

OFFICE OF THE  
**JUDICIAL CONDUCT COMMISSIONER**

**Annual Report for 2011/2012**

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 2012**

## **This Report**

1. This is the seventh 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 came into effect.

## **The Commissioner**

2. The first Commissioner appointed under the Act was Mr Ian Haynes. His term of office commenced on 1 August 2005 and concluded on 12 July 2009.
3. The second, and current, Commissioner is Sir David Gascoigne. He took office on 3 August 2009.

## **The Deputy Commissioner**

4. An office called the Deputy Judicial Conduct Commissioner was established by an amendment to the Act. The amendment came into force on 23 March 2010.
5. The role of the Deputy Judicial Conduct Commissioner 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.
6. Mr Alan Ritchie was appointed to this position. He took office on 30 June 2011.

## **The Complaint Process**

7. The Commissioner's role under the Act is to receive, assess and categorise complaints about the conduct of Judges.
8. 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 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 sound recordings. The Commissioner may also make such other inquiries as the Commissioner considers appropriate.

9. In carrying out his or her functions, the Commissioner must act independently, and must also act in accordance with the principles of natural justice.
10. Once the Commissioner has completed a preliminary examination of a complaint, the Commissioner must select and apply one of the four courses of action, 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, a power conferred by the amendment to the Act referred to in paragraph 4 above); 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.
11. An illustration of the process is shown in the **attached** diagram (see page 11).
12. 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**

13. 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, emailed or postal inquiries.

## Complaints Received

14. The following **Table A** shows the statistics for complaints received by the Commissioner for the five years from 1 August 2007 to 31 July 2012:

Complaint particulars	2011-12	2010-11	2009-10	2008-09	2007-08
Number of complaints received	328	181	223	139	101
Number of unfinalised complaints from previous year	146	138	63	50	31
<b>Total</b>	<b>474</b>	<b>319</b>	<b>286</b>	<b>189</b>	<b>132</b>
Outcomes					
Decision to take no further action under Section 15A	95	20	2	0	0
Complaints dismissed under section 16	269	140	125	113	80
Complaints referred to Head of Bench under Section 17	6	4	3	4	2
Complaints referred to Head of Bench at outset with consent of complainant because of conflict of interests or under Section 8B	2	0	1	0	0
Recommendation that a Judicial Conduct Panel be appointed under Section 18	0	0	3	0	0
Complaints withdrawn	5	9	14	9	0
<b>Total complaints dealt with</b>	<b>377</b>	<b>173</b>	<b>148</b>	<b>126</b>	<b>82</b>
Number of complaints unfinalised at 31 July	97	146	138	63	50
<b>Total</b>	<b>474</b>	<b>319</b>	<b>286</b>	<b>189</b>	<b>132</b>

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

Courts	2011-12	2010-11	2009-10	2008-09	2007-08
Supreme Court	62	16	25	4	10
Court of Appeal	49	28	23	12	9
High Court	86	63	72	44	19
District Court	71	49	62	48	50
Family Court	52	19	29	27	13
Youth Court	0	0	0	0	0
Environment Court	2	1	5	3	0
Employment Court	0	2	2	0	0
Maori Land Court	1	2	2	1	0
Courts Martial Appeal Court	0	0	0	0	0
Coroners Court	5	1	3	0	0
<b>Total</b>	<b>328</b>	<b>181</b>	<b>223</b>	<b>139</b>	<b>101</b>

16. During the year from 1 August 2011 to 31 July 2012, 186 complainants complained, in all, about 328 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.
17. The following **Table C** shows a summarised year-on-year comparison between the past year (to 31 July 2012) and the previous year (to 31 July 2011). It also shows the increase or decrease in numbers, year-on-year.

Complaint particulars	Full Year to 31 July 2012		Prior year to 31 July 2011		Full year comparison for 2010-11 and 2011-12 increase/(decrease)		
					No.		%
Complaints received during year	328		181		147		81%
Unfinalised complaints from prior year	146		138		8		6%
<b>Total</b>	<b>474</b>		<b>319</b>		<b>155</b>		<b>49%</b>
Total dealt with and completed during year	377		173		204		118%
Total unfinalised at year's end	97		146		(49)		(34%)
<b>Total</b>	<b>474</b>		<b>319</b>		<b>155</b>		<b>49%</b>

## Decisions Made

18. During the year from 1 August 2011 to 31 July 2012, 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 95 complaints. This was done using the power conferred by Section 15A of the Act.
  - (b) *Dismissal*: They dismissed 269 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 occurred 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.

