledge, making it an important contribution to literature.

Furthermore, the literature does not offer insights on policies or initiatives for improving the proportion of women judges in New Zealand. To address this gap, I identified a network of gender-sensitive initiatives applied by women lawyer associations and judiciary and showed that these initiatives failed to address women's barriers during the judicial appointment processes. Such initiatives may not address the lack of intersectional diversity in the judiciary, which is a considerable issue that needs further research. Nonetheless, this research is an important contribution to the literature, as it provides valuable insights and recommendations for addressing the unequal representation of women in the New Zealand judiciary.

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[103] Managers, Public Service Commission and Gemini3 Pty Ltd, 'Job Share Guide: Managers'.

[104] Interview with a female District Court Judge (25November 2021)

In the introduction, I explained that our understanding of the problem of women's unequal representation in the judiciary evolves by applying different solutions and each solution reveals an aspect of the problem that requires further attention. This thesis has shown that the result-based policy in Victoria has benefited a limited percentage of female judges from narrow backgrounds. In chapter two, I noted that a challenge in setting result-based policies is the group classification of individuals. Victoria's result-based policy classifies people based on their gender and sets a target for improving the percentage of female judges. In chapter seven, I showed that although result-based policies rapidly increase the percentage of women judges, they have not benefited all women, and categorising people based solely on their gender risks overlooking people with diverse backgrounds, who encounter intersectional disadvantages. My thesis suggests that diversifying policies can reduce underrepresentation along each identity dimension. However, they cannot eliminate underrepresentation at the intersectional level. Thus, result-based gender-sensitive policies would benefit a limited proportion of women as they fail to address the structural issues of the judicial appointment processes. More research is needed to explore how judicial appointment processes would impact female candidates from diverse socio-cultural backgrounds and offer gender-sensitive policies and initiatives for improving the appointment of female judges who encounter an intersection of various disadvantages.

Bibliography

I. Books, journals and reports

Adams M, 'Doing What Doesn't Come Naturally. On the Distinctiveness of Comparative Law', *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing Limited 2013)

Adams M and Van Hoecke M (eds), 'Conclusion: Challenges of Comparison', *Comparative Methods in Law, Humanities and Social Sciences* (Edward Elgar Publishing 2021)

Adlam G, 'Snapshot of the Profession at 1 February 2018' [2018] Lawtalk 43

——, 'New Zealand's Judiciary at 14 March 2019' [2019] Lawtalk 24

——, 'Snapshot of the Profession 2020' [2020] Lawtalk 26

AIJA, 'AIJA Judicial Gender Statistics Number and Percentage of Women Judges and Magistrates at June 2021' (The Australasian Institute of Judicial Administration 2021)

Akpet KO, 'The Australian Legal System:The Legal Profession and the Judiciary' [2011] Ankara Bar Review 71

Allen AL, 'Was I Entitled or Should I Apologize? Affirmative Action Going Forward' (2011) 15 The journal of ethics 253

Anderson A and Scholtens M, ''Even Now, People Still See a Good Lawyer as a Man in a Suit' : The Voice of Women in New Zealand's Senior Courts' (2019) 3 New Zealand women's law journal 183

Anderson E, *The Imperative of Integration* (Princeton University Press 2010)

Arlinghaus A and others, 'Working Time Society Consensus Statements: Evidence-Based Effects of Shift Work and Non-Standard Working Hours on Workers, Family and Community' (2019) 57 Industrial health 184

Arneson R J, 'Equality and Equal Opportunity for Welfare' (1989) 56 Philosophical studies 77

Arsiniega B, 'Beyond Big Law: Toward a More Inclusive Study of Gender in the Legal Profession' (2020) 27 UCLA women's law journal 113

Ashby N, 'Absent from the Top - a Critical Analysis of Women's Underrepresentation in New Zealand's Legal Profession' (2017) 1 New Zealand women's law journal 80

Bacchi CL, The Politics of Affirmative Action: 'women,' Equality and Category Politics (Sage Publications 1996)

Balint PJ and others, Wicked Environmental Problems: Managing Uncertainty and Conflict (Island Press 2011)

Barbee JR and Keil EC, 'Experimental Techniques of Job Interview Training for the Disadvantaged: Videotape Feedback, Behavior Modification, and Microcounseling' (1973) 58 Journal of applied psychology 209

Barnett J, Burt M and Nair N, 'Snapshot of the Profession 2021' [2021] Lawtalk 36

Bartlett KT, 'Feminist Legal Methods' (1990) 103 Harvard law review 829

Bindman G and Monaghan K, 'Judicial Diversity: Accelerating Change' (2014)

Binning JF and others, 'Effects of Preinterview Impressions on Questioning Strategies in Same - and Opposite-Sex Employment Interviews' (1988) 73 Journal of applied psychology 30

Bird R, 'Legal Research and the Legal System in Australia' (2000) 28 International journal of legal information 70

Blackham A, 'Court Appointment Processes and Judicial Diversity' (2013) 24 Public Law Review 233

Bogoch B, 'Judging in a "Different Voice": Gender and the Sentencing of Violent Offences in Israel' (1999) 27 International Journal of the Sociology of Law 51

Bolton SC and Muzio D, 'Can't Live with 'Em; Can't Live without 'Em: Gendered Segmentation in the Legal Profession' (2007) 41 Sociology (Oxford) 47

Boston J and Callister P, 'Diversity and Public Policy' (2005) 1 Policy Quarterly

Boyd CL, 'Representation on the Courts? The Effects of Trial Judges' Sex and Race' (2016) 69 Political Research Quarterly 788

Boyd CL, Epstein L and Martin AD, 'Untangling the Causal Effects of Sex on Judging' (2010) 54 American Journal of Political Science 389

Boyle C, 'Sexual Assault and the Feminist Judge' (1985) 1 Canadian journal of women and the law 93

Brashears ME, 'Sex, Society, and Association : R Cross-National Examination of Status Construction Theory' (2008) 71 Social psychology quarterly 72

Brecher E, Bragger J and Kutcher E, 'The Structured Interview: Reducing Biases Toward Job Applicants with Physical Disabilities' (2006) 18 Employee responsibilities and rights journal 155

Buijze A, 'Six Faces of Transparency' (2013) 9 Utrecht law review 3

Butler J, Gender Trouble: Feminism and the Subversion of Identity (10th anniversary, Routledge 1999)

Campbell C and Smith D, 'Distinguishing Between Direct and Indirect Discrimination' [2022] Modern law review

Campbell I, Charlesworth S and Malone J, 'Part-Time of What?: Job Quality and Part-Time Employment in the Legal Profession in Australia' (2012) 48 Journal of sociology (Melbourne, Vic.) 149

