

OFFICE OF THE
JUDICIAL CONDUCT COMMISSIONER

Annual Report for 2014/2015

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

Contents

This report.....	3
The Commissioner and Deputy Commissioner.....	3
The complaint process.....	3
Advice to the public.....	4
Complaints received.....	5
Decisions made.....	7
Responses of the Judiciary.....	8
Comparative statistics.....	9
Complexity and frequency.....	9
Litigation.....	10
Administrative support.....	10
Legislative changes.....	10
Final comments.....	11
Overview of Process for Judicial Conduct Commissioner and Judicial Conduct Panel.....	12

Annual Report of the Judicial Conduct Commissioner for the year ended 31 July 2015

This report

1. This is the tenth Annual Report since the first Commissioner took office on 1 August 2005, that 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. It will come to an end on 30 August 2015.
3. The new Commissioner will be Alan Ritchie. He will take office on 31 August 2015. Mr Ritchie is currently the Deputy Commissioner. He was appointed to that position on 30 June 2011.
4. The new Deputy Commissioner will be Kathryn Snook. She will also take office on 31 August 2015.
5. The Deputy’s role was until recently, 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. A recent change to legislation now gives the Deputy Commissioner the same jurisdiction to examine complaints as the Commissioner.

The complaint process

6. The Commissioner’s role under the Act is to receive, assess and categorise complaints about the conduct of Judges.
7. 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.
8. In carrying out his or her functions, the Commissioner must act independently, and must also act in accordance with the principles of natural justice.

9. 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.
10. An illustration of the process is shown in the **attached** diagram (see page 12).
11. 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

12. 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, postal or emailed inquiries.

Complaints received

13. The following **Table A** shows the statistics for complaints received by the Commissioner for the five years from 1 August 2010 to 31 July 2015:

Complaint particulars	2014-15	2013-14	2012-13	2011-12	2010-11
Number of complaints received	313	235	258	328	181
Number of unfinalised complaints from previous year	95	79	97	146	138
Total	408	314	355	474	319
Outcomes					
Decision to take no further action under Section 15A	33	25	62	95	20
Complaints dismissed under section 16	267	184	196	269	140
Complaints referred to Head of Bench under Section 17	2	4	7	6	4
Complaints referred to Head of Bench at outset because of conflict of interests under Section 8B	4	0	1	2	0
Recommendation that a Judicial Conduct Panel be appointed under Section 18	0	0	0	0	0
Complaints withdrawn	4	6	10	5	9
Total complaints dealt with	310	219	276	377	173
Number of complaints unfinalised at 31 July	98	95	79	97	146
Total	408	314	355	474	319

14. The principal features of that **Table A** are these:
- The total number of complaints was 408; that is 94 more (or 30% more) than the previous year.
 - The total number of complaints dealt with is 310; that is 91 more (or 42% more) than the previous year.
 - The total number of complaints unfinalised is 98; that is 3 more (or 3% more) than the previous year.
15. The following **Table B** shows the number of complaints received, on a Court by Court basis:

Courts	2014-15	2013-14	2012-13	2011-12	2010-11
Supreme Court	177	67	34	62	16
Court of Appeal	16	21	46	49	28
High Court	45	62	65	86	63
District Court	52	53	67	71	49
Family Court	16	24	30	52	19
Youth Court	0	0	0	0	0
Environment Court	0	5	4	2	1
Employment Court	0	1	4	0	2
Maori Land Court	2	0	5	1	2

Courts	2014-15	2013-14	2012-13	2011-12	2010-11
Court Martial	0	0	0	0	0
Coroners Court	5	2	3	5	1
Total	313	235	258	328	181

16. That **Table B** requires some elaboration:

- (a) Section 11(1) of the Act requires the Commissioner to “... deal with every complaint made under this section about the conduct of a Judge ...”

Thus, the focus is upon the number of Judges complained about, rather than the number of complaints.

- (b) During the past reporting year, the total number of complaints about individual *Judges* was 313. The number of actual *complaints* was 168. In other words, some complainants made complaints about more than one Judge.
- (c) That way of reporting, while factually and numerically accurate, can convey a misleading impression, especially so far as the Supreme Court and (to a lesser extent) the Court of Appeal are concerned.
- (d) The point is best illustrated by an example. If three separate complainants each lodge two comparable complaints in respect of all five Judges of the Supreme Court, then that represents six complaints naming 30 Judges in total.
- (e) Many variations on that simple example exist in practice. The issue of multiple and serial complaints is referred to in paragraphs 30 to 32 of this report.

17. The following **Table C** shows a summarised year-on-year comparison between the past year (to 31 July 2015) and the previous year (to 31 July 2014). It also shows the increase or decrease in numbers, year-on-year.

