

OFFICE OF THE  
**JUDICIAL CONDUCT COMMISSIONER**

**Annual Report for 2013/2014**

Presented to the House of Representatives pursuant to Clause 9(2), Schedule 2 of the  
Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004



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# Annual Report of the Judicial Conduct Commissioner for the year ended 31 July 2014

## This report

1. This is the ninth Annual Report since the first Commissioner took office on 1 August 2005, being the date on which the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (the “Act”) came into effect.

## The Commissioner and Deputy Commissioner

2. The current Commissioner is Sir David Gascoigne. He took office on 3 August 2009. His term of office expired on 2 August 2014 but continues under carry-over provisions in the Act.
3. The current Deputy Commissioner is Alan Ritchie. He took office on 30 June 2011. The Deputy’s role is to deal with complaints where the Commissioner has a conflict of interest, or where the Commissioner is absent or incapacitated, or where there is a vacancy in the office of Commissioner.

## The complaint process

4. The Commissioner’s role under the Act is to receive, assess and categorise complaints about the conduct of Judges.
5. The procedure generally adopted by the Commissioner, following the receipt of a complaint about the conduct of a Judge, is to notify the Judge of the complaint, and, where appropriate, to seek any comment which the Judge may wish to make. The Commissioner can obtain any Court documents, including transcripts of hearings, and can listen to any audio recordings. The Commissioner may also make such other inquiries as the Commissioner considers appropriate.
6. In carrying out his or her functions, the Commissioner must act independently, and must also act in accordance with the principles of natural justice.
7. Once the Commissioner has completed a preliminary examination of a complaint, the Commissioner must select and apply one of the four courses of action, as set down in the Act:
  - (a) the Commissioner may exercise the power to take no further action in respect of the complaint (under section 15A); or

- (b) the Commissioner may (under section 16) dismiss the complaint on one of the nine grounds specified in that section; or
  - (c) the Commissioner may (under section 17) refer the complaint to the Head of Bench, that is, to the Head of the particular Court on which the Judge who is the subject of the complaint sits; or
  - (d) the Commissioner may (under section 18) recommend that the Attorney-General appoint a Judicial Conduct Panel to inquire further into any matters concerning the conduct of a Judge, if the Commissioner is of the opinion that:
    - (i) such an inquiry is necessary or justified; and
    - (ii) if established, the conduct may warrant consideration of the removal of the Judge.
8. An illustration of the process is shown in the **attached** diagram (see page 11).
9. The process, as briefly described above, but more particularly set out in the Act, is intended to serve the purpose of the Act.

The purpose of the Act, as set out in section 4, is to enhance public confidence in, and to protect the impartiality and integrity of, the judicial system by:

- (a) providing a robust investigation process to enable informed decisions to be made about the removal of Judges from office;
- (b) establishing an office for the receipt and assessment of complaints about the conduct of Judges;
- (c) providing a fair process that recognises and protects the requirements of judicial independence and natural justice.

### Advice to the public

10. The Commissioner provides advice to the public about the complaint process through:
- A website which describes the complaint process and provides downloadable forms and guidance sheets.
  - A brochure entitled “Complaints about Judicial Conduct”.
  - Responding to telephone, faxed, emailed or postal inquiries.

### Complaints received

11. The following **Table A** shows the statistics for complaints received by the Commissioner for the five years from 1 August 2009 to 31 July 2014:

