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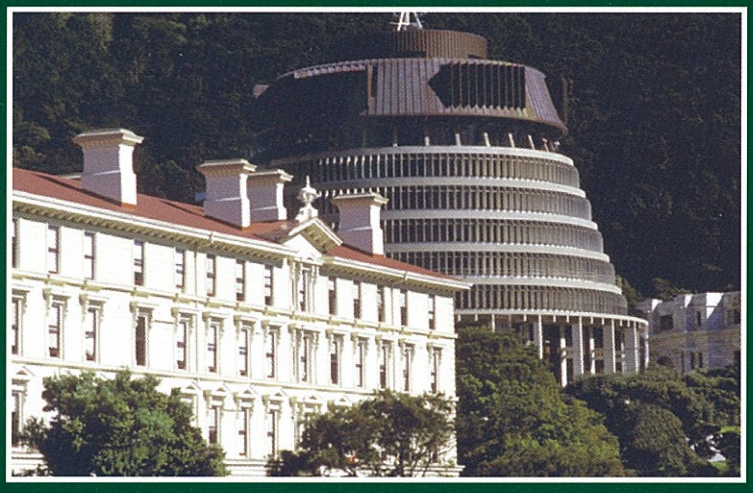

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OPENING ADDRESS

Hon Margaret Wilson*

Professor Palmer, distinguished guests, ladies and gentlemen. May I extend a warm welcome to those of you who have travelled from overseas. It is a pleasure to open this First Annual Conference on the Primary Functions of Government, with a focus on the courts, and I congratulate the New Zealand Centre for Public Law for organising the conference, with so many distinguished speakers.

I have noted the range of topics to be discussed at the conference. They all appear relevant to the challenges facing the courts at this time. I observe, however, that most of the sessions deal with the substance of the work of the courts: the application of rules to facts in disputes that come to the courts for resolution (though I note also that the access to justice session will deal with issues relating to legal process). Matters of legal process and administration are sometimes overlooked, yet they are essential to the efficient and equitable administration of justice.

I thought, therefore, that it might be of interest if I made a few observations this morning from the Government's perspective, and in particular from that of a Minister of the Crown who is faced with a range of responsibilities for the administration of justice, including developing legal policy, supervising the enactment of legislation through Parliament, and ensuring there are adequate resources available to judges and staff, including adequate and secure courthouses and courtrooms. The office of Attorney-General also has the role of recommending judicial appointments and their removal if warranted, and of managing the interface between the government and the judiciary and Crown Law Office.

The first point I want to make is an obvious one: From the perspective of government, the role and function of the courts is complex. It is so complex that it seems to require an Attorney-General, a Minister of Justice, and four Associate Ministers of Justice. And until recently it required four agencies, now reduced to three. At times one wonders whether there were not more efficiencies when there was one Minister and one agency. But I shall

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* Attorney-General; Associate Minister of Justice; Associate Minister for Courts; Acting Minister responsible for the Law Commission.

leave any comment on that to Sir Geoffrey Palmer, who was lucky enough to work under that system.

The serious point I am making is that the fragmentation of matters relating to justice and the courts does increase transaction costs, and does make a whole-of-government approach to any issue more difficult. The separation of operational activity of government from policy advice may have made economic sense, but it increases the likelihood of a lack of coherence in decision making. This is one reason why the Government decided in 2003 to re-merge the Ministry of Justice and the Department for Courts.

For government, then, the courts are not just about the application of legal rules by a judge in court. But for understandable reasons, it is this aspect of courts that attracts the attention of academics and practitioners.

A lack of attention to the development of legal policy and the architecture and infrastructure of the courts, however, means a full appreciation of the role that the courts play within our society is often lost by analysts and commentators. There is a risk that an over-emphasis on analysis of legal rules fails to capture the context within which those rules are enacted and applied.

Perhaps I can explain my point better by reference to my own experience in the development of legal policy. I can recall that support among non-governmental organisations in the 1970s for a Human Rights Commission in New Zealand arose from the inability of the courts to address issues of discrimination against women. Prior to the enactment of the Human Rights Commission Act in 1977, there was no statutory recognition that discrimination on the basis of gender alone was unlawful and harmful to the rights of the individual. Advocacy for a separate commission to oversee anti-discrimination rights arose from a lack of confidence in the courts to undertake such a task.

Rights-speak had not entered the New Zealand legal vocabulary at that time, so there was little expectation that the courts should undertake this jurisdiction. The common law had proved an inadequate tool to rectify harmful discriminatory behaviour, so new institutions were sought to develop the jurisprudence of individual rights. There was also a concern that the adversarial nature of the court process made it ill-suited to the resolution of disputes that required a win–win result.

Of course the enactment of the Bill of Rights Act 1990 and, more recently, the Human Rights Amendment Act 2001 will not only give impetus to the development of rights jurisprudence, but also bring into focus the issue of the relationship between the courts and the government. The 2001 amendment was designed to address serious access to justice issues that confront claimants pursuing their rights in this area. The publicly funded disputes resolution process now enables the pursuit of claims of discrimination not only

against private individuals and organisations, but also against government legislation, policies, and practices.

In accordance with the reflective approach the Government has to new legislation, I am pleased to note that the Human Rights Commission, the Crown Law Office, and the Ministry of Justice will hold a workshop early in 2004 to review the lessons learnt from our experience to date with this new legislation. Regular performance reviews by government agencies, with a view to recommending what if any adjustments need to be made, is in my view an essential element in the efficient and equitable administration of justice.