Campion MA, Palmer DK and Campion JE, 'A Review of Structure in the Selection Interview' (1997) 50 Personnel psychology 655

Campion MA, Pursell ED and Brown BK, 'Structured Interviewing: Raising the Psychometric Properties of the Employment Interview' (1988) 41 Personnel psychology 25

Carter JS and Lippard CD, The Death of Affirmative Action? Racialized Framing and the Fight against Racial Preference in College Admissions (Bristol University Press 2020)

Cartier G, 'Reconceiving Discretion: From Discretion as Power to Discretion as Dialogue' (ProQuest Dissertations Publishing 2004)

Carvalho J-P, Pradelski B and Williams C, 'Affirmative Action with Multidimensional Identities' [2022] Available at SSRN 4070930

Catalyst (Organization), The Double-Bind Dilemma for Women in Leadership: Damned If You Do, Doomed If You Don't (Catalyst 2007)

Caufield RP, 'How the Pickers Pick: Finding a Set of Best Practices for Judicial Nominating Commissions' (2007) 34 The Fordham urban law journal 163

Cheer U and others, Flexible and Part-Time Work Arrangements in the Canterbury Legal Profession: A Report (2017)

Chen EM, 'The Judiciary, Diversity, and Justice for All' (2003) 91 California Law Review 1109

Chrisman R, 'Affirmative Action: Extend It' (2013) 43 The Black scholar 71

Christensen T, Lægreid OM and Lægreid P, 'Administrative Coordination Capacity; Does the Wickedness of Policy Areas Matter?' (2019) 38 Policy & society 237

Cockayne J and Auckland District Law Society, *Women in the Legal Profession: The Report of the Second Working Party on Women in the Legal Profession* (Public Relations Dept of the Auckland District Law Society 1989)

Cotterrell R, 'Comparative Law and Legal Culture', *The Oxford Handbook of Comparative Law (2nd edn)* (2nd edn, Oxford University Press 2019)

County Court of Victoria, 'Annual Report 2020–21' (2021)

——, 'Indictable Offences' (*Magistrates' Court of Victoria*, 24 March 2022)

Crawford JT, 'Imposter Syndrome for Women in Male Dominated Careers' (2021) 32 Hastings Women's L.J.

Crosby FJ and VanDeVeer C, Sex, Race, and Merit Debating Affirmative Action in Education and Employment (University of Michigan Press 2000)

Cunningham-Parmeter K, 'Father Time: Flexible Work Arrangements and the Law Firm's Failure of the Family' (2011) 53 Stanford Law Review

Dagan H, 'The Real Legacy of American Legal Realism' (2018) 38 Oxford journal of legal studies 123

Davis KC, *Discretionary Justice: A Preliminary Inquiry*, vol IB-71 (University of Illinois Press 1971)

Davis R and Williams G, 'Reform of the Judicial Appointment Process: Gender and the Bench of the High Court of Australia' (2003) 27 Melbourne University Law Review 819

Dawuni J and Kang A, 'Her Ladyship Chief Justice: The Rise of Female Leaders in the Judiciary in Africa' (2015) 62 Africa today 45

De Cruz P, *Comparative Law in a Changing World* (3rd edn, Routledge-Cavendish 2007)

De Vos M, Beyond Formal Equality: Positive Action under Directives 2000/43/EC and 2000/78/EC (European Commission 2007)

Deloitte and Westpac New Zealand Limited, *Westpac New Zealand Sharing the Load Report* (Westpac New Zealand 2021)

Dicey AV, Introduction to the Study of the Law of the Constitution (Liberty/Classics 1982)

Dipboye RL, 'Self-Fulfilling Prophecies in the Selection-Recruitment Interview' (1982) 7 The Academy of Management review 579

Dipboye RL, 'Structured and Unstructured Selection Interviews: Beyond the Job Fit Model' (1994) 12 Research in Personnel and Human Resources Management

Dixon R, 'Female Justices, Feminism, and the Politics of Judicial Appointment: A Re-Examination' (2010) 21 Yale Journal of Law and Feminism 297

Dixon R, Zhang J and Vassel R, 'Reimagining Job Sharing' (2020)

Dougherty TW, Callender JC and Turban DB, 'Confirming First Impressions in the Employment Interview: A Field Study of Interviewer Behavior' (1994) 79 Journal of applied psychology 659

Durant LV, 'Gender Bias and Legal Profession: A Discussion of Why There Are Still so Few Women on the Bench' (2004) 4 University of Maryland Law Journal of Race, Religion, Gender and Class

Dworkin R, *Taking Rights Seriously* (Harvard University Press 1977)

Eagly AH and Carli LL, 'Women and the Labyrinth of Leadership' (2007) 85 Harvard business review 62

Eastland T, 'The Case against Affirmative Action' (1992) 34 William and Mary law review 33

Edwards SD, 'Three Versions of an Ethics of Care' (2009) 10 Nursing philosophy 231

Elek JK and Rottman DB, 'Methodologies for Measuring Judicial Performance: The Problem of Bias' (2014) 4 Oñati Socio-legal Series 863

Ellemers N, 'Gender Stereotypes' (2018) 69 Annual review of psychology 275

Epstein CF and others, 'Glass Ceilings and Open Doors: Women's Advancement in the Legal Profession' (1995) 64 Fordham law review 291

Evans S and Williams J (Australian law professor), 'Appointing Australian Judges: A New Model' (2008) 30 The Sydney law review 297

Evans T and Hupe P, 'Conceptualizing Discretion' (2020)

Feenan D, 'Women Judges: Gendering Judging, Justifying Diversity' (2008) 35 Journal of Law and Society 490

Fershtman D and Pavan A, '"Soft" Affirmative Action and Minority Recruitment' (2021) 3 The American economic review. Insights 1

Fiske ST and Neuberg SL, 'A Continuum of Impression Formation, from Category-Based to Individuating Processes: Influences of Information and Motivation on Attention and Interpretation' (1990) 23 Advances in experimental social psychology 1

Fletcher JK and Bailyn L, 'The Equity Imperative: Redesigning Work for Work-Family Intergration', *Work and life integration: organizational, cultural, and individual perspectives* (Lawrence Erlbaum Associates, Publishers 2005)

Florea L and others, 'From First Impressions to Selection Decisions: The Role of Dispositional Cognitive Motivations in the Employment Interview' (2019) 48 Personnel review 249

Fredman S, 'Substantive Equality Revisited' (2016) 14 International journal of constitutional law 712

Fuentes-Rohwer L and Johnson KR, 'A Principled Approach to the Quest for Racial Diversity on the Judiciary' (2004) 10 Michigan Journal of Race & Law