<b>Complaint particulars</b>	<b>2013-14</b>	<b>2012-13</b>	<b>2011-12</b>	<b>2010-11</b>	<b>2009-10</b>
Number of complaints received	235	258	328	181	223
Number of unfinalised complaints from previous year	79	97	146	138	63
<b>Total</b>	<b>314</b>	<b>355</b>	<b>474</b>	<b>319</b>	<b>286</b>
<b>Outcomes</b>					
Decision to take no further action under Section 15A	25	62	95	20	2
Complaints dismissed under section 16	184	196	269	140	125
Complaints referred to Head of Bench under Section 17	4	7	6	4	3
Complaints referred to Head of Bench at outset with consent of complainant because of conflict of interests or under Section 8B	0	1	2	0	1
Recommendation that a Judicial Conduct Panel be appointed under Section 18	0	0	0	0	3
Complaints withdrawn	6	10	5	9	14
<b>Total complaints dealt with</b>	<b>219</b>	<b>276</b>	<b>377</b>	<b>173</b>	<b>148</b>
Number of complaints unfinalised at 31 July	95	79	97	146	138
<b>Total</b>	<b>314</b>	<b>355</b>	<b>474</b>	<b>319</b>	<b>286</b>

12. The following **Table B** shows the number of complaints received, on a Court by Court basis:

<b>Courts</b>	<b>2013-14</b>	<b>2012-13</b>	<b>2011-12</b>	<b>2010-11</b>	<b>2009-10</b>
Supreme Court	67	34	62	16	25
Court of Appeal	21	46	49	28	23
High Court	62	65	86	63	72
District Court	53	67	71	49	62
Family Court	24	30	52	19	29
Youth Court	0	0	0	0	0
Environment Court	5	4	2	1	5
Employment Court	1	4	0	2	2
Maori Land Court	0	5	1	2	2
Court Martial	0	0	0	0	0
Coroners Court	2	3	5	1	3
<b>Total</b>	<b>235</b>	<b>258</b>	<b>328</b>	<b>181</b>	<b>223</b>

13. During the year from 1 August 2013 to 31 July 2014, 188 complainants complained, in all, about 235 Judges. In other words, some complainants made complaints about more than one Judge. For example, some complainants complained about:
- (a) a Judge who presided over a hearing at first instance, as well as Judges who then presided over one or more subsequent appeals;
  - (b) several Judges who comprise a panel of Judges at an appellate level (in the case of the Supreme Court, that may mean up to five Judges).

14. The following **Table C** shows a summarised year-on-year comparison between the past year (to 31 July 2014) and the previous year (to 31 July 2013). It also shows the increase or decrease in numbers, year-on-year.

Complaint particulars	Full year to 31 July 2014	Prior year to 31 July 2013	Full year comparison for 2012-13 and 2013-14 increase/(decrease)	
			No.	%
Complaints received during year	235	258	(23)	(9%)
Unfinalised complaints from previous year	79	97	(18)	(19%)
<b>Total</b>	<b>314</b>	<b>355</b>	<b>(41)</b>	<b>(12%)</b>
Total dealt with and completed during year	219	276	(57)	(20%)
Total unfinished at year's end	95	79	16	20%
<b>Total</b>	<b>314</b>	<b>355</b>	<b>(41)</b>	<b>(12%)</b>

## Decisions made

15. During the year from 1 August 2013 to 31 July 2014, the Commissioner and, in some instances, the Deputy Commissioner have made the following decisions:

- (a) *No further action*: They decided to take no further action in respect of 25 complaints. This was done using the power conferred by Section 15A of the Act.
- (b) *Dismissal*: They dismissed 184 complaints during the year upon one or more of the grounds set out in section 16(1) of the Act.

The most common ground for the dismissal of complaints was where, essentially, the complainant called into question the validity of a decision made by a Judge. Section 8(2) of the Act provides that it is not a function of the Commissioner to challenge or call into question the legality or correctness of any judgment or other decision made by a Judge in relation to any legal proceedings. The proper avenue for that is by way of appeal or application for judicial review. The Commissioner's jurisdiction extends to issues of judicial conduct and not to judicial decisions as such.

