

Summary 2003

### WWLA SUBMISSION ON THE JUDICIAL MATTERS BILL

We made a submission on the Judicial Matters Bill just before the close of play last year. A summary of our submissions follows.

We supported the option in the Bill for judges to be able to work part-time. However, we noted that the model in the Bill does not provide any certainty for those who require flexibility in their work. Thus we said the Bill will not, in our view, assist to achieve what we see as a clear priority which is the appointment of more women to ensure we have a judiciary that is representative of the New Zealand community.

We made the following comments:

#### Background

- There has been strong anecdotal evidence for many years now that a significant number of women will not accept appointment as judges because of the lack of flexibility in the judicial role. This role has traditionally been full-time with little flexibility as to times for commencing and finishing the work day. As well some judges must regularly travel for reasonably lengthy periods to reach outlying courts and in some cases regularly stay overnight away from their families.
- This type of work life is largely incompatible with having the day to day responsibility for the care of children, which evidence suggests is still the primary responsibility of women even when they work outside the home.<sup>1</sup>
- As well women now tend to return to the workforce shortly after having children and therefore for a number of years have to combine the demands of work and family.
- Also, women are now having children at an older age and thus are more likely to have the care of children or young adults at a time when they are eligible in terms of legal experience for judicial appointment.
- The ability to be employed part-time as a judge will, it is hoped, make judicial appointment a more attractive option for women. This is vital to ensure that our judiciary becomes more

<sup>1</sup> See the results for the Time Use Survey 1998-1999 available on the Department of Statistics website <http://www.stats.govt.nz> at pages 35 & 36

representative of our society. The under-representation of women in the judiciary can no longer be explained by women needing to "catch up" with men. Women have been coming out of law schools in large numbers for many years and yet there has been no comparable increase in the numbers of women appointed (or accepting appointments) to the judiciary. WWLA understands that less than 25% of judges in the District Court, and less than 15% of judges in the High Court and Court of Appeal, are women. WWLA believes that the lack of flexibility in the judicial role is one reason for these low numbers and as well that increasing the numbers of women in the judiciary must be a priority.

- WWLA does not support anything other than merit based appointments. However, we question the definition of "merit" that in some people's minds appears to involve having worked as a barrister or in a top law firm as well as being in the position of being able to sacrifice all other areas of life in favour of work. Though it is beyond the scope of this Bill, WWLA suggests that widening the pool of potential judges to include academics as well as those practising in corporate entities or within the public service, must also occur. Many lawyers within these groups have wide ranging legal experience and knowledge, as well as other important qualities such as analytical skills and good judgement, and should be considered more often for appointment. Along with part-time judicial appointments, widening the pool of potential judges will also assist to ensure our judiciary is more diverse and representative of society.
- WWLA is concerned that the Bill does not change the current position in any significant way. Under the Bill judges are all appointed full-time and a judge must be authorised to take up a part-time position. There is no recognition in the Bill that part-time work is a valid career option.
- Concerning the proposal that all judges will be full-time except possibly for short periods as are authorised, WWLA suggests that the Committee consider the experience of part-time judicial work in the United Kingdom. This experience is outlined in *Without Prejudice Women in the Law* by Gill Gatfield.<sup>2</sup> It is clear that part-time judicial roles are the norm in the United Kingdom. Part-time appointments include: deputy High Court judges, recorders, assistant recorders, deputy district judges, deputy Supreme Court masters and registrars, and acting stipendiary magistrates.<sup>3</sup>

<sup>2</sup> *Without Prejudice Women in the Law*, Gill Gatfield, Brookers, 1996

<sup>3</sup> page 418 citing the United Kingdom's Law Chancellor's Department

- WWLA feels that under the proposed process, there will be no certainty for potential candidates in terms of their ability to work part-time, and that this will do little to encourage more women to accept judicial appointment.
- The inclusion of an option for permanent part-time judges is feasible (as shown by the experience in the United Kingdom) and should be included in the Bill. The administrative challenges will be no different to current ones in terms of juggling work allocation and the placement of judges in circuit courts, jury trial weeks etc to accommodate illness, leave entitlements and reserve weeks.
- WWLA is aware that some people see a potential issue arising if part-time judicial work is combined with other legal work particularly court work. This issue is separate from the issue of work and family balance confronting many women lawyers. It could be dealt with reasonably easily with rules either in legislation or through the New Zealand Law Society.

