

PERMANENT ORDER PROHIBITING PUBLICATION OF THE NAME AND IDENTIFYING PARTICULARS OF THE AFFECTED PERSON, INCLUDING THE NATURE OF ANY CONNECTION WITH THE APPLICANT.

THE INTERIM ORDERS PROHIBITING PUBLICATION OF IDENTIFYING PARTICULARS OF THE FORMER JUDGE AND BACKGROUND CIRCUMSTANCES SURROUNDING THE COMPLAINT HAVE BEEN LIFTED BUT WILL REMAIN IN FORCE UNTIL 22 JULY 2022.

JUDICIAL CONDUCT PANEL

JCP 1/2022

UNDER the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004

IN THE MATTER of an appointment of a Judicial Conduct Panel to inquire into matters concerning the conduct of former CORONER SARN HERDSON

Hearing: 5 April 2022

Panel: Thomas J (Chair), Judge L Hinton, J Caine

Counsel: D R La Hood (Special Counsel) and K L Kensington (Counsel Assisting Special Counsel)
P F Wicks QC and J L Libbey for the Applicant

Decision: 23 June 2022

**DECISION OF THE PANEL
(JURISDICTION)**

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Introduction

[1] Once a judge ceases to hold judicial office, should a judicial conduct panel, appointed to inquire into a complaint against the judge and provide an opinion as to whether consideration of removal of the judge from office is justified, nevertheless undertake its task? That is the issue before the judicial conduct panel appointed by the Attorney-General on 30 August 2021 (the Panel). It arises because, that same day, the Judge concerned gave notice of her resignation, effective 1 September 2021.

[2] The former Judge (the applicant) protests the jurisdiction of the Panel to proceed with its inquiry on the following grounds:

- (a) Lack of jurisdiction – the applicant is no longer a Judge to whom the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (the Act) applies; and
- (b) Mootness (abuse of process) –
 - (i) Given the applicant has ceased to be a judge in terms of the Act, the issue of whether or not the judicial conduct complained of warrants the Attorney-General’s consideration of removal is moot, namely the Panel cannot fulfil its statutory reporting function as required by the Act;
 - (ii) It would be an abuse of process for the Panel to proceed to inquire and make factual findings but otherwise be unable to fulfil its statutory reporting function under the Act to report to the Attorney-General the Panel’s opinion as to whether consideration of removal of the judge is justified and the reasons for the Panel’s conclusion;
 - (iii) Alternatively, it would be a frivolous exercise for the Panel to inquire into the matter of the applicant’s conduct where the Panel could only provide an incomplete report, particularly given that no other action is available to the Attorney-General following receipt of the report except to initiate a judge’s removal.
- (c) The public interest is not engaged as removal of a judge from office is not a live issue. There is no public utility in the Panel undertaking the inquiry and proceeding to make a report confined to findings of fact upon which the Attorney-General cannot act.

[3] The Panel is a creature of statute. It has been convened by the Attorney-General pursuant to the Act and its function and powers are those set out in the Act. The issues raised by the applicant require us to interpret the Act by ascertaining its meaning from its text and in light of its purpose and context.¹

¹ Legislation Act 2019, s 10.

Historical background to the removal of judges

[4] Judicial independence is a cornerstone of a free and democratic society. Judges who do not have security of tenure may be subject to influence and there can be no assurance of fair and impartial justice. Accordingly, the removal of a judge is a serious matter with constitutional ramifications.

[5] In New Zealand, the removal of judges is constrained by the Act.

[6] In order to view the Act in context and to assist in understanding and interpreting it, it is useful to explore the historical underpinnings of judicial independence and the tenure of judges.

England

[7] In the Middle Ages, there was no real concept of judicial independence. In the twelfth century, the first judges were trusted members of the King's own court, to whom the monarch delegated the authority to act in Royal affairs. They acted at the King's behest and were paid from his purse. This role eventually evolved into the position of justices in eyre, itinerant judicial officers with a mixed administrative and judicial jurisdiction.² They would visit counties on a circuit to dispense the King's justice with questionable standards of fairness and impartiality.³

[8] By the thirteenth century, stationary courts, such as the Court of Common Pleas and the Court of the King's Bench, which functioned independently of the King's physical presence, were established.⁴ Professional judges presided over the administration of the early common law.⁵ While these new judges bore a closer resemblance to contemporary judiciary, they did not enjoy the same protections.

[9] The work of English judges could be fraught with political danger. Judges were either appointed during the King's pleasure or during good behaviour. Judges appointed during the

² Courts and Tribunals Judiciary "History of the judiciary" <judiciary.uk>.

³ JH Baker *An Introduction to English Legal History* (3rd ed, Butterworth & Co, Worcester, 1990) at 170-171 and 190.

⁴ CH McIlwain "The Tenure of English Judges" [1913] 7 *Am Political Sci Rev* 217 at 219.

⁵ JH Baker, above n 3, at 21-22.

King's pleasure could be dismissed from office by an executive act of the Crown, while judges appointed during good behaviour could be dismissed only by a legal proceeding on the part of the Crown commenced by a writ of *scire facias*.⁶ Because judges were often appointed during pleasure, the monarch could wield the threat of removal from office to encourage judicial subservience. Judges were also subject to significant parliamentary control enforced by impeachment and punishment.⁷

[10] At times individual cases required judges to delineate the boundaries of Royal prerogative and parliamentary privilege. As a result, the judiciary would find itself entangled, sometimes fatally so, in the power struggle between Parliament and the monarch. In 1387, Richard II sought judicial advice on the legality of a parliamentary commission which assumed powers previously exercised by the monarch. The judges declared the commission was invalid and traitorous. In retaliation, Parliament impeached the judges for giving false answers to the King and sentenced them to death. The Chief Justice of the King's Bench, Tresillian CJ, was hanged and the other participating judges were banished to Ireland.⁸

[11] Judges who refused to submit to Royal instruction were particularly vulnerable during the reign of the Stuart kings. In one infamous example, Sir Edward Coke, Chief Justice of the Court of Common Pleas, refused to submit to the wishes of King James I on a matter of law. Shortly after, the King issued a writ dismissing Coke CJ, despite his reputation as the greatest lawyer in England.⁹

[12] The judiciary gained a small measure of judicial independence in 1642, when Charles I was persuaded to appoint all new judges during good behaviour. This proved short-lived, however, as Charles II reverted to the use of "during pleasure" in judges' patents, a practice continued by his successor, James II.¹⁰ Both monarchs took full advantage of the leverage the power of removal gave them over the judiciary. Charles II dismissed eleven judges during his reign and James II removed twelve judges in only three or four years.¹¹

⁶ LJ King "Removal of Judges" [2013] 6 FJLR 169 at 170.