Generally, the statutory grounds for the dismissal of complaints were varied and included these:

- (i) that the complaint fell outside the Commissioner's jurisdiction (most notably where section 8(2) of the Act had effect);
- (ii) that the complaint had no bearing on judicial functions;

- (iii) that the complaint was frivolous, vexatious or not in good faith;
  - (iv) the complaint was about a judicial decision that is or was subject to a right of appeal or right to apply for judicial review;
  - (v) that the person who was the subject of the complaint was no longer a Judge;
  - (vi) that the Commissioner had previously considered the subject matter of the complaint and it had not warranted any particular action.
- (c) *Reference to Head of Bench:* They referred four complaints to the relevant Heads of Bench, pursuant to section 17(1) or section 8B(3) of the Act. It is then for the Head of Bench to determine how best to deal with matters, administratively, so far as the Judge complained of is concerned.
- (d) *Recommendation as to a Judicial Conduct Panel:* No recommendation was made in the past year, pursuant to section 18(1) of the Act, that a Judicial Conduct Panel be appointed to inquire into matters concerning the alleged conduct of a Judge.
- (e) *Withdrawal:* Six complaints were withdrawn by the respective complainants, following consideration of material provided by the Commissioner during the course of the preliminary examination.
16. Complaints have been based on a variety of grounds. By far the most common was that the person who was aggrieved considered that a decision, ruling or order of a Judge was wrong. As indicated in paragraph 15(b) above, a complaint on that basis falls outside the Commissioner's jurisdiction – and must be dismissed for that reason. Other grounds specified in complaints included: perceptions of rudeness, unfairness, inappropriate remarks, failure to listen, failure to take note of relevant material, prejudice, bias, predetermination, conflicts of interest and corruption. (Depending upon the circumstances, not all of those will fall within the Commissioner's jurisdiction.)
17. The mention of corruption, in particular, again merits some explanation. In some instances, a complainant has alleged that a Judge has been corrupt. The Commissioner and Deputy Commissioner take such an allegation especially seriously. But their investigations have revealed nothing that even hints at corruption. Some complainants do, however, conclude that the fact that a Judge disagrees with their (to them) self-evidently logical contentions must, in itself, be clear evidence that there has been corruption at work. But in no instance, so far, has any supporting information been proffered - or revealed, upon examination - to support the assertion.
18. Of the 95 unfinalised complaints in 2013/2014, one remains deferred pending the conclusion of relevant Court proceedings. The Act authorises the Commissioner, following consultation with the Head of Bench, to defer



dealing with a complaint pending the outcome of the relevant proceedings or the conclusion of an appeal.

## Responses of the Judiciary

19. The Commissioner is pleased to report that, overall, Judges about whom complaints have been made have, as previously, responded in a constructive and helpful manner. This materially assists the Commissioner in the examination of complaints and is appreciated by the Commissioner.
20. There were, again as previously, a few instances in which a Judge might have been expected to be more forthcoming in providing some information about the context from which a complaint has arisen. It does help to have a reasonably explicit balance of views to consider.

## Comparative statistics

21. Table C (paragraph 14 above) provides a brief comparison of the number of complaints and the extent to which they were dealt with, as between:
  - (a) this reporting year (to 31 July 2014); and
  - (b) the previous reporting year (to 31 July 2013).
22. These points emerge:
  - (a) there were 23 fewer new complaints received this year than there were last year (making a total of 235 for this year). That is an decrease of 9%;
  - (b) there were 57 fewer complaints finalised this year than last year (making a total of 219 for this year). That is an decrease of 20%;
  - (c) the number of unfinalised complaints this year was 95, an increase of 16 on last year's figure of 79.
23. Thus, the number of new complaints received during the past year was fewer than for the previous year. The number of unfinalised complaints as at 31 July this year has risen slightly and, as just mentioned, stood at 95.
24. That figure of 95 is still higher than is desirable. It is hard to say what an optimum figure should be. There will always be complaints in the course of examination. Time must be allowed for processing them, for Judges to respond, for (sometimes) Judges' decisions and the transcripts or audio recordings to be obtained and studied, for (sometimes) the views of others to be sought, and for decisions to be considered, written and then dispatched.

## Complexity and frequency

25. It is also the case that many complaints are becoming increasingly complex and detailed. A greater number now require more time to be spent in investigating them, considering them, and evolving a decision.