Complaint particulars	Full year to 31 July 2015	Prior year to 31 July 2014	Full year comparison for 2013-14 and 2014-15 increase/(decrease)	
			No.	%
Complaints received during year	313	235	78	33%
Unfinalised complaints from previous year	95	79	16	20%
Total	408	314	94	30%
Total dealt with and completed during year	310	219	91	42%
Total unfinished at year's end	98	95	3	3%
Total	408	314	94	30%

Decisions made

18. During the year from 1 August 2014 to 31 July 2015, 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 33 complaints. This was done using the power conferred by Section 15A of the Act.
- (b) *Dismissal:* They dismissed 267 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) that 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 the complaint fails to raise any significant issue not already considered.
- (c) *Reference to Head of Bench:* They referred six complaints to the relevant Heads of Bench, two pursuant to section 17(1) and four pursuant to section 8B(3) of the Act (where the Commissioner and Deputy have conflicts of interest). 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:* Four complaints were withdrawn by the respective complainants, generally following consideration of material provided by the Commissioner during the course of the preliminary examination.
19. 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 simply (or grossly) wrong. As indicated in paragraph 18(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.)
20. 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.

Responses of the Judiciary

21. 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. Many Judges go to some lengths to provide material that helps to explain the circumstances and context from which a complaint has arisen. This materially assists the Commissioner in the examination of complaints and is appreciated by the Commissioner.
22. 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 background to the complaint. It does help to have a reasonably explicit balance of views to consider.
23. The accessibility of audio recordings of court proceedings has improved markedly over the past year. This has assisted the Commissioner to examine some complaints in a more timely manner than in the past. An audio recording can also provide useful information as to the tone and manner of those involved.

Comparative statistics

24. Table C (paragraph 17 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 2015); and
 - (b) the previous reporting year (to 31 July 2014).
25. These points emerge:
- (a) there were 78 more new complaints received this year than there were last year (making a total of 313 for this year). That is an increase of 33%;
 - (b) there were 91 more complaints finalised this year than last year (making a total of 310 for this year). That is an increase of 42%;
 - (c) the number of unfinalised complaints this year was 98, an increase of 3 on last year's figure of 95.
26. Thus, although the number of new complaints received during the past year was significantly greater than for the previous year, the number of unfinalised complaints increased only marginally.
27. That figure of 98 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

28. 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).
29. 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.
30. 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, challenging the correctness of judicial decisions – and are thus beyond the Commissioner’s jurisdiction. Nonetheless, it is important to approach and examine each complaint received impartially, on the premise that it may prove to be well founded.

31. A comparatively recent development is that a number of those dissatisfied litigants now act in concert in making complaints about Judges. The complaints are made separately, though they are thematically linked.
32. A significant proportion of the complaints just mentioned are made by individuals who have been declared by the Court to be vexatious litigants – and sometimes by supporters of those individuals. The complaints often arise from unsuccessful applications to the Supreme Court to appeal against decisions of the Court of Appeal or unsuccessful applications for the recall of previous decisions of the Supreme Court. The growth in the number of those unsuccessful applications helps, to a significant degree, to explain the comparatively large number of complaints then made against the Judges of the Supreme Court in the past year (see paragraph 16 above).

Litigation

33. As a separate but often related issue, some complainants, who are dissatisfied with the decision made by the Commissioner in respect of their complaint, then initiate legal proceedings against the Commissioner, by way of judicial review, in an attempt to have the decision overturned or remitted for reconsideration.
34. That is, of course, their right – as it is also the Commissioner’s duty to defend such proceedings where it is incorrectly alleged that the Commissioner or the Deputy has acted unlawfully.
35. The point, for the purpose of this report, however, is to note that attending to these litigious efforts requires a good deal of time and attention, as well as incurring attendant legal fees.

Administrative support

36. 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 four 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

37. On 26 March this year the Judicial Conduct Commissioner and Judicial Conduct Panel Amendment Act 2015 came into force. It made two small but useful changes. The first is to allow the Commissioner a broader basis for referring a complaint to the Deputy Commissioner. The second allows the Commissioner or Deputy Commissioner to dismiss a complaint if it fails

to raise any issue of significance that he or she has not previously considered.

38. As mentioned in the previous report, the principal 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 be able to withstand the frequent applications for judicial review that are made.
39. Another issue concerns the extent to which the Commissioner is required to maintain confidentiality. There is a limited exemption from that duty stated in section 19 of the Act, but there is some basis for suggesting that it is overly restrictive and that some cautious relaxation of the general duty may assist in a better understanding of both the purpose and the operations of the Act – without impinging upon the right to privacy.
40. Nonetheless, the Act has been in force for ten years now, and a review of its structure and the suitability of its principal provisions could usefully be carried out.