Other grounds for the dismissal of complaints were varied and included these:

- (i) that the complaint fell outside the Commissioner's jurisdiction;
  - (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 8 complaints to the relevant Heads of Bench, pursuant to section 17(1) or section 8B of the Act. It is then for the Head of Bench to determine how best to deal with matters, so far as the Judge complained of is concerned.
- In two of those 8 instances, the Commissioner felt that there was, or could be a perception of, a conflict of interest. He then referred the complaints to the Deputy Commissioner. For his part, the Deputy Commissioner (for different reasons) reached the same conclusion about a conflict. So, as required by section 8B of the Act, he referred those complaints to the relevant Head of Bench.
- (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:* 5 complaints were withdrawn by the respective complainants, 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 a decision, ruling or order of a Judge was wrong. As indicated in paragraph 18(b) above, a complaint on that basis falls outside the Commissioner's jurisdiction. 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, conflict of interests and corruption. (Depending upon

the circumstances, not all of those will fall within the Commissioner's jurisdiction.)

20. The mention of corruption, in particular, merits some explanation. In a few 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 contentions must, in itself, be clear evidence that there has been corruption. But in no instances, so far, has any supporting information been proffered, or revealed, to support the assertion.
21. Of the 97 unfinalised complaints in 2011/2012, 7 remain 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**

22. The Commissioner is pleased to report that, overall, Judges about whom complaints have been made have responded in a constructive and helpful manner. This materially assists the Commissioner in the examination of complaints and is appreciated by the Commissioner.
23. There were a few instances in which a Judge might have been expected to be a little more forthcoming in providing some view about the context from which a complaint has arisen.

### **General Observations**

24. Table C (paragraph 17 above) provides a brief comparison about the number of complaints and the extent to which they were dealt with, as between:
  - (a) this reporting year (to 31 July 2012); and
  - (b) the previous reporting year (to 31 July 2011).
25. These points emerge:
  - (a) there were 147 more new complaints received this year than there were last year (making a total of 328 for this year). That is an increase of 81%;
  - (b) there were 204 more complaints finalised this year than last year (making a total of 377 for this year). That is an increase of 118%;
  - (c) the number of unfinalised complaints this year was 97, a reduction of 49 below last year's figure of 146. That is a reduction of 34%.
26. Thus, the workload of the Commissioner continues to grow. But the rate at which complaints are being considered and finalised has improved



markedly. The number of unfinalised complaints as at 31 July this year has fallen and, as just mentioned, stands at 97.

27. That figure of 97 is still too high. But significant progress is being made. 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) decisions and transcripts or recordings to be obtained and studied, for (sometimes) the views of others to be sought, and for decisions to be written.
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.
29. In the two previous annual reports, I was overtly critical of the lack of resources with which to undertake the work required to be done. The workload continued to grow, but the resources needed – especially people, but also premises and equipment – were increasingly inadequate for the purpose.
30. At the end of the last year's annual report, I mentioned that productive discussions were at last being held with the administering authority, the Ministry of Justice. I am pleased to say that those discussions have since proved to be fruitful.
31. More personnel, to assist in the administration and examination of complaints, have been made available. New premises have been found. (Previously, there was no space for the Commissioner in the Office of the Judicial Conduct Commissioner.) New equipment has been installed. I am grateful to the senior personnel at the Ministry who have assisted with these necessary improvements.
32. In fact, the provision of additional resources (when taken with the increasing numbers of complaints) has created a different issue. The amount of work confronting me, as Commissioner, has grown. I do have the great advantage of support from the Deputy Commissioner, Mr Ritchie. But the circumstances in which he can act of his own initiative are tightly constrained (see paragraph 5).
33. One way of easing the position would be to amend the Act to provide for the appointment of more than one Judicial Conduct Commissioner – one of whom would be Chief Judicial Conduct Commissioner. (This may be compared with the provisions of the Ombudsmen Act 1975.)
34. In the longer term such a change may be necessary. But for present purposes, a simpler solution is available. It is to amend the Act to allow the Commissioner to delegate to the Deputy Commissioner the power to examine and make decisions in respect of specific identified complaints, where the Commissioner considers that to be expedient and conducive to attaining the purpose of the Act. The Deputy may then exercise the powers of the Commissioner in relation to those complaints.
35. I propose to pursue that proposal. There are a number of other amendments to the Act that could usefully be made which would improve

its effectiveness, without derogating from the principles upon which it is founded. I propose to advance these issues as well.