Many decisions require significant elaboration (the longest, so far, covered 45 pages plus attachments).

26. In addition, in order to obtain a clearer picture of what has transpired in a courtroom, it is often very helpful to listen to the audio recording of a hearing. That takes time. But it seems increasingly necessary to do that, so as to be fair both to the complainant and to the Judge. An audio recording frequently discloses relevant information about the tone and temper of the exchanges that took place that is not at all apparent from a transcript.
27. A significant proportion of all complaints come from a comparatively small number of dissatisfied litigants who make repeated complaints when they receive judicial decisions which they do not accept. The complaints are generally expressed as raising issues of conduct on the part of the judge or judges concerned. Closer examination, however, often reveals that they are, essentially, about the correctness of judicial decisions – and thus beyond my jurisdiction. Nonetheless, it is important to approach and examine each complaint received impartially, on the premise that it may prove to be well founded.

## **Litigation**

28. As a separate but often related issue, there has also been a growing trend for some complainants, who are dissatisfied with the decision made by the Commissioner in respect of their complaint, then to initiate legal proceedings against the Commissioner, by way of judicial review, in an attempt to have the decision overturned or remitted for reconsideration.
29. That is, of course, their right – as it is also the Commissioner's duty to defend such proceedings where it is wrongly alleged that the Commissioner or the Deputy has acted unlawfully.
30. The point, for the purpose of this report, however, is to note that attending to these litigious efforts is requiring an increasing amount of time and attention, as well as incurring attendant legal fees.

## **Administrative support**

31. The Ministry of Justice is the authority that is responsible for the provision of administrative support. It currently makes available – on a part-time basis – the services of five highly talented people, with different skills. It also provides premises and equipment. These administrative arrangements do assist with the burden of work. It remains the case, however, that I, as Commissioner, and on occasions Mr Ritchie, as Deputy Commissioner, still remain under significant pressure.

## **Legislative changes**

32. In the previous annual report, I also mentioned the need for some legislative change. One of the specific changes I had proposed (a broader basis for delegation to the Deputy Commissioner) is included in the Statutes Amendment Bill currently before Parliament. If enacted, such a

change would be beneficial. Another amendment will clarify a provision to dismiss a complaint.

33. The Act does contain some internal contradictions. These generally affect the approach and scope of activity that the Commissioner should undertake in carrying out his or her responsibilities under the Act. For example, the Commissioner is required by the Act to conduct “preliminary examinations” of complaints. This suggests something of a fast and almost cursory nature. By contrast, though, the Commissioner is also required to specify the “grounds” or “reasons” for each decision. And those should, desirably, be sufficiently well researched and robustly expressed to withstand the frequent applications for judicial review that are made.
34. These apparent contradictions in the Act do not currently present a serious problem. (In the example just given, the practice has been to adopt the more studied approach.) Nonetheless, the Act has been in force for nine years now, and a review of its structure and the suitability of its principal provisions could usefully be carried out.