⁷ Shimon Shetreet *Judges on Trial – A Study of the Appointment and Accountability of the English Judiciary* (North-Holland Publishing Company, Netherlands, 1976) at 7.

⁸ Theodore Frank Thomas Plucknett *A Concise History of the Common Law* (5th ed, Little, Brown and Co, Boston, 1956) at 241.

⁹ JH Baker, above n 3, at 191.

¹⁰ LJ King, above n 6, at 171.

¹¹ JH Baker, above n 3, at 192; and the Hon Justice John Priestly *Chipping Away at the Judicial Arm* [2009] 17 Wai L Rev 1 at 4.

[13] The Act of Settlement 1700 finally established security of tenure for judges in England. Judicial commissions were made during good behaviour and a judge could be removed only upon the address of both houses of Parliament.¹² There was, however, one significant flaw in the legislation. It provided for security of tenure during the lifetime of the monarch only. The death of a sovereign disrupted security of tenure and placed judicial independence at risk during the transition period. If the new monarch chose not to renew a judge's patent, the judge would be dismissed from office.¹³

[14] This oversight was remedied by the Commissions and Salaries of Judges Act 1760. The Act abolished the vacation of judicial office on the death of the sovereign and provided for continuance of judicial commissions. It also provided that judicial salaries could not be reduced while a judge's commission continued.¹⁴

New Zealand

[15] New Zealand did not immediately inherit the guarantee of judicial independence. The first Supreme Court Judges were appointed by the Crown and held office during its pleasure.¹⁵ In *Terrell v Secretary of State for the Colonies*, Lord Goddard CJ held that the provisions of the Act of Settlement relating to the tenure of judges did not apply to any colony. Rather, it was for the Crown or Parliament to establish, by statute, the conditions under which judges held office in the colony.¹⁶ In 1858 the Supreme Court Judges Act introduced security of tenure to judges in New Zealand. This guarantee was eventually carried through to the Constitution Act 1986 which provides at s 23:

A Judge of the High Court shall not be removed from office except by a Sovereign or Governor-General, acting upon an address of the House of Representatives, which address may be moved only on the grounds of that Judge's misbehaviour or of that Judge's incapacity to discharge the function of that Judge's office.

¹² LJ King, above n 6, at 171.

¹³ JH Baker, above n 3, at 192.

¹⁴ JH Baker, above n 3, at 192; and Shimon Shetreet, above n 7, at 11-13.

¹⁵ Andrew P Stockley "Judicial Independence: The New Zealand Experience" (1997) 3 Aust J Leg Hist 145 at 146 referring to Supreme Court Ordinances 1841, 1844. "The English Laws Act 1858 was passed to clarify the status of English law in New Zealand. In colonies that had only a British settler population, English law was deemed to be in force from the inception of the colony but in colonies with an indigenous population with its own practices, it was not. The English Laws Act stipulated that all English law as of 14 January 1840 (the date William Hobson was sworn in as the colony's first lieutenant-governor) were deemed to be in force in New Zealand, where applicable to New Zealand circumstances."

¹⁶ *Terrell v Secretary of State for the Colonies* [1953] 2 QB 482, DC. See also Phillip A Joseph "Appointment, discipline and removal of judges in New Zealand" in HP Lee (ed) *Judiciaries in Comparative Perspective* (Cambridge University Press, New York, 2011) at 76, referring to Imperial Laws Application Act 1988.

[16] The protocol under which complaints about judges were dealt with during this time was described by the Court of Appeal in *Bradbury v Judicial Conduct Commissioner*.¹⁷

[A] protocol was in place under which complaints were largely dealt with by Heads of Bench. Where the complaint was serious, the protocol proceeded on the basis that the Attorney-General would establish a panel of three retired judges to consider the matter and make recommendations. The Attorney-General would consider the recommendations and then decide whether to place the matter before the House of Representatives. There was also provision for unsatisfied complainants to raise the matter with a Judicial Complaints Lay Observer who could ask the Chief Justice to review the matter or the Head of Bench to reconsider.

[17] When the Labour government came into office in 1999, it promised to provide for greater transparency around judicial appointments and removals. In 2002, Sir Geoffrey Palmer was asked to write a report on the subject. The Judicial Administration Issues Report was released on 1 November 2002. The report recommended, among other things, that the role of the Judicial Conduct Commissioner should be created. The Commissioner would receive and screen complaints and would decide whether any matter required independent investigation that could lead to formal removal procedures against a judge. A judicial conduct panel would then be activated to consider the issue. It would investigate the matter and would provide a report to the Attorney-General, who would then consider whether to move an address in Parliament for removal of the Judge.¹⁸

[18] The recommendations in this report led to the drafting of the Judicial Matters Bill (the Bill) which in turn led to the enactment of the Act. The explanatory note to the Bill stated that the measures introduced by the Bill were:

... aimed at maintaining and enhancing public confidence in the judiciary and recognising the fundamental importance in a democracy of ensuring an independent judiciary and addressing judicial resources.

[19] The long and often fraught history of the judiciary demonstrates that the removal of a judge and the process undertaken to do so is no small matter. As the Full Court of the High Court in *Wilson v Attorney-General* observed, the Act presumes that public confidence not only results from increased accountability but also from protecting judicial independence and treating individual judges fairly.¹⁹ The processes and standards contained in the Act seek

¹⁷ *Bradbury v Judicial Conduct Commissioner* [2014] NZCA 411 at [82].

¹⁸ Geoffrey Palmer *Judicial Administration Issues* (Chen Palmer & Partners, 1 November 2002) at 1 and 9-11.

¹⁹ *Wilson v Attorney-General* [2011] 1 NZLR 399, at [39].

to regulate and manage the power of removal in a way which achieves a safe balance between the two interests.