Furtado JV, Moreira AC and Mota J, 'Gender Affirmative Action and Management: A Systematic Literature Review on How Diversity and Inclusion Management Affect Gender Equity in Organizations' (2021) 11 Behavioral sciences 21

Gavin B, 'Re-Examining the Concept and Principle of Equality in EC Law' (2003) 22 Yearbook of European law 117

Geyh CG, 'The Dimensions of Judicial Impartiality' (2013) 65 Florida law review 493

Glanert S, Mercescu A and Samuel G, *Rethinking Comparative Law* (Edward Elgar Publishing Limited 2021)

Gleeson M, 'Judicial Selection and Training : Two Sides of the One Coin' (2003) 77 Australian law journal 591

Gorman EH, 'Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms' (2005) 70 American sociological review 702

Graham BL, 'Toward an Understanding of Judicial Diversity in American Courts' (2004) 10 Michigan Journal of Race & Law

Gray IL, 'The People's Court : Into the Future' (Institute of Judicial Administration 2003)

Greenman E, Torres-Spelliscy C and Chase M, 'Improving Judicial Diversity' in Jane Campbell Moriarty (ed), *Women and the Law* (Thomson/West 2009)

Grey L, 'Reflections from a Young Woman Entering the Profession - Would a Female Partner Quota Address Gender Inequality within the New Zealand Legal Profession?' (2017) 1 New Zealand women's law journal 51

Guarnieri C, 'Appointment and Career of Judges in Continental Europe: The Rise of Judicial Self-Government' (2004) 24 Legal studies (Society of Legal Scholars) 169

Haire SB and Moyer LP, Diversity Matters: Judicial Policy Making in the U.S. Courts of Appeals (University of Virginia Press 2015)

Hakim C, 'Women, Careers, and Work-Life Preferences' (2006) 34 British journal of guidance & counselling 279

Hale B and Hunter R, 'A Conversation with Baroness Hale' (2008) 16 Feminist legal studies 237

Hamilton B, 'The Law Council of Australia Policy 2001 on the Process of Judicial Appointments: Any Good News for Future Female Judicial Appointees?' (2001) 1 Law and justice journal 223

Handsley E and Lynch A, 'Facing up to Diversity? Transparency and the Reform of Commonwealth Judicial Appointments 2008-13' (2015) 37 The Sydney law review 187

Harris BV, 'A Judicial Commission for New Zealand : A Good Idea That Must Not Be Allowed to Go Away' [2014] New Zealand law review 383

Head BW and Alford J, 'Wicked Problems: Implications for Public Policy and Management' (2015) 47 Administration & society 711

Heilman ME, 'Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organizational Ladder' (2001) 57 Journal of social issues 657

Henly JR and Lambert SJ, 'Unpredictable Work Timing in Retail Jobs: Implications for Employee Work–Life Conflict' (2014) 67 Industrial & labor relations review 986

Hirschl R, Comparative Matters: The Renaissance of Comparative Constitutional Law (Oxford University Press 2014)

Hodges-Aeberhard J, 'Affirmative Action in Employment: Recent Court Approaches to a Difficult Concept' (1999) 138 International Labour Review 247

Hofäcker D and König S, 'Flexibility and Work-Life Conflict in Times of Crisis: A Gender Perspective' (2013) 33 International journal of sociology and social policy 613

Holmes DK, 'Structural Causes of Dissatisfaction among Large-Firm Attorneys: A Feminist Perspective' (1990) 12 Women's rights law reporter 9

Holzer HJ and Neumark D, 'What Does Affirmative Action Do?' (2000) 53 Industrial & labor relations review 240

Hudson N, 'Appointment, Role and Powers of Judges' [2019] County Court of Victoria, Fact Sheet 13

Huffcutt AI, 'From Science to Practice: Seven Principles for Conducting Employment Interviews' (2010) 12 Applied H.R.M. Research 15

Huffcutt AI, Culbertson SS and Weyhrauch WS, 'Moving Forward Indirectly: Reanalyzing the Validity of Employment Interviews with Indirect Range Restriction Methodology' (2014) 22 International journal of selection and assessment 297

Hughes RA, Leane GWG and Clarke A, Australian Legal Institutions: Principles, Structure and Organisation (2nd edn, Lawbook Co 2003)

Hull KE and Nelson RL, 'Assimilation, Choice, or Constraint? Testing Theories of Gender Differences in the Careers of Lawyers' (2000) 79 Social forces 229

Hunter R, 'Can Feminist Judges Make a Difference?' (2008) 15 International journal of the legal profession 7

——, 'Justice Marcia Neave: Case Study of a Feminist Judge' in Ulrike Schultz and Gisela Shaw (eds), *Gender and judging* (Hart Publishing 2013)

——, 'More than Just a Different Face? Judicial Diversity and Decision-Making' (2015) 68 Current Legal Problems 119

——, 'Feminist Judging in the "Real World"' (2018) 8 Oñati socio-legal series 1275

Hunter RC and Rackley E, Justice for Everyone: The Jurisprudence and Legal Lives of Brenda Hale (Cambridge University Press 2022)

Hutchinson TCM, *Researching and Writing in Law* (3rd edn, Thomson Reuters/Lawbook Co 2010)

Hyman P, Hopes Dashed?: The Economics of Gender Inequality (Bridget Williams Books Limited 2017)

Ibarra H, 'Homophily and Differential Returns: Sex Differences in Network Structure and Access in an Advertising Firm' (1992) 37 Administrative science quarterly 422

——, 'Personal Networks of Women and Minorities in Management: A Conceptual Framework' (1993) 18 The Academy of Management review 56

Ifill SA, 'Racial Diversity on the Bench: Beyond Role Models and Public Confidence' (2000) 57 Washington and Lee Law Review 405

Jackson JD, 'Beyond Quality: First Principles in Judicial Selection and Their Application to a Commission-Based Selection System' (2007) 34 The Fordham urban law journal 125

Jacobs LA, Pursuing Equal Opportunities: The Theory and Practice of Egalitarian Justice (Cambridge University Press 2004)

Jashari M and Pepaj I, 'The Role of the Principle of Transparency and Accountability in Public Administration' (2018) 10 Acta Universitatis Danubius. Administratio 60

Johnson KR, 'How Political Ideology Undermines Racial and Gender Diversity in Federal Judicial Selection: The Prospects for Judicial Diversity in the Trump Years' [2017] Wisconsin Law Review 345

Jones MP, 'Increasing Women's Representation Via Gender Quotas: The Argentine Ley de Cupos' (1996) 16 Women & politics 75