Final comments

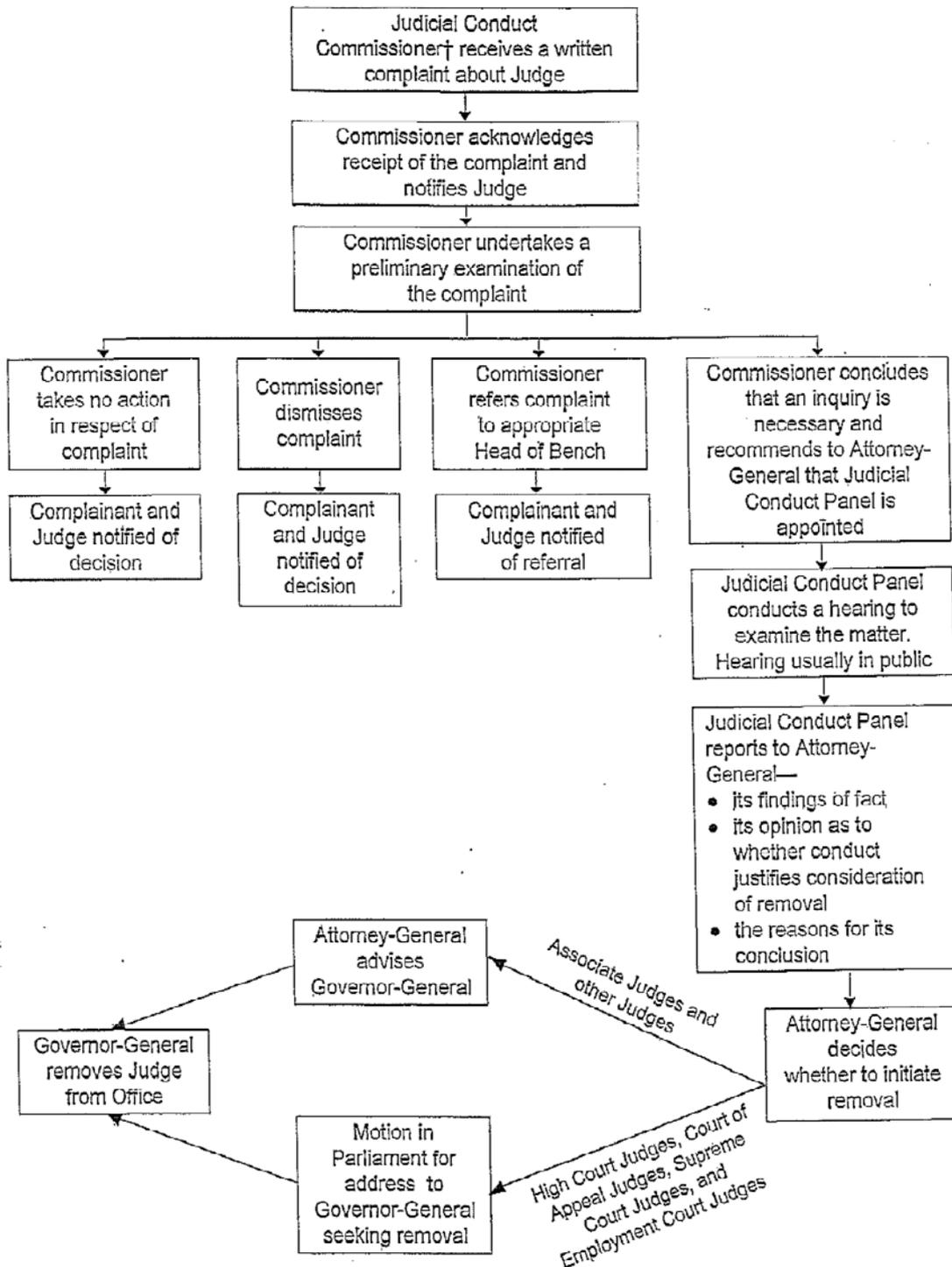
41. My colleagues and I express the hope that in the coming year it will be possible to record a reduction (towards the indefinable optimum) in the number of unfinalised complaints. Such a reduction is not an end in itself. Its purpose is to improve the efficiency of operations, in order to reduce the time between complaints being lodged and decisions being completed. And that helps serve the objectives of the Act.
42. This is the final report that I will be presenting. I wish to express my gratitude to:
 - The Attorney-General, for offering me the opportunity to serve as Commissioner;
 - the Deputy Commissioner;
 - the personnel provided by the Ministry to work with me;
 - the counsel who represent me in the conduct of litigation; and
 - all others who have assisted me, in many ways, throughout the past six years.

21 August 2015



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.