The statutory scheme

[20] Because a judicial conduct panel is appointed by the Attorney-General pursuant to the Act, the questions of jurisdiction and mootness before the Panel must be considered in the context of the scheme of the Act as a whole.

[21] The purpose of the Act is:²⁰

4 Purpose

The purpose of this Act 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.

[22] The Act establishes the office of the Judicial Conduct Commissioner (the Commissioner).²¹ The Commissioner's functions are to receive, investigate and deal with complaints about Judges.²² The Commissioner has all the powers necessary to carry out these functions and is required to act independently in doing so.²³ The Commissioner's role is only to investigate matters in relation to judicial conduct, not to "challenge or call into question the legality or correctness of any direction, order, judgment, or other decision given or made by a Judge in relation to any legal proceedings".²⁴

[23] Under the Act, any person may make a complaint about the conduct of a Judge.²⁵

²⁰ Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 4.

²¹ Section 7(1).

²² Section 8(1).

²³ Sections 8(3) and 9.

²⁴ Section 8(2).

²⁵ Section 12.

[24] A Judge is defined as:²⁶

Judge—

- (a) means—
 - (i) a Judge of the Supreme Court; or
 - (ii) a Judge of the Court of Appeal; or
 - (iii) a Judge or an Associate Judge of the High Court; or
 - (iv) a Judge of the Employment Court; or
 - (iva) a Judge of the Court Martial; or
 - (v) a Judge of the Court Martial Appeal Court; or
 - (vi) a District Court Judge; or
 - (vii) a Judge of the Environment Court; or
 - (viii) a Judge of the Maori Land Court; or
 - (ix) a coroner; and
- (b) includes a person who holds office as an acting Judge, or an acting Associate Judge; but
- (c) does not include a retired Judge or a former Judge.

[25] The Act then sets out how the Commissioner must deal with a complaint. He²⁷ must first conduct a preliminary investigation, making any inquiries into the complaint he considers appropriate and form an opinion as to whether:²⁸

- (a) there are any grounds for exercising his or her power under section 15A to take no further action in respect of the complaint; or
- (b) there are any grounds for dismissing the complaint under section 16; or
- (c) the subject matter of the complaint, if substantiated, could warrant referral of the complaint to the Head of Bench under section 17; or
- (d) the subject matter of the complaint, if substantiated, could warrant consideration of the removal of the Judge from office by way of a recommendation under section 18.

[26] Having formed an opinion, the Commissioner must then take one of the following steps:

²⁶ Section 5.

²⁷ We use the masculine gender as the position is currently held by a man.

²⁸ Section 15(1).

- (a) exercise his power to take no further action in respect of the complaint under s 15A; or
- (b) dismiss the complaint under s 16; or
- (c) refer the complaint to the Head of Bench under s 17; or
- (d) recommend that the Attorney-General appoint a judicial conduct panel to inquire into any matter or matters concerning the conduct of a Judge under s 18.

[27] The scheme of the Act is that referral to the head of bench is the “default option”.²⁹

[28] Importantly for present purposes, s 16 provides that the Commissioner must dismiss the complaint if:³⁰

The person who is the subject of the complaint is no longer a Judge.

[29] The Commissioner’s power to recommend that the Attorney-General appoint a judicial conduct panel is prescribed by s 18, which provides:

18 Commissioner’s power to recommend that Attorney-General appoint Judicial Conduct Panel

- (1) The Commissioner may recommend to the Attorney-General that he or she appoint a Judicial Conduct Panel to inquire into any matter or matters concerning the alleged conduct of a Judge if the Commissioner is of the opinion that—
 - (a) an inquiry into the alleged conduct is necessary or justified; and
 - (b) if established, the conduct may warrant consideration of removal of the Judge.
- (2) The Commissioner must give reasons with his or her recommendation under subsection (1).
- (3) The Commissioner must give the complainant and the Judge who is the subject of the complaint written notification of any action taken under subsection (1).

²⁹ *Wilson v Attorney-General*, above n 19, at [42]. The Commissioner publishes an annual report. Over the last three years, the Commissioner reports 716 complaints. No further action was taken in relation to 129 complaints, 537 complaints were dismissed and 34 complaints were referred to Head of Bench.

³⁰ Section 16(1)(g).

[30] Section 21(1) empowers the Attorney-General to appoint a judicial conduct panel “to inquire into, and report on, any matter or matters concerning the conduct of a Judge that have been the subject of a recommendation by the Commissioner under section 18”.

[31] The functions of a judicial conduct panel are prescribed by s 24:

24 Functions of Panel

- (1) A Judicial Conduct Panel must inquire into, and report on, the matter or matters of judicial conduct referred to it by the Attorney-General on the recommendation of the Commissioner.
- (2) The Panel must conduct a hearing into the matter or matters referred to it by the Attorney-General.
- (3) The Panel may also inquire into, and report on, any other matters concerning the conduct of the Judge that arise in the course of its dealing with the referral from the Attorney-General.
- (4) The Panel must give the Attorney-General a report in accordance with section 32.

[32] The Commissioner, and every person employed in his office, must keep confidential all matters that come to their knowledge in the performance of their functions and must not communicate any of those matters to anyone except for the purpose of carrying out their functions under, or giving effect to, the Act.³¹ In contrast, there is a presumption that every hearing of a judicial conduct panel will be held in public.³²

[33] A judicial conduct panel must provide a report to the Attorney-General at the conclusion of its inquiry. The report must set out the Panel’s findings of fact and its opinion, with reasons, as to whether consideration of removal of the Judge is justified.³³

[34] If a judicial conduct panel concludes that removal of a judge is justified, the Attorney-General must determine in his or her absolute discretion whether to take steps to initiate removal.³⁴ A judicial conduct panel report recommending consideration of removal is

³¹ Section 19.

³² Section 29. There is also nothing to prevent the Attorney-General from discussing the matter publicly unless non-publication orders are in place.

³³ Section 32(2).