Joseph PA, 'Appointment, Discipline and Removal of Judges in New Zealand', *Judiciaries in Comparative Perspective* (Cambridge University Press 2011)

Kanerva A, Lammintakanen J and Kivinen T, 'Experiences of the Fairness of Recruitment from Unsuccessful Applicants in the Field of Nursing: Experiences of the Fairness of Recruitment' (2010) 18 Journal of nursing management 293

Kastellec JP, 'Racial Diversity and Judicial Influence on Appellate Courts' (2013) 57 American Journal of Political Science 167

Kay FM and Wallace JE, 'Mentors as Social Capital: Gender, Mentors, and Career Rewards in Law Practice' (2009) 79 Sociological inquiry 418

Kellough JE, Understanding Affirmative Action : Politics, Discrimination, and the Search for Justice (Georgetown University Press 2006)

Kennedy A-M, 'Macro-Social Marketing' (2015) 36 Journal of Macromarketing 354

Kennedy A-M and Parsons A, 'Macro-Social Marketing and Social Engineering: A Systems Approach' (2012) 2 Journal of social marketing 37

Kennedy R, *For Discrimination: Race, Affirmative Action, and the Law* (First Vintage books, Vintage Books, a division of Penguin Random House LLC 2015)

Kerr J, 'Turning Lawyers into Judges Is a Public Responsibility' [2020] Australian Public Law

King KL and Greening M, 'Gender Justice or Just Gender? The Role of Gender in Sexual Assault Decisions at the International Criminal Tribunal for the Former Yugoslavia' (2007) 88 Social Science Quarterly 1049

King LJ, 'The Attorney-General, Politics and the Judiciary' (2000) 74 Australian law journal 444

Kirby M, 'Modes of Appointment and Training of Judges - a Common Law Perspective' (2000) 26 Commonwealth law bulletin 540

Klettner A, Clarke T and Boersma M, 'Strategic and Regulatory Approaches to Increasing Women in Leadership: Multilevel Targets and Mandatory Quotas as Levers for Cultural Change' (2016) 133 Journal of business ethics 395

Knights D and Richards W, 'Sex Discrimination in UK Academia' (2003) 10 Gender, work, and organization 213

Krackhardt D, 'Assessing the Political Landscape: Structure, Cognition, and Power in Organizations' (1990) 35 Administrative Science Quarterly 342

Krebs S, Nielsen I and Smyth R, 'What Determines the Institutional Legitimacy of the High Court of Australia?' (2019) 43 Melbourne University law review 605

Kreuter MW and others, 'Understanding Wicked Problems: A Key to Advancing Environmental Health Promotion' (2004) 31 Health education & behavior 441

Kumra S, 'Exploring Career "Choices" of Work-Centred Women in a Professional Service Firm' (2010) 25 Gender in management 227

Kutcher EJ and Bragger JD, 'Selection Interviews of Overweight Job Applicants: Can Structure Reduce the Bias?' (2004) 34 Journal of applied social psychology 1993

Lagreid P and Rykkja LH, 'Organizing for "Wicked Problems" – Analyzing Coordination Arrangements in Two Policy Areas: Internal Security and the Welfare Administration' (2015) 28 The International journal of public sector management 475

Lasser M de S-O -l'E, 'The Question of Understanding', *Comparative legal studies: traditions and transitions* (2003)

——, Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy (2010)

Latu IM, Mast MS and Stewart TL, 'Gender Biases in (Inter) Action: The Role of Interviewers' and Applicants' Implicit and Explicit Stereotypes in Predicting Women's Job Interview Outcomes' (2015) 39 Psychology of women quarterly 539

Law Council of Australia, 'Equitable Briefing Policy 2019-2020 Financial Year' (2020)

Legrand P, 'The Same and the Different', Comparative legal studies: Traditions and transitions (2003)

——, 'The Guile and The Guise: Apropos of Comparative Law as We Know It' (2021) 16 Asian journal of comparative law 155

——, Negative Comparative Law: A Strong Programme for Weak Thought (Cambridge University Press 2022)

Leiter B, 'Rethinking Legal Realism: Toward a Naturalized Jurisprudence' (1997) 76 Texas law review 267

——, 'Legal Realism and Legal Doctrine' (2015) 163 University of Pennsylvania law review 1975

Levin A and Alkoby A, 'Shouldn't the Bench Be a Mirror? The Diversity of the Canadian Judiciary' (2019) 26 International journal of the legal profession 69

Liden RC, Bauer TN and Parsons CK, 'Person Perception in Employment Interviews' in Manuel London (ed), *How People Evaluate Others in Organizations* (Psychology Press 2001)

Little I, 'Socio-Economic Diversity in New Zealand Law Schools: A Case for Adopting a More Nuanced Approach to Admission Schemes' [2020] New Zealand law review 335

Loveday H and Lavers T (eds), *Feminist Judgments in International Law* (Bloomsbury Publishing 2019)

Macan T, 'The Employment Interview: A Review of Current Studies and Directions for Future Research' (2009) 19 Human resource management review 203

Macan TH and Dipboye RL, 'The Effects of Interviewers' Initial Impressions on Information Gathering' (1988) 42 Organizational behavior and human decision processes 364

——, 'The Relationship of Interviewers' Pre-Interview Impressions to Selection and Recruitment Outcomes' (1990) 43 Personnel Psychology 745

Macerollo A, 'Power of Masculinity in the Legal Profession: Women Lawyers and Identity Formation' (2008) 1 the Windsor Review of Legal and Social 121

Mack K and Roach Anleu S, 'Entering the Australian Judiciary: Gender and Court Hierarchy' (2012) 34 Law & policy 313

——, 'In-Court Judicial Behaviours, Gender and Legitimacy' (2012) 21 Griffith Law Review 728

Malleson K, 'Justifying Gender Equality on the Bench: Why Difference Won't Do' (2003) 11 Feminist Legal Studies 1

——, 'Rethinking the Merit Principle in Judicial Selection' (2006) 33 Journal of Law and Society 126

——, 'Diversity in the Judiciary: The Case for Positive Action' (2009) 36 Journal of Law and Society 376

——, 'The Disruptive Potential of Ceiling Quotas in Addressing the Over-Representation in the Judiciary', *Debating judicial appointments in an age of diversity* (Routledge 2017)

Managers, Public Service Commission and Gemini3 Pty Ltd, 'Job Share Guide: Managers'

Martin E, 'The Representative Role of Women Judges' (1993) 77 Judicature 166

Masselot A and Brand T, 'Diversity, Quotas and Compromise in the Boardroom : Tackling Gender Imbalance in Economic Decision-Making' (2015) 26 New Zealand universities law review 535