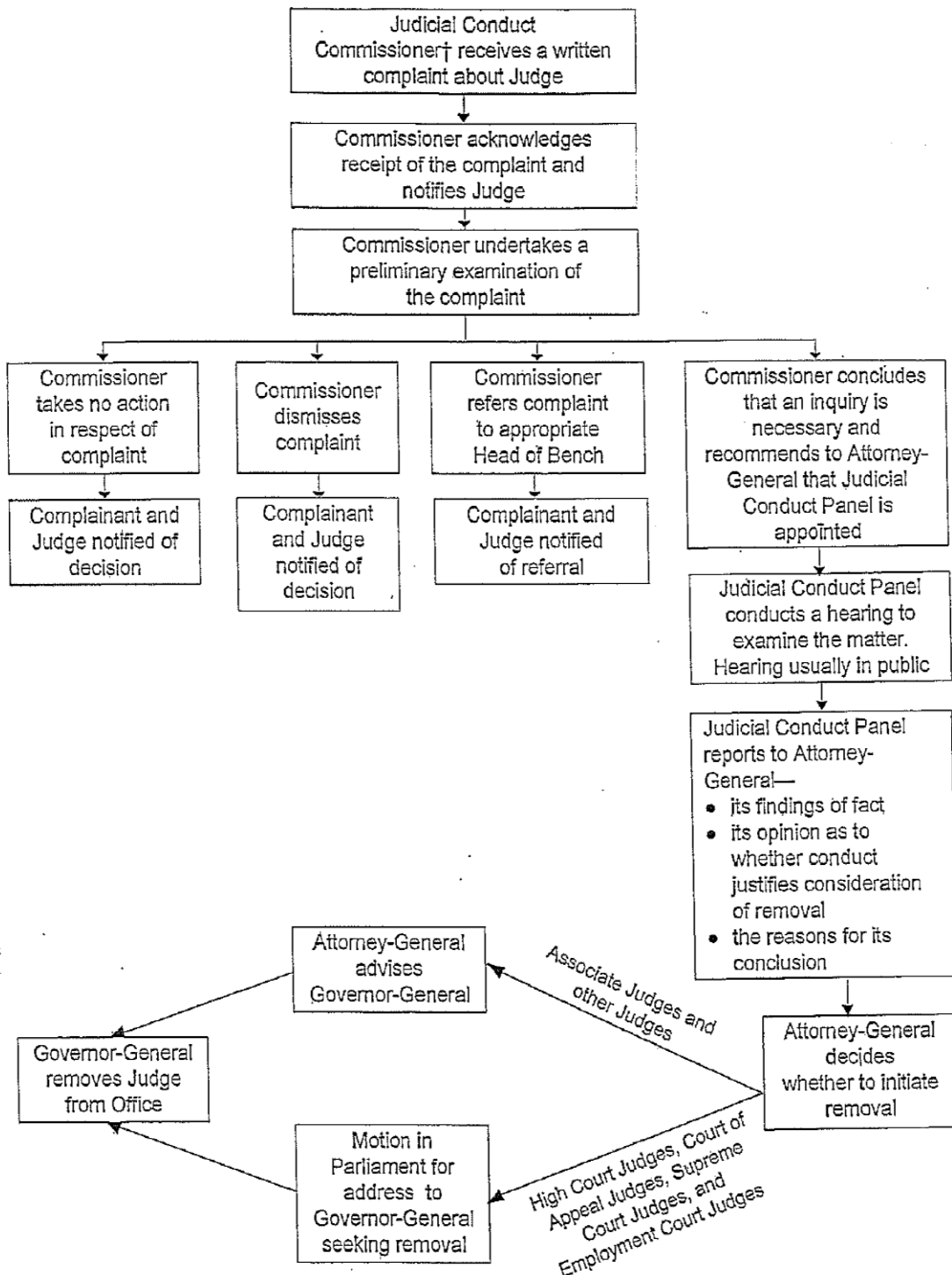
36. I am hopeful that in next year's annual report I will be able to record a further reduction (towards the indefinable optimum) in the number of unfinalised complaints. Such a reduction is not an end in itself. Its purpose is to improve the efficiency of operations, in order to reduce the time between complaints being lodged and decisions being completed. And that helps serve the objectives of the Act.
37. I wish to express my gratitude to the Ministry and to all those who have assisted me, in many ways, throughout the past year.

21 August 2012

A handwritten signature in black ink, reading "David Gascoigne". The script is cursive and fluid, with the first name "David" and last name "Gascoigne" clearly legible.

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.