³⁴ Section 33.

a pre-requisite to removal (unless the Judge has been convicted of a serious criminal offence, in which case the Attorney-General may act independently of the Act).³⁵

[35] The next steps for removing a judge take place outside of the Act and depend upon the court in which the judge sits.³⁶ Judges of the Senior Courts and Employment Court may be removed from office only by the House of Representatives and only on the grounds of incapacity or misbehaviour.³⁷ Judges in other courts may be removed by the Governor-General on the advice of the Attorney-General in accordance with the provisions of the relevant statute under which they are established, which generally refers to inability or misbehaviour. The role the Act plays in removal differs somewhat between courts – for example the District Court Act³⁸ provides that the removal of a Judge *may* be initiated in accordance with the Act, whereas the Coroners Act 2006³⁹ prevents removal unless a judicial conduct panel has reported to the Attorney-General its opinion that consideration of a coroner’s removal is justified.

[36] An overview of the process is provided for by the Act⁴⁰ and is set out in Schedule 1 of the Act:

³⁵ *Wilson v Attorney-General*, above n 19, at [38] when discussing the removal of judges of the Senior Courts.

³⁶ Judges of the Senior Courts are removed pursuant to the Constitution Act 1986, Associate Judges pursuant to the Senior Courts Act 2016, Employment Court Judges pursuant to the Employment Relations Act 2000, District Court Judges pursuant to the District Court Act 2016, Judges of the Court Martial pursuant to the Court Martial Act 2007, Judges of the Māori Land Court pursuant to the Te Ture Whenua Maori Act 1993 and Coroners pursuant to the Coroners Act 2006.

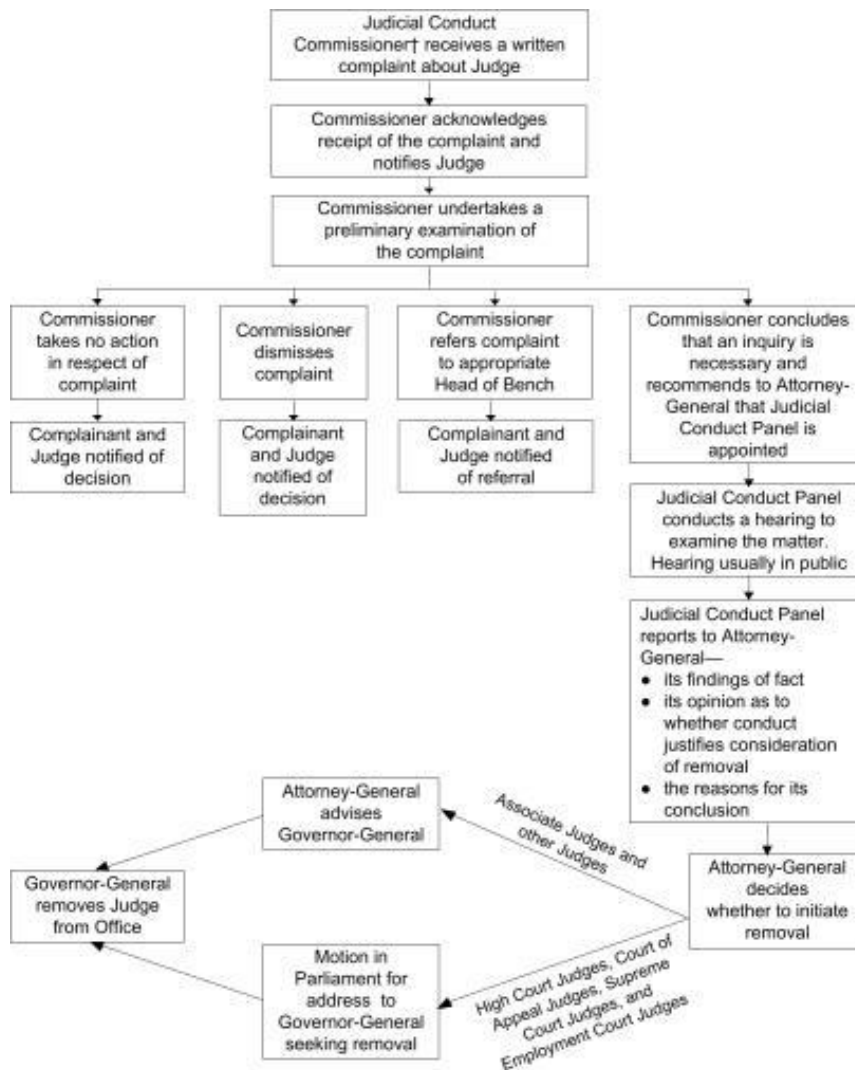
³⁷ Constitution Act 1986, s 23; and Employment Relations Act 2000, s 204.

³⁸ District Court Act 2016, s 29(3).

³⁹ Coroners Act 2006, s 114(1). Pursuant to s 114(2)(b), the Attorney-General may take steps independently of the Act to initiate the removal of a coroner, if the coroner has been convicted of a criminal offence punishable by two or more years’ imprisonment.

⁴⁰ Section 3.

Schedule 1
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.

The Act's purpose and how it is achieved

[37] The purpose of the Act is stated in s 4, which for convenience we set out again:

4 Purpose

The purpose of this Act 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.

[38] Mr La Hood, appointed by the Attorney-General as Special Counsel in the inquiry,⁴¹ submits that the purpose of the Act should be interpreted through a wider public interest lens which is not solely focused on the question of removal. In his submission, if a judge is able to avoid a judicial conduct panel inquiry into allegations of serious misbehaviour by resigning, public confidence (and by extension the purpose of the Act) would be undermined.

[39] We agree with Mr Wicks QC for the applicant, that s 4 must be read as a whole. That is, the aim of enhancing public confidence in and protecting the impartiality and integrity of the judicial system is achieved *by* the three methods identified in (a) to (c). While s 4 provides that the Act's purpose is to enhance public confidence in the judicial system, this is achieved by providing for an investigation process to enable informed decisions to be made about the removal of judges, establishing the Commissioner's office to assess complaints and by providing a fair process. The enhancement of public confidence in the judicial system is not a stand-alone purpose of the Act.

[40] In passing the Act, Parliament sought to increase the accountability of judges while at the same time adopting a fair process that protects the requirement of judicial independence and natural justice.

[41] As the Full Court of the High Court in *Wilson* put it, the objectives under the Act:⁴²

... are designed collectively to enhance public confidence in the judicial system; that is, the legislation presumes that public confidence results not merely from increased accountability but also from protecting judicial independence and treating judges fairly.