McCarthy JM, Van Iddekinge CH and Campion MA, 'Are Highly Structured Job Interviews Resistant to Demographic Similarity Effects?' (2010) 63 Personnel psychology 325

McDaniel MA and others, 'The Validity of Employment Interviews: A Comprehensive Review and Meta-Analysis' (1994) 79 Journal of applied psychology 599

McDonald E and others, 'Introducing the Feminist and Mana Wahine Judgments', *Feminist judgments of Aotearoa New Zealand: te rino: a two-stranded rope* (Hart Publishing, an imprint of Bloomsbury Publishing Plc 2017)

McGinn KL and Croson R, 'What Do Communication Media Mean for Negotiations? A Question of Social Awareness' in Michele J Gelfand and Jeanne M Brett (eds), *The handbook of negotiation and culture* (Stanford University Press 2004)

McGuire GM, 'Gender, Race, Ethnicity, and Networks: The Factors Affecting the Status of Employees' Network Members' (2000) 27 Work and occupations 501

Menand L, 'The Changing Meaning of Affirmative Action' [2020] The New Yorker

Menkel-Meadow C, 'The Comparative Sociology of Women Lawyers: The "Feminization" of the Legal Profession' (1986) 24 Osgoode Hall law journal (1960) 897

Metz I and Tharenou P, 'Women's Career Advancement: The Relative Contribution of Human and Social Capital' (2001) 26 Group & organization management 312

Miller C, 'The Persistent Effect of Temporary Affirmative Action' (2017) 9 American economic journal: Applied economics 152

Miller SL and Maier SL, 'Moving Beyond Numbers: What Female Judges Say about Different Judicial Voices' (2008) 29 Journal of Women, Politics & Policy 527

Milligan J, 'Pluralism in America: Why Judicial Diversity Improves Legal Decisions about Political Morality' (2006) 81 New York University Law Review 1206

Ministry for Women, 'Gender Inequality and Unpaid Work: A Review of Recent Literature' (2019)

Ministry of Justice, 'The Judicial Appointments Protocol'

——, 'Youth Court/Te Kōti Taiohi o Aotearoa'

——, 'Judicial Appointments: Office of District Court Judge' 2019

Moréteau O, 'The Words of Comparative Law' (2019) 6 Journal of International and Comparative Law 183

Morgenroth T and Ryan MK, 'Quotas and Affirmative Action: Understanding Group-Based Outcomes and Attitudes' (2018) 12 Social and personality psychology compass e12374

Morris G, *Law Alive: The New Zealand Legal System in Context* (4th edn, Thomson Reuters (Professional) Australia Pty Limited 2019)

Motowidlo SJ and others, 'Studies of the Structured Behavioral Interview' (1992) 77 Journal of applied psychology 571

Murray R, 'Quotas for Men: Reframing Gender Quotas as a Means of Improving Representation for All' (2014) 108 The American political science review 520

Myers KO, 'Merit Selection and Diversity on the Bench' (2012) 46 Indiana law review 43

Neill F, 'Women Face Variety of Challenges' New Zealand Law Society 30 June 2016

New Zealand. Ministry of Women's Affairs, 'Realising the Opportunity: Addressing New Zealand's Leadership Pipeline by Attracting and Retaining Talented Women' (Ministry of Women's Affairs 2013)

Noel C, 'The End of the Silk Road? The Metamorphosis of Queen's Counsel into Senior Counsel in New Zealand' (2006) 15 Commonw Law 27

Noon M, 'Pointless Diversity Training: Unconscious Bias, New Racism and Agency' (2018) 32 Work, employment and society 198

Olivier M, 'Some Thoughts on Judicial Diversity in the New Supreme Court Era' (2008) 16 Waikato law review : Taumauri 46

Olmsted B, 'Job Sharing: An Emerging Work-Style' (1979) 118 International labour review 283

Opeskin B, 'Dismantling the Diversity Deficit Towards a More Inclusive Australian Judiciary', *The judge, the judiciary, and the court: individual, collegial and institutional judicial dynamics in Australia* (Cambridge University Press 2021)

——, Future-Proofing the Judiciary: Preparing for Demographic Change (Springer Nature 2021)

Örücü AE, 'Methodology of Comparative Law', Elgar Encyclopedia of Comparative Law, Second Edition (2012)

O'Sullivan D, 'Gender and Judicial Appointment' (1996) 19 University of Queensland law journal 107

O'Toole V and others, 'Emotional Wellbeing as Perceived and Understood through the Lenses of SEL and PYD : A Qualitative Commentary and Suggestions for Future Research in Aotearoa New Zealand' (2019) 48 New Zealand journal of psychology 91

Otto D, 'Feminist Judging in Action: Reflecting on the Feminist Judgments in International Law Project' (2020) 28 Feminist Legal Studies 205

Pagone GT, 'Australia: Employment Practices and Awareness of Diversity' (1997) 22 International legal practitioner

Paterson A, 'Power and Judicial Appointment: Squaring the Impossible Circle', *Debating Judicial Appointments in an Age of Diversity* (2017)

Peacock L, 'Law Firms Have "Unconscious Bias" That Stops Women from Getting Promoted, Says Senior City Lawyer' *The Telegraph* (United Kingdom, 24 May 2013)

Pemberton J and New Zealand Law Foundation, 'First Steps: The Experiences and Retention of New Zealand's Junior Lawyers' (The Law Foundation 2016)

Pignataro G, 'Equality of Opportunity: Policy and Measurement Paradigms' (2012) 26 Journal of economic surveys 800

Pogrebtsova E, Luta D and Hausdorf PA, 'Selection of Gender-incongruent Applicants: No Gender Bias with Structured Interviews' (2020) 28 International journal of selection and assessment 117

Pojman LP, 'The Case Against Affirmative Action' [1998] The International journal of applied philosophy 97

Pratt A and Sossin L, 'A Brief Introduction of the Puzzle of Discretion' (2009) 24 Canadian Journal of Law and Society 302

Pringle JK and others, Women's Career Progression in Auckland Law Firms: Views from the Top, Views from Below (Gender & Diversity Research Group 2014)

Pulakos ED and Schmitt N, 'Experience-Based and Situational Interview Questions: Studies of Validity' (1995) 48 Personnel psychology 289

Pylkkanen EM, 'Words That Carry Meaning: Issue Definition and Affirmative Action' (ProQuest Dissertations Publishing 2005)

Rackley E, *Women, Judging and the Judiciary* (Taylor & Francis Group 2012)

Rackley E and Webb C, 'Three Models of Diversity', *Debating judicial appointments in an age of diversity* (Routledge 2017)