### **Final comments**

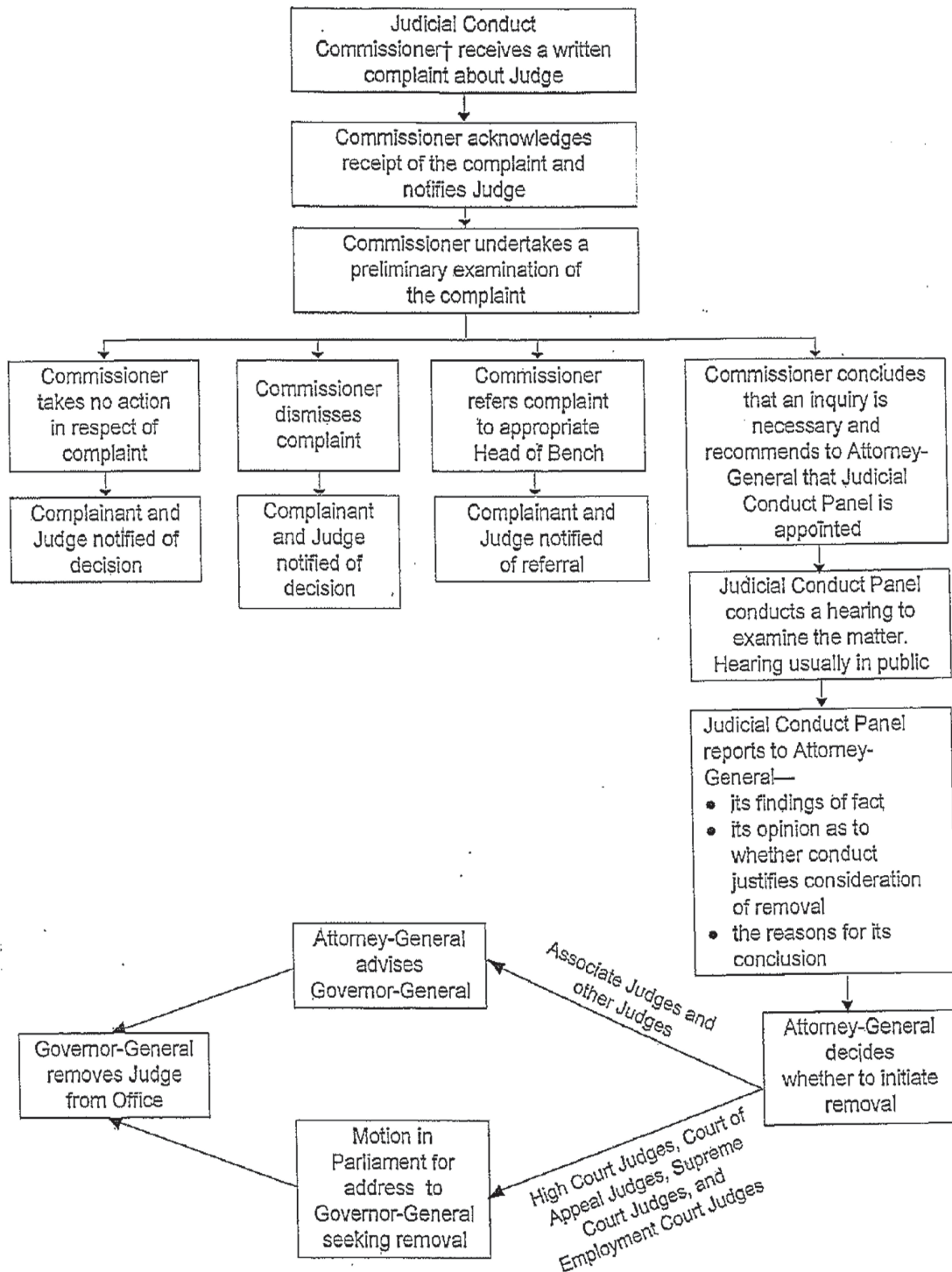
35. I am hopeful that in next year’s annual report it will be possible to record a further reduction (towards the indefinable optimum) in the number of unfinalised complaints. Such a reduction is not an end in itself. Its purpose is to improve the efficiency of operations, in order to reduce the time between complaints being lodged and decisions being completed. And that helps serve the objectives of the Act.
36. I wish to express my gratitude to:
  - the Deputy Commissioner;
  - the personnel provided by the Ministry to work with me;
  - the counsel who represent me in the continuing flow of litigation; and
  - all others who have assisted me, in many ways, throughout the past year.

10 October 2014



Sir David Gascoigne, KNZM, CBE  
**Judicial Conduct Commissioner**

## Overview of Process for Judicial Conduct Commissioner and Judicial Conduct Panel



†Judicial Conduct Commissioner or Commissioner includes a Deputy Judicial Conduct Commissioner carrying out the Commissioner's functions when the Commissioner has a conflict of interest, is absent from office, or is incapacitated, and during a vacancy in the office of Commissioner.