[42] The Court went on to note that:⁴³

The power of removal creates tension between accountability and independence which the Act aims to address through processes and standards designed to ensure that judges are not lightly removed.

⁴¹ Section 28.

⁴² *Wilson v Attorney-General*, above n 19, at [39].

⁴³ At [41].

Does the Act apply to judges who have ceased holding judicial office?

(i) When a complaint is before the Commissioner

[43] This question is easily answered in respect of those who fall under the jurisdiction of the Commissioner.

[44] The definition of judge in s 5 specifically provides that a judge “does not include a retired judge or a former judge”. Section 16 requires the Commissioner to dismiss any complaint if the subject of the complaint is no longer a judge.

[45] What that means in practice is that, even if the person holds office as a judge at the time a complaint is laid, the Commissioner must dismiss it, regardless of its gravity, if the person ceases to hold judicial office while the Commissioner is seized of the complaint.

(ii) Is the position any different once a judicial conduct panel has been appointed?

[46] This is the essential issue.

[47] At the time the Commissioner recommended the Attorney-General appoint a judicial conduct panel to inquire into the alleged conduct, the applicant was a judge as defined in the Act. On 27 August 2021, the Attorney-General accepted the Commissioner’s recommendation and, on 30 August, appointed the Panel. The applicant gave notice of her resignation on the same day, effective 1 September 2021, and ceased to hold judicial office from that date.

[48] The applicant protests the jurisdiction of the Panel to take any further steps on the basis she is no longer a person to whom the Act applies. In Mr Wicks’ submission, relying on the definition of judge, ss 16 and 18 of the Act and the overall purpose of the Act, the Panel is not statutorily empowered to consider the Attorney-General’s reference to it.

[49] Special Counsel, Mr La Hood, submits that a different interpretation should be taken. He advances two arguments. First, that the Panel’s task does not expressly require consideration of the fact of whether the person is still a judge. The provision which would have provided for this was removed during Select Committee consideration of the Bill (discussed in more detail below). Mr La Hood stresses that the Panel is considering the “matter of judicial conduct referred to it by the Attorney-General”. In his submission, it is only when

the Panel comes to issuing its report, in which it must give an opinion to the Attorney-General as to whether consideration of removal of the applicant is justified, that the fact she has ceased to hold judicial office could become relevant. Mr La Hood submits the fact the applicant has ceased to hold judicial office does not mean that the Panel cannot give an opinion and indeed it can still make findings of fact.

[50] The second argument advanced by Mr La Hood is that, if it were implicit that an inquiry was intended to come to an end upon a person ceasing to hold judicial office, s 16(1)(g) of the Act would be redundant. If the Act were intended to operate in that way, it would equally be the case that the Commissioner's inquiry should come to an end once the person complained of ceased to hold judicial office. Mr La Hood suggests it would be somewhat odd for the Act to operate in two different ways in respect of a former judge – that the Commissioner is given *explicit* power to, and must, dismiss a complaint, but a judicial conduct panel's power to do so is *implicit*.

Discussion

The legislative history of the Act

[51] An examination of the legislative history of the Bill and its passage through the Select Committee assists in the task of interpreting the Panel's powers and jurisdiction.

[52] The Bill originally provided for a judicial conduct panel to have the power to dismiss a complaint as an alternative to completing a report. Clause 31 of the Bill provided:

31 When Panel may dismiss complaint

The Judicial Panel may dismiss a complaint if the Panel is of the opinion that:

- (a) the complaint should be dismissed on any of the grounds under s 15; or
- (b) the complaint cannot be substantiated.

[53] Clause 15 listed the criteria on which the Commissioner must dismiss complaints and is now s 16 of the Act which requires, amongst other things, the dismissal of a complaint if the person complained about is no longer a judge.

[54] During the Select Committee process, cl 15 was amended and cl 31 was deleted. The commentary accompanying the Bill, as reported by the Committee, said:

... we recommend the deletion of clause 31, which provides for a complaint to be dismissed by a Judicial Conduct Panel on any of the grounds under clause 15 or if the complaint cannot be substantiated. This clause is unnecessary and may lead to confusion about the status of a complaint that has been dismissed by the Judicial Conduct Panel.

[55] The purpose of a judicial conduct panel and its process was also clarified:

We recommend an amendment ... to clarify that the purpose of appointing a Judicial Conduct Panel is to inquire into and report on a matter of conduct, not to resolve a complaint. The Panel's investigation would be for the purpose of considering whether a recommendation should be made that a Judge should be removed from office.

[56] Clause 33 was introduced, providing that a judge may not be removed unless a judicial conduct panel had first reported its opinion that consideration of removal was justified. It was noted that “the Bill seeks to establish the inquiry process to be adopted prior to the removal of a judge”.

[57] Subsequent to the hearing before us in the present case, Special Counsel provided the Panel with the Ministry of Justice’s “Additional recommendations” on Part 1 of the Bill which provides some further background to the removal of cl 31 beyond that included in the Select Committee Report. In its discussion recommending deletion of cl 31, the Ministry of Justice said:⁴⁴

The Ministry of Justice recommends that this clause be deleted. It is unnecessary and may lead to confusion about the state of a complaint that has been dismissed by the Panel. We note also that the Judges of the High Court and Court of Appeal recommend that clause 31 should be deleted. The Panel’s function is to inquire into and report on a matter of conduct that has been referred to it by the Attorney-General.

We have already recommended that provisions relating to the Judicial Conduct Panel should not refer to a “complaint”. See page 25 of the departmental report on Part 1 recommending amendments to this effect to clauses 20-34 of the Bill. The reason for that proposal is to clarify that this is not a complaints resolution process but is for the purpose of considering fitness for office. The focus has moved away from the complaint and onto the serious issue of conduct that was identified by the Judicial Conduct Commission.

For this reason it is not useful to provide for the Panel to be able to dismiss complaints under clause 15 of the Bill. The matter before it is not the complaint and its inquiry is

⁴⁴ This report was provided to the Panel by special counsel. It was obtained from the Parliamentary Library.

directed to the matter on which it must report under clause 32. It is preferable for the Panel to simply revert to the Attorney-General its conclusion. That conclusion may be, for example, that the matter is trivial, vexatious or frivolous and does not justify consideration of removal.