Ragins BR and Kram KE, 'The Roots and Meaning of Mentoring' [2007] The Handbook of Mentoring at Work 3

Reilly A and Masselot A, 'A Precarious Work and Work-Family Reconciliation: A Critical Evaluation of New Zealand's Regulatory Framework, Work Life Balance' (2017) 98 Bulletin of Comparative Labour Relations 285

Resnik J, 'On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges' (1988) 61 Southern California law review 1877

Rhode DL, 'The Unfinished Agenda: Women and the Legal Profession' [2001] American Bar Association Commission on Women in the Profession

Ridgeway CL, 'Interaction and the Conservation of Gender Inequality: Considering Employment' (1997) 62 American sociological review 218

Ridgeway CL and Balkwell JW, 'Group Processes and the Diffusion of Status Beliefs' (1997) 60 Social psychology quarterly 14

Riles A, 'Wigmore's Treasure Box: Comparative Law in the Era of Information' (1999) 40 Harvard international law journal 221

Ritchey T, Wicked Problems, Social Messes: Decision Support Modelling with Morphological Analysis, vol 17 (Springer Science & Business Media 2011)

Rittel HWJ and Webber MM, 'Dilemmas in a General Theory of Planning', Foundations of the Planning Enterprise: Critical Essays in Planning Theory: Volume 1 (2017)

Roberts N, 'Wicked Problems and Network Approaches to Resolution' (2000) 1 International public management review 1

Robinson RK, 'Perceptual Segregation' (2008) 108 Columbia law review 1093

Roithmayr D, 'Deconstructing the Distinction between Bias and Merit' (1997) 85 California law review 1449

Ruhl JB and Salzman J, 'Symposium: Governing Wicked Problems' (2020) 73 Vanderbilt law review 1561

Rupani R, 'Job Interview Skills and Techniques - A Practice Set in Communication' (2013) 4 Journal of commerce and management thought 719

Ryle R, Questioning Gender: A Sociological Exploration (SAGE Publications, Inc 2016)

Schauer F, 'Legal Realism Untamed' (2013) 91 Texas law review 749

Scherer N and Curry B, 'Does Descriptive Race Representation Enhance Institutional Legitimacy? The Case of the U.S. Courts' (2010) 72 The Journal of Politics 90

Schuck PH, 'Affirmative Action: Past, Present, and Future' (2002) 20 Yale law & policy review 1

Senden L and Selanec G, *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, Including on Company Boards* (European Commission Directorate-General for Justice Unit JUST/D1 Equal Treatment Legislation 2013)

Sharma PRD, 'Interpreting "Procedure Established by Law" with "Rule of Law": A Comparitive View of Irish, Japanese and Indian Constitution' (2017) 4 Forensic Research & Criminology International Journal, Medcarve,

Shortall S, 'Turning the Tide to Make More Women Law Firm Partners in New Zealand' (NZLS CLE 2016)

Siems M, 'The Power of Comparative Law: What Types of Units Can Comparative Law Compare?' (2019) 67 The American journal of comparative law 861

Smith P, Caputi P and Crittenden N, 'A Maze of Metaphors around Glass Ceilings' (2012) 27 Gender in management 436

Smyth R and Mishra V, 'The Publication Decisions of Judges on the County Court of Victoria' (2009) 85 The Economic record 462

Sohrab JA, 'Avoiding the "Exquisite Trap": A Critical Look at the Equal Treatment/Special Treatment Debate in Law' (1993) 1 Feminist legal studies 141

Sojo VE and others, 'Reporting Requirements, Targets, and Quotas for Women in Leadership' (2016) 27 The Leadership quarterly 519

Solanke I, 'Where Are the Black Judges in Europe?' (2019) 39 Connecticut Journal of International Law Summer

——, 'Where Are the Black Judges in Europe?' (2019) 34 CONN. J. INT'L L. 289

Sommerlad H, 'Minorities, Merit, and Misrecognition in the Globalized Profession' (2012) 80 Fordham law review 2481

——, 'The "Social Magic" of Merit: Diversity, Equity, and Inclusion in the English and Welsh Legal Profession' (2015) 83 Fordham law review 2325

Sossin L, 'Redistributing Democracy: An Inquiry into Authority, Discretion and the Possibility of Engagement in the Welfare State' (1994) 26 Ottawa law review 1

Spáč S, 'Recruiting European Judges in the Age of Judicial Self-Government' (2018) 19 German law journal 2077

——, 'The Illusion of Merit-Based Judicial Selection in Post-Communist Judiciary: Evidence from Slovakia' (2020) ahead-of-print Problems of post-communism 1

'Spotlight on... in-House Lawyers' [2017] Lawtalk 84

——, 'Courts and Tribunals' (2022)

Sterba JP, *Affirmative Action for the Future* (1st edn, Cornell University Press 2009)

Swider BW, Barrick MR and Harris TB, 'Initial Impressions: What They Are, What They Are Not, and How They Influence Structured Interview Outcomes' (2016) 101 Journal of applied psychology 625

Taylor G, *The Constitution of Victoria* (Federation Press 2006)

Taylor S, 'Valuing Our Lawyers: The Untapped Potential of Flexible Working in the New Zealand Legal Profession' (New Zealand Law Society 2017)

Thakur M, Bansal A and Maini R, 'Job Sharing as a Tool for Flexible Work Systems: Creating Opportunities for Housewives in the Indian Labor Market' (2018) 33 Gender in management 350

Thatcher G, 'The Supreme Court of New Zealand' (2010) 36 Commonwealth law bulletin 461

The Attorney-General's Judicial Appointments Unit, 'Expression of Interest to Be Appointed to the Bench of the High Court'

The Office of the Chief Justice, 'Annual Report' (2022)

The Victorian Government Department of Justice, 'Reviewing the Judicial Appointments Process in Victoria, Discussion Paper' [2010] the Victorian Government Department of Justice

Thornton M, 'Affirmative Action, Merit and the Liberal State' (1985) 2 Australian journal of law and society 28

——, 'The Flexible Cyborg : Work-Life Balance in Legal Practice' (2016) 38 The Sydney law review 1

——, 'Work/Life or Work/Work? Corporate Legal Practice in the Twenty-First Century' (2016) 23 International Journal of the Legal Profession 13

Thornton M and Bagust J, 'The Gender Trap: Flexible Work in Corporate Legal Practice' (2007) 45 Osgoode Hall law journal (1960) 773

Tremblay D-G, 'Work-Family Balance for Women 20 Lawyers Today: A Reality or Still a Dream?', *Handbook on Well-Being of Working Women* (2016)

Turenne S, Fair Reflection of Society in Judicial Systems: A Comparative Study, vol 7 (Springer 2015)