We have yet to encounter a case where the tribunal or court makes a declaration of inconsistency with the Bill of Rights standard. There is no power for the court to override the legislation and substitute its own view of the law. New Zealand has opted for a policy of what I term "co-existence" between the government and the courts on such matters. By this I mean there is respect for each other's roles, but also an expectation that both will act within the rule of law. In practice, this means that government would be expected to remedy any declared breach, or if this were not practical, to explain its reasons. Currently, for example, we know that there are some inconsistencies in relation to same sex couples in the social welfare area. Government is moving to redress these issues—but they are complex.

I am aware of course that the constitutional debate surrounding the relationship between the government and the courts is normally constructed in terms of those who support parliamentary sovereignty and those who support the supremacy of the courts. I look forward to reading the papers and commentary on this debate that will undoubtedly arise during the conference. I note that Dr Petra Butler, who is a member of the National Advisory Council assisting the Human Rights Commission in developing a New Zealand Action Plan for Human Rights, is also addressing this issue.

While the relationship between Parliament and the courts is a significant constitutional issue, I do not have time here to do anything more than acknowledge its importance. For those interested in the current discussion in the New Zealand context, I recommend a review of the debate surrounding the recent enactment of the Supreme Court Act 2003 as an example of how little knowledge there is amongst people generally, and the legal profession in particular, of constitutional matters. I also recommend, in contrast to that debate, a recent article by the Chief Justice in the Public Law Review, entitled "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round".[1] As I have indicated, I take a different approach to the issue and believe it is time we developed a less adversarial

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1 Rt Hon Dame Sian Elias "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (2003) 14 PLR 148.

approach, concentrating more on the complementary nature of the ongoing relationship between government and the courts.

It is appropriate in the context of a conference on the courts to make reference to the Supreme Court that becomes a legal reality on 1 January 2004. I do not want to discuss the nature of what passed for a debate on the issue, but to place the Supreme Court in the context of the important work being undertaken by the Law Commission on the structure of the courts. This work is of much greater importance than the Supreme Court Act, because it will have a more profound effect on the structure of our courts and the administration of justice.

In May 2001, when I was the Minister responsible for the Law Commission, I requested the Commission to examine the structure of all state adjudicative bodies below the Court of Appeal. Under its President, Justice Robertson, the Commission has laboured hard and undertaken a thorough review. It has published two consultation papers,[2] and held numerous workshops and consultations with various interested groups in the profession and community. In his foreword to the second paper to come out of the project, the President cautioned that:[3]

> [W]hen it comes to justice and its application through the courts we appear to be lagging behind countries we compare with such as the UK, Australia and Canada.

He suggested that the experience of these countries could assist us, but also noted, wisely if I may observe, that we must have solutions that are "of and for New Zealanders".[4]

Justice Robertson also observed astutely that:[5]

> [A]ltering jurisdictional lines and changing physical processes would be the least difficult part. Much more demanding will be changing attitudes and approaches which are deeply entrenched but which unintentionally create barriers and alienate too many people.

I understand that the Commission expects to present its report in the first quarter of 2004.[6] Once Government has the report the real reform work will begin.

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2 New Zealand Law Commission *Striking the Balance: Your Opportunity to Have Your Say on the New Zealand Court System* (NZLC PP51, Wellington, 2002); *Seeking Solutions: Options for Change to the New Zealand Court System: Have Your Say: Part 2* (NZLC PP52, Wellington, 2002).

3 New Zealand Law Commission *Seeking Solutions*, above n 2, 2.

4 New Zealand Law Commission *Seeking Solutions*, above n 2, 2.

5 New Zealand Law Commission *Seeking Solutions*, above n 2, 1.

6 [Ed: The report, *Delivering Justice for All: A Vision for New Zealand Courts and Tribunals* (NZLC R85, Wellington, 2004), was released in March 2004.]

As I said at the outset of this address, there is often too little attention paid to the architecture and infrastructure of the courts. Examples of what I mean by this are included in the Judicial Matters Bill currently before Parliament.[7] The Bill is primarily an attempt to start to provide the professional structures and processes that will underpin the concept of independence of the judiciary. A discussion paper on the appointments process for the judiciary will be published in 2004.[8] We are also waiting to see the outcome of the United Kingdom's examination of this issue. It is a complex one, and goes to the heart of the relationship between government and the courts.

It is vital that our court system maintain credibility. Courts are the institution through which we resolve our disputes without violence. Their proper functioning is an essential element in any government's responsibility to maintain peace and good order in the community. I note the trend away from the courts to other methods of dispute resolution and on occasions have been an advocate for the greater use of mediation and adjudication. The main driver for this development, in my view, has been not only cost, but also the limitations of an adversarial system in providing the type of justice required by a community seeking to promote co-existence at a time when difference is becoming greater. Perhaps this is the greatest challenge facing the courts at the moment: to remain relevant by fulfilling the needs and expectations of the community they serve.

I note my time is up, yet there still seems much to say. I look forward, for one thing, to reading the papers on customary law, which provides a challenge for the courts and government alike. May I wish you all the best over the next two days. I am sorry I cannot participate more fully in what I know will be a significant conference.

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7 [Ed: The Judicial Matters Bill 2003, no 71 had its first reading on 4 September 2003. After consideration by the Justice and Electoral Committee, the Bill was divided in the Committee of the Whole House into 11 Bills including the Judicial Conduct Commissioner and Judicial Conduct Panel Bill, assented to on 19 May 2004 and to commence on dates appointed by Order in Council (Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 2).]

8 [Ed: Ministry of Justice *Appointing Judges: A Judicial Appointments Commission for New Zealand? A Public Consultation Paper* (Wellington, 2004).]