[58] The Ministry's submission highlights that the purpose of a judicial conduct panel is to focus on whether consideration of removal of a judge from office is justified.

[59] This is reinforced by the fact that the Select Committee recommended there be no extension to the options open to a judicial conduct panel in its report to the Attorney-General short of the removal opinion – such as censure, public apology or counselling. These options are available to similar bodies in other jurisdictions, as discussed below.

[60] Mr La Hood submits that it is not apparent that the question of whether resignation or retirement deprives a judicial conduct panel of jurisdiction was ever explicitly considered. However, in light of the legislative history and purpose of a judicial conduct panel, this is not surprising. After a matter is referred to a judicial conduct panel, it initiates an inquiry for the purpose of making findings of fact to inform its opinion as to whether consideration of removal of the judge is required. All steps a judicial conduct panel is required to take are directed to the ultimate question of whether removal of a sitting judge from office is required.

The judicial conduct panel's task

[61] Mr La Hood accepts that the purpose of the Act, and therefore a judicial conduct panel, is to inform decisions about the removal of judges. He acknowledges that only those complaints which the Commissioner considers involve alleged conduct which may warrant consideration of removal of a judge from office will be referred to a judicial conduct panel. However, he emphasises the mandatory language associated with a judicial conduct panel. Under s 24:

24 Functions of Panel

- (1) A Judicial Conduct Panel must inquire into, and report on, the matter or matters of judicial conduct referred to it by the Attorney-General on the recommendation of the Commissioner.
- (2) The Panel must conduct a hearing into the matter or matters referred to it by the Attorney-General.

- (3) The Panel may also inquire into, and report on, any other matters concerning the conduct of the Judge that arise in the course of its dealing with the referral from the Attorney-General.
- (4) The Panel must give the Attorney-General a report in accordance with section 32.

[62] The judicial conduct panel must then provide a report to the Attorney-General. Section 32 provides:

32 Report by Panel

- (1) A Judicial Conduct Panel must provide a report to the Attorney-General at the conclusion of its inquiry.
- (2) The report must set out—
 - (a) the Panel’s findings of fact; and
 - (b) the Panel’s opinion as to whether consideration of removal of the Judge is justified; and
 - (c) the reasons for the Panel’s conclusion.

[63] Mr La Hood submits that “on the face of it, at least” the Act gives no ability for the Panel to do anything other than conduct a hearing into the alleged conduct and report to the Attorney-General. He does not suggest, however, that the Panel does not have jurisdiction to grant the applicant’s application, a topic to which we will return.

[64] Mr La Hood emphasises that a judicial conduct panel has a role both as a finder of fact and as an advisory opinion-maker. A judicial conduct panel must provide an opinion as to whether the alleged conduct is established on the evidence and then its opinion as to whether consideration of removal of the judge is justified.

[65] In respect of the present case, Mr La Hood suggests that, if the Panel found the allegations established, the Panel’s opinion could be either:

- (a) the conduct does not meet the standard that would justify consideration of removal;
- (b) the conduct does meet the standard but, because the applicant no longer holds judicial office, ultimately consideration of removal is not justified; or

- (c) the conduct does justify consideration of removal of the Judge and it is entirely a matter for the Attorney-General what to do with that, in light of the fact the applicant no longer holds judicial office.

[66] It is our view that an examination of the Act indicates that any judicial conduct panel inquiry and report is *only* for the purpose of informing its opinion as to whether the consideration of removal of a judge who holds office is warranted.

[67] We start with s 18 and the Commissioner's power to recommend that the Attorney-General appoint a judicial conduct panel.

[68] In addition to the requirement that he dismiss a complaint if the person has ceased to hold judicial office, the Commissioner can *only* recommend the appointment of a judicial conduct panel if he is of the opinion that an inquiry into the alleged conduct is necessary or justified *and* if established, the conduct may warrant consideration of removal of the judge. As the Full Court said in *Wilson*, the Commissioner must be of the opinion:⁴⁵

... that there is sufficient substance to the complaint to warrant the appointment of a Panel; the Commissioner must believe both that the facts alleged in the complaint are sufficiently plausible to justify further investigation and that the conduct, if established, may be serious enough to warrant consideration of removal rather than referral to a Head of Bench.

[69] The scope of a judicial conduct panel's inquiry is determined by the Act. Under s 18, when the Commissioner recommends the Attorney-General appoint a judicial conduct panel to inquire into a complaint, he must identify the matter or matters concerning the judge's conduct that warrant an inquiry on the basis that, if established, the conduct may warrant the judge's removal. Section 21 plainly states that a judicial conduct panel is appointed to inquire and report on those matters. While a judicial conduct panel may also inquire into and report on any other matters concerning the conduct of the judge that arise in the course of its dealing with the referral,⁴⁶ the Full Court in *Wilson* noted that any additional matters must relate to matters that have been referred by the Attorney-General. Any new matters must be the subject of a fresh complaint to the Commissioner.⁴⁷

⁴⁵ *Wilson v Attorney-General*, above n 19, at [44].

⁴⁶ Section 24(3).

⁴⁷ *Wilson v Attorney-General*, above n 19, at [48].

[70] When this is read together with s 32, which provides that a judicial conduct panel must set out its finding of fact and opinion, with reasons, as to whether consideration of removal is justified, it is clear that the scope of a judicial conduct panel's inquiry and report is limited to consideration of matters serious enough to warrant consideration of removal.

[71] The fact a judicial conduct panel does not have the ability to recommend a referral to head of bench, or any other rehabilitative or punitive steps, reinforces the evident limit and restriction on the function and powers of a judicial conduct panel. We note that during the passage of the Bill, the Select Committee considered whether a judicial conduct panel should be able to recommend sanctions short of consideration of removal. In its report dated 3 May 2004, the Committee stated:⁴⁸

The majority of us recommend no extension to the options open to a Panel in its report to the Attorney-General, under clause 32. We consider it is appropriate that the Panel's report to the Attorney-General at the conclusion of its inquiry sets out the Panel's findings of fact, its opinion as to whether the complaint justifies consideration of removal of the Judge and the reasons for the Panel's conclusion.