Turnbull L, 'The "Wicked Problem" of Fiscal Equality for Women' (2010) 22 Canadian journal of women and the law 213

Ulrich L and Trumbo D, 'The Selection Interview since 1949' (1965) 63 Psychological bulletin 100

Valcke C, Comparing Law: Comparative Law as Reconstruction of Collective Commitments (Cambridge University Press 2018)

van Emmerik IJH and others, 'Networking Your Way through the Organization. Gender Differences in the Relationship between Network Participation and Career Satisfaction' (2006) 21 Women in management review (Bradford, West Yorkshire, England : 1992) 54

Van Hoecke M, 'Comparing across Societies and Disciplines', *Comparative Methods in Law, Humanities and Social Sciences* (Edward Elgar Publishing 2021)

van Zyl Smit J, '"Opening up" Commonwealth Judicial Appointments to Diversity? The Growing Role of Commissions in Judicial Selection', *Debating Judicial Appointments in an Age of Diversity* (2017)

Victorian Legal Services Board + Commissioner, 'Delivering More Together' (2021) Annual

Vogenauer S, 'Sources Of Law and Legal Method in Comparative Law', *The Oxford Handbook of Comparative Law* (2019)

Waddington L and Bell M, 'Reflecting on Inequalities in European Equality Law' (2003) 28 European law review 349

Waldron J, 'The Rule of Law' in Edward N Zalta and Uri Nodelman (eds), *The stanford encyclopedia of philosophy* (2016)

Walsh J, 'Not Worth the Sacrifice? Women's Aspirations and Career Progression in Law Firms' (2012) 19 Gender, work, and organization 508

Wass V and McNabb R, 'Pay, Promotion and Parenthood amongst Women Solicitors' (2006) 20 Work, employment and society 289

Watkins D and Burton M, *Research Methods in Law* (Routledge 2013)

Watton E, Stables S and Kempster S, 'How Job Sharing Can Lead to More Women Achieving Senior Leadership Roles in Higher Education: A UK Study' (2019) 8 Social sciences (Basel) 209

Webb D, Ruru J and Scott P, *The New Zealand Legal System: Structures and Processes* (6th edn, Lexis Nexis New Zealand Ltd 2016)

Weber EP and Khademian AM, 'Wicked Problems, Knowledge Challenges, and Collaborative Capacity Builders in Network Settings' (2008) 68 Public administration review 334

Webley L and Duff L, 'Women Solicitors as a Barometer for Problems within the Legal Profession - Time to Put Values before Profits?' (2007) 34 Journal of law and society 374

Webster M and Hysom SJ, 'Creating Status Characteristics' (1998) 63 American sociological review 351

Westen P, 'The Empty Idea of Equality' (1982) 95 Harvard law review 537

Weston-Scheuber K, 'Appearances by Gender in the Victorian Supreme and County Courts 2017-2019' (Women Barristers Association (WBA) and Victorian Women's Trust 2020)

Whelan J and Wood R, 'Increasing Gender Diversity through Targets with Teeth', *Women in Leadership: Understanding the Gender Gap* (CEDA 2013)

Whiting VR and de Janasz SC, 'Mentoring in the 21st Century: Using the Internet to Build Skills and Networks' (2004) 28 Journal of management education 275

Wiig S and others, 'Defining the Boundaries and Operational Concepts of Resilience in the Resilience in Healthcare Research Program' (2020) 20 BMC health services research 330

Williamson LG and others, 'Employment Interview on Trial : Linking Interview Structure with Litigation Outcomes' (1997) 82 Journal of applied psychology 900

Wilson M, 'Appointing Judges the New Zealand Way' (2013) 21 Waikato law review : Taumauri 41

Wilson W, 'The Study of Administration' (1887) 2 Political Science Quarterly

Wolgast S, Bäckström M and Björklund F, 'Tools for Fairness: Increased Structure in the Selection Process Reduces Discrimination' (2017) 12 PloS one e0189512

Wong MY, 'Methods in Comparative Politics', *Comparative Methods in Law, Humanities and Social Sciences* (Edward Elgar Publishing 2021)

Wynn JA Jr and Mazur EP, 'Judicial Diversity: Where Independence and Accountability Meet' (2004) 67 Albany Law Review 775

——, ‘Judicial Diversity: Where Independence and Accountability Meet’ (2004) 67 Albany Law Review 775

II. Legislations and regulations

Commonwealth of Australia Constitution Act 1977

Constitution Act 1975

County Court Act 1958

Criminal Procedure Act 2011

District Court Act 2016

Equitable Briefing Policy 2016

Family Court Act 1980

Magistrates’ Court Act 1989

Senior Courts Act 2016

Supreme Court Act 1986

Crimes Act 1958

Sentencing Act 1991

The Victorian Bar Equality of Opportunity Briefing Policy 2004

III. Internet sources

Bradley A, ‘90 Percent of High Court, Court of Appeal Judges Pākehā’ (*RNZ*, 20 September 2021) <https://www.rnz.co.nz/news/is-this-justice/451867/90-percent-of-high-court-court-of-appeal-judges-pakeha> accessed 21 October 2022

——, ‘Judges Can Be Appointed without Ever Attending an Interview’ (*RNZ*, 21 September 2021) <https://www.rnz.co.nz/news/is-this-justice/451941/judges-can-be-appointed-without-ever-attending-an-interview> accessed 22 October 2022

Breen C, ‘Fewer than 1% of New Zealand Men Take Paid Parental Leave – Would Offering Them More to Stay at Home Help?’ (*The Conversation*, 14 April 2022) <https://theconversation.com/fewer-than-1-of-new-zealand-men-take-paid-parental-leave-would-offering-them-more-to-stay-at-home-help-180777> accessed 8 August 2022

'By the Numbers' (New Zealand Law Society, 2020) <https://www.lawsociety.org.nz/professional-practice/diversity-and-inclusion/women-in-the-legal-profession/by-the-numbers/> accessed 21 November 2022

'Contact the Coronial Offices' (*Coronial Services of New Zealand*) <https://coronialservices.justice.govt.nz/contact/> accessed 11 February 2022

County Court of Victoria ,'Family Law' (*Magistrates' Court of Victoria*) <https://www.mcv.vic.gov.au/family-matters/family-law> accessed 24 March 2022

County Court of Victoria, 'Summary Offences' (*Magistrates' Court of Victoria*) <https://www.mcv.vic.gov.au/criminal-matters/criminal-offences/summary-offences> accessed 24 March 2022

County Court of Victoria, 'The Court System' (*Magistrates' Court of Victoria*, 24 March 2022) <https://www.mcv.vic.gov.au/court-system> accessed 24 March 2022