#### Proposed process for authorising a period of part-time work

- The model contained in the Bill also requires the concurrence by the Head of Bench (as defined in clause 4 of the Bill) of the court to which the judge applying to work part-time belongs. Thus the ability to work part-time will depend upon the views of the particular person who holds the position of the relevant Head of Bench at the time the application is considered.
- Moreover, in deciding whether or not to agree to a period of part-time work the relevant Head of Bench "*must have regard to the ability of the Court to discharge its obligations in an orderly and expeditious way*" (see for example clause 42 of the Bill inserting new section 5AA(4) of the District Courts Act 1947).
- WWLA is concerned that there is already high demand upon judicial resources within the court system and thus it may often be the case that allowing a judge to work part-time will affect the ability of the court to carry out its functions effectively. This will particularly be the case in courts where only a small number of judges are available. To prevent this would require a commitment by the Government to appointing a sufficient pool of judges to enable some to work part-time without impacting upon the ability of the courts to perform effectively or placing additional pressure on full-time judges.
- It is noted that the Bill provides for the maximum number of judges

for various courts to be prescribed by Order in Council. Presumably this will more easily allow increasing the maximum number of judges for the purpose of accommodating a number of part-time judges.

Reasonable entitlement to work as a part-time judge

- WWLA believes that there should be a reasonable entitlement to work part-time as a judge. Such an entitlement will benefit not only women with childcare responsibilities, but also men who wish to assume a greater role with childcare. In respect of full-time judges who wish to move to part-time work this could be subject to reasonable but flexible notice requirements to allow a court's business to be planned effectively.
- WWLA suggests that without this women who will not accept appointment now because of lack of flexibility, will not accept appointment once the Bill is passed, if there is only a mere possibility that they will be allowed to work part-time. These women need some degree of certainty that there will be some flexibility in the role. As it stands the Bill provides them only with a possibility that part-time work will be approved and this will be dependant at any time upon the views of those that must authorise part-time work as well as the resources available to the relevant court to accommodate the request to do so.
- WWLA is strongly of the view that the proposed model will achieve little change to the numbers of women who will wish to accept appointment as judges.

We made the following recommendations:

- A: The Bill should be amended to provide for permanent part-time appointments, with a provision that a part-time judge may be appointed on a full-time basis at a later stage, subject to a vacancy arising.
- B: The Bill should include a statement (or statements relating to the various provisions concerning different courts) along the lines that:

*An application to work part-time as a judge will be approved by the Attorney-General following advice from the relevant Head of Bench that the approval will not unduly interfere with the ability of the court to discharge its obligations in an orderly and expeditious way; and the relevant Head of Bench will take all reasonable steps to accommodate a judge wishing to work part-time. Such steps may*

*include: making a recommendation to the Attorney-General that more judges be appointed so that a sufficient pool of judges exists to carry out the court's functions; transferring other judges whether on a permanent or temporary basis, or approving job sharing arrangements between two or more part-time judges.*

### **EMPLOYMENT RELATIONS REFORM BILL**

WWLA is considering making submissions on the Employment Relations Law Reform Bill. These submissions are due by 27 February.

This Bill repeals the Equal Pay Act 1972 and sets up a new regime for dealing with equal pay issues in the workplace. The Bill does not deal with the issue of equal pay for work of equal value across different occupational groups eg nurses and police officers. WWLA understands that that issue is the subject of policy work currently being done by the Government.

If you would like to contribute to submissions on this Bill please email: Cathy Rodgers-Smith [catheriner-s@ohrp.org.nz](mailto:catheriner-s@ohrp.org.nz) or Gina deGraaff [Gina.DeGraaff@crownlaw.govt.nz](mailto:Gina.DeGraaff@crownlaw.govt.nz)