[72] That a judicial conduct panel is focused on the most serious conduct only is reinforced by its makeup and format. A judicial conduct panel is a special tribunal with the allegations presented by a special prosecutor called "special counsel",⁴⁹ and must conduct a public hearing into the judge's conduct.

[73] We agree with Mr Wicks that the combination of the exclusion of retired or former judges from the definition of a judge and the threshold requirement that the Commissioner must believe the conduct complained of could warrant removal of the judge before recommending the appointment of a judicial conduct panel, also leads to the conclusion that any judicial conduct panel inquiry is for the purpose of informing its opinion as to whether the consideration of removal of a judge who holds office is warranted.

[74] In summary, the legislative intent is plain. A judicial conduct panel is to report to the Attorney-General on whether, in light of its findings following its inquiry, consideration of the removal of a judge from office is justified. It is not intended that a judicial conduct panel attempts to resolve the complaint or consider other sanctions.

⁴⁸ Judicial Matters Bill 2003 (71-2) (Select Committee Report) at 7-8.

⁴⁹ Section 28.

[75] Therefore, the proposition that a judicial conduct panel should continue with its inquiry despite the fact that the person the subject of the Attorney-General's referral has ceased to hold judicial office and the judicial conduct panel would be unable to fulfil its purpose is, in our view, unsustainable. The judicial conduct panel would be involved in a futile exercise in providing a report to the Attorney-General, who would have no power or authority to take any action as a result of the report because the person is no longer a judge.⁵⁰ That conclusion is compelling in the present case as the Panel has not even *begun* its task. The applicant brought forward her resignation to be effective from the date following that of the Panel's appointment.

The New Zealand experience

[76] The only other occasion in New Zealand when a judicial conduct panel has been convened concerns the former Supreme Court Judge, Justice Wilson. In that case, the Commissioner had recommended the Attorney-General appoint a judicial conduct panel. Following a decision of the Full Court of the High Court,⁵¹ the Commissioner's recommendation and Attorney-General's decision were set aside, and the appointment of the judicial conduct panel was quashed. The matter was referred back to the Commissioner to conduct an investigation and form an opinion under s 15 of the Act. Before the Commissioner had undertaken that task, Justice Wilson resigned and, when his resignation took effect, the Commissioner dismissed the complaint as he was required to do pursuant to s 16(1)(g).

[77] Given those circumstances, that case is of little assistance to the issue before us. We have, however, considered the position in comparable common law jurisdictions which are particularly relevant given our shared historical context. We are grateful to counsel for their research in this regard.

Other jurisdictions

[78] We have considered the position in New South Wales, Australian Capital Territory, South Australia, Canada and England, Wales and Northern Ireland.

⁵⁰ Similarly, the Attorney-General has the power under s 34 to take steps against a judge convicted of a serious offence but this provision must also apply only to a sitting judge.

⁵¹ *Wilson v Attorney-General*, above n 19, at [145]–[146].

New South Wales

[79] The Judicial Officers Act 1986 (NSW) was widely relied on when the New Zealand legislation was drafted. Complaints, if not summarily dismissed, are either referred to the Conduct Division (the equivalent of a judicial conduct panel) or to the relevant head of jurisdiction. A complaint must be dismissed if the person complained about is no longer a judicial officer. Where New South Wales differs from New Zealand, however, is that the Conduct Division has the power to refer the complaint back to the relevant head of jurisdiction if it is of the opinion that the matter does not justify parliamentary consideration of removal. The report may include recommendations as to what steps might be taken to deal with the complaint.

[80] Mr La Hood relies on the fact that s 32 of the Judicial Officers Act requires the Conduct Division to cease dealing with a complaint if the officer ceases to hold office for any reason. In his submission, the New South Wales Legislature specifically turned its mind to what should happen if a Judge ceased to hold judicial office when the complaint was before the equivalent of a judicial conduct panel. We make three points in response. First, unlike in New South Wales, the Act defines a judge as not including a retired judge or former judge. Secondly, given the purpose of the Act and the very limited pathway for a complaint to reach a judicial conduct panel under s 18 and the panel's powers under s 24, a judicial conduct panel is focused on the issue of whether a judge should be removed from office. Thirdly, and in contrast to the position of the Conduct Division, a judicial conduct panel is focused solely on the ultimate question of whether consideration of the removal of the Judge is warranted. The Conduct Division has, as an alternative route, the ability to refer the complaint back to the relevant head of jurisdiction. This serves only to emphasise that a New Zealand judicial conduct panel has a sole ultimate purpose.

Australian Capital Territory

[81] The Judicial Commissions Act 1994 (ACT) establishes a judicial council (similar to New Zealand's Commissioner) which undertakes a preliminary examination of a complaint and must dismiss it if the person complained of is no longer a judicial officer. If the complaint is substantiated, but parliamentary consideration of removal is not justified, it is referred to the head of jurisdiction. If the council considers the complaint could justify parliamentary consideration of the judge's removal, then it must recommend the appointment of a judicial

commission to examine the complaint. The judicial commission appears to have powers similar to a judicial conduct panel. It must conduct an examination of the complaint and prepare a report to the Attorney-General⁵² setting out its findings on material questions of fact and its conclusion as to whether or not the behaviour could amount to misbehaviour or incapacity such as to warrant the judge's removal from office.

[82] As is the case with the Act, the Judicial Commissions Act is silent on what is to occur should the judge resign following referral of the matter to the judicial commission. The position therefore closely mirrors that of New Zealand. Notably, in 2009, conduct regarding the then Chief Magistrate was referred to a judicial commission. He resigned shortly afterwards for medical reasons. It appears that the Government then halted any further inquiry by the judicial commission. The Attorney-General stated that the advice he had received was that the Judicial Commissions Act no longer applied and the commission was "void" because there was "no longer a judicial officer to inquire into".⁵³

South Australia

[83] The Judicial Commissioner Act 2015 establishes the roles of a judicial conduct commissioner and judicial conduct panel. It does not expressly deal with the situation where a judge resigns during the judicial conduct panel process.

New South Wales, Australian Capital Territory, South Australia

[84] Of all of the publicly available cases in the three Australian states, the inquiry or investigation has ceased upon the judge either having resigned or retired. This has, we understand, occurred in six cases.⁵⁴

⁵² The Judicial Commissions Act 1994 (ACT), s 22.