Court Services Victoria, 'About Us' (*Magistrates' Court of Victoria*, 2022) <https://www.mcv.vic.gov.au/about-us> accessed 27 April 2022

——, 'Civil Matters' (*Magistrates' Court of Victoria*, 24 March 2022) <https://www.mcv.vic.gov.au/civil-matters> accessed 24 March 2022

Courts of New Zealand, 'Guidelines for Judicial Conduct 2019'

——, 'Appointments' (*Courts of New Zealand*, 5 June 2021) <https://www.courtsofnz.govt.nz/about-the-judiciary/role-judges/appointments/> accessed 5 June 2021

——, 'Structure of the Court System' (2022) <https://www.courtsofnz.govt.nz/about-the-judiciary/structure-of-the-court-system/> accessed 27 October 2022

——, 'Heads of Bench' (2023) <https://www.courtsofnz.govt.nz/about-the-judiciary/role-judges/role-heads/> accessed 18 January 2023

'Day-to-Day Work of a District Court Judge' (*District Court of New Zealand*) <https://www.districtcourts.govt.nz/about-the-courts/day-to-day-work-of-a-district-court-judge/> accessed 11 April 2023

District Court of New Zealand, 'Jury Trials' <https://www.districtcourts.govt.nz/reports-publications-and-statistics/annual-reports/page-2342/jury-trials/#:~:text=A%20defendant%20has%20the%20right,judges%20hold%20jury%20trial%20warrants.> accessed 25 October 2022

Employment New Zealand, 'Hours of Work' (2022) <https://www.employment.govt.nz/hours-and-wages/hours-of-work/> accessed 12 March 2023

ILANZ, 'WHAT IS ILANZ?' (*In-House Lawyers Association of New Zealand*, 2021) <https://ilanz.org/about/what-is-ilanz/> accessed 17 August 2021

National Domestic and Family Violence Bench Book, 'Jurisdiction of FCFCA' (2022) <https://dfvbenchbook.aija.org.au/foundational-information/jurisdiction-of-fca-fcca/#:~:text=Under%20the%20legislation%2C%20the%20Family,commenced%20on%201%20September%202021.> accessed 25 October 2022

New Zealand Bar Association, 'About Barristers' (*New Zealand Bar Association*, 2022) <https://www.nzbar.org.nz/faqs-about-barristers> accessed 23 October 2022

Simpson M, 'Employment Matters: Post Covid-19 Realities for Law Firms' (*New Zealand Law Society*, 2021) <https://www.lawsociety.org.nz/about-us/contact/privacy-copyright-and-disclaimer/> accessed 16 November 2022

State Government of Victoria, 'Balanced Boards Make Better Decisions' (*Premier of Victoria*, 28 March 2015) <https://www.premier.vic.gov.au/balanced-boards-make-better-decisions/> accessed 19 September 2022

State of Victoria, 'Judicial Appointments' (*Justice and Community Safety*, 2020) <https://www.justice.vic.gov.au/justice-system/courts-and-tribunals/judicial-appointments> accessed 20 April 2022

Supreme Court of Victoria, 'Commercial Court' (*Supreme Court of Victoria*, 2022) <https://www.supremecourt.vic.gov.au/law-and-practice/areas-of-the-court/commercial-court> accessed 7 April 2022

——, 'Criminal Division' (*Supreme Court of Victoria*, 2022) <https://www.supremecourt.vic.gov.au/law-and-practice/areas-of-the-court/criminal-division> accessed 7 April 2022

——, 'How the Court Works' (*Supreme Court of Victoria*, 2022) <https://www.supremecourt.vic.gov.au/about-the-court/how-the-court-works> accessed 6 April 2022

——, 'Judges' (2022) <https://www.supremecourt.vic.gov.au/about-the-court/our-judiciary/judges> accessed 28 April 2022

The County Court of Victoria, 'History of the Court' (*County Court Victoria*, 2021) <https://www.countycourt.vic.gov.au/learn-about-court/history-court> accessed 28 April 2022

——, 'Common Law Division' (*County Court Victoria*, 2022) <https://www.countycourt.vic.gov.au/going-court/common-law-division> accessed 25 March 2022

——, 'Court Divisions' (*County Court Victoria*, 2022) <https://www.countycourt.vic.gov.au/learn-about-court/court-divisions> accessed 25 March 2022——, 'Criminal Division' (*County Court Victoria*, 2022) <https://www.countycourt.vic.gov.au/going-court/criminal-division> accessed 25 March 2022

The Courts of New Zealand, 'Judges' (*The Courts of New Zealand*) <https://www.courtsofnz.govt.nz/the-courts/high-court/judges/> accessed 22 September 2021

——, 'Judges' (*The Courts of New Zealand*) <https://www.courtsofnz.govt.nz/the-courts/supreme-court/judges/> accessed 28 July 2022

——, 'Judges' (*The Courts of New Zealand*) <https://www.courtsofnz.govt.nz/the-courts/court-of-appeal/judges/> accessed 28 July 2022

'The Delicate Balance: Part Time/Flexible Work' (*New Zealand Law Society*, 2019) <https://www.lawsociety.org.nz/news/publications/lawtalk/issue-929/the-delicate-balance-part-timeflexible-work/> accessed 16 November 2022

'The Gender Pay Gap' (*New Zealand Law Society*, 2022) <https://www.lawsociety.org.nz/professional-practice/diversity-and-inclusion/women-in-the-legal-profession/the-gender-pay-gap/#:~:text=Evidence%20exists%20of%20a%20gender,upper%20ends%20of%20the%20scale.> accessed 21 November 2022

The Federal Court of Australia, 'The Court's Jurisdiction' (2022) <https://www.fedcourt.gov.au/about/jurisdiction> accessed 25 October 2022

The State of Victoria, 'Labor Government Committed To Equality In The Legal Profession' (*Premier of Victoria*, 2015) <https://www.premier.vic.gov.au/labor-government-committed-equality-legal-profession> accessed 21 June 2022

Victoria Law Foundation, 'Government Institutions' (2022) <https://victorialawfoundation.org.au/for-the-community/learn-about-victorias-legal-system/explaining-victorias-legal-sector/government-institutions> accessed 26 October 2022

Victoria Legal Aid, 'Victoria's Courts and Tribunals' (*Victoria Legal Aid*, 2022) <https://www.legalaid.vic.gov.au/find-legal-answers/courts-and-legal-system/victorias-courts-and-tribunals> accessed 25 March 2022

Victorian Bar, 'What Is a Barrister?' (*Victorian Bar*, 2022) <https://www.vicbar.com.au/public/about/what-barrister> accessed 8 April 2022