⁵³ Katherine Pohl and Stephen Dziedzic "Cahill resigns, commission abandoned" (17 November 2009) ABC News <abc.net.au>.

⁵⁴ The six cases are: (1) a judge was convicted of failing to submit tax returns prior to his appointment. An inquiry to consider his removal did not proceed once the judge resigned; (2) a judge convicted of child sex offences resigned without the need for an inquiry; (3) a judge suspected of drunk driving resigned; (4) Judicial Commission ceased its investigation when a judge resigned on medical grounds; (5) a judge's car was detected speeding and there was evidence casting doubt on her denial of responsibility. A judicial panel was announced but the judge resigned immediately; (6) a commission was established to consider wrongdoing by a judge but he resigned before the commission was conducted.

Canada

[85] The Canadian Judicial Council (Council), comprising the Chief Justice of Canada and other heads of bench, has the power to investigate complaints and make bylaws in respect of the conduct of inquiries. The Council, at the request of the Minister or Attorney-General of a province, undertakes an inquiry as to whether a judge should be removed from office. The Council then reports its conclusion and recommends to the Minister the removal of a judge from office if satisfied on specified grounds. Any inquiry must relate to a complaint or allegation on its facts sufficient enough to warrant the removal of the judge.

[86] It appears there is nothing in the various legislative instruments addressing what occurs if a judge resigns during the process (the definition of a judge does not make any reference to a retired or former judge). Three cases were brought to our attention. In one, the judge resigned before the inquiry committee made a recommendation and two other proceedings were stayed after the judge retired early.

[87] Relevantly, in one case the Council stayed an inquiry after the resignation of the judge became effective. An inquiry committee (analogous to a judicial conduct panel) had been appointed to inquire into a complaint about the judge on 8 February 2017. The judge apologised and resigned two days later, with the resignation to be effective from 1 June 2017. The judge's application to stop the Council from taking any further steps was dismissed and an inquiry committee was established. However, it was not possible to hold a hearing until after the judge's effective retirement date and as a consequence the inquiry committee recommended to the Council that the proceedings be permanently stayed. The inquiry committee did not consider it in the public interest to continue, noting that the only public consequence of a finding of misconduct would be a recommendation to the Council that the judge be removed from the bench but, given the judge's retirement, any such recommendation would be without consequence.

[88] In Mr La Hood's submission, the inquiry committee's reasoning for staying the process was "somewhat sparse", the implication being it should not necessarily be relied on. An alternative inference is that an indepth analysis is not required in order to conclude that, once a judge's resignation is effective, there is no point in continuing with a process where the ultimate question is whether the judge is fit for office or not.

England, Wales and Northern Ireland

[89] The Judicial Discipline (Prescribed Procedures) Regulations 2014 apply in England, Wales and Northern Ireland. The Lord Chancellor designates officials as the judicial conduct investigations office to undertake inquiries under the Regulations. Advice is provided to the Lord Chancellor and Lord Chief Justice, who have various options to pursue. Importantly, for the purposes of this case, if the judge ceases to hold office, consideration of the complaint must cease. The Lord Chancellor and Lord Chief Justice may continue to make a finding of misconduct only when the process is so far advanced that advice for removal is imminent.

[90] The only case referred to us concerned a judge who retired just days before he was scheduled to appear before a disciplinary tribunal over alleged misconduct. The only report we are aware of simply notes that the investigation of his conduct automatically lapsed.⁵⁵

Summary

[91] In both Australia and Canada, bodies equivalent to a judicial conduct panel appear to consider that there is no requirement for, or utility in, persisting with a process which broadly mirrors that required of a judicial conduct panel if the judge is no longer in office.

Conclusion

[92] The Act establishes the Commissioner's office to receive and assess complaints about the conduct of judges and provides for a process to enable decisions to be made about the removal of judges. The Act explicitly states who is considered to be a judge for its purposes. Retired and former judges are excluded from the definition of judge. The purpose of a judicial conduct panel is also clear. It is to investigate the matters referred to it by the Attorney-General, with the ultimate purpose of providing an opinion based on its findings of fact, as to whether consideration by the Attorney-General of removal of a judge from office is warranted.

[93] As the legislative history shows, the proposition that a judicial conduct panel should address other options short of removal from office was specifically considered and rejected by the Legislature. When the definition of judge and the purpose of a judicial conduct panel are

⁵⁵ Mr Justice Peter Smith report: <https://www.legalcheek.com/2017/10/mr-justice-peter-smith-will-retire-tomorrow-days-before-disciplinary-hearing/>.

taken together in context, it is apparent that the Act does not, and was never intended to, apply to a former judge, whether or not the matter of conduct has already been referred to a judicial conduct panel.

[94] The Panel has determined that it has no jurisdiction to take any further steps in this case.

Would the process be moot?

[95] This analysis applies equally to the argument that the inquiry should be stayed on the ground of mootness. As discussed in relation to jurisdiction, the purpose of a judicial conduct panel is to consider matters relating to judicial conduct referred to it by the Attorney-General, make findings of fact on those matters, and provide its opinion as to whether consideration of removal of a judge who holds judicial office is warranted.

[96] The ultimate outcome of a report by the Panel to the Attorney-General is the potential removal of the applicant as a judge. But the applicant is no longer a judge, meaning that the Attorney-General would have no power to take any action in relation to a report by the Panel.

[97] We agree with the applicant that the inquiry should be stayed because the process would be moot. As a matter of principle, courts will not hear moot cases. There is no dispute that a judicial conduct panel has inherent jurisdiction to dismiss an application on the grounds of mootness. Similarly, there is no dispute that a judicial conduct panel has implied or inherent powers to dismiss, stay or strike out the reference to it for want of jurisdiction.⁵⁶

[98] We are satisfied that it would be an abuse of process for the Panel to proceed with its inquiry in circumstances where the result will not lead to any practical outcome.⁵⁷ There is no tenable issue before the Panel and it cannot fulfil its statutory reporting function required by s 32 of the Act.

⁵⁶ Section 26(1) of the Act provides that the panel has the same powers as conferred on a Commission of Inquiry by ss 4 and 4B to 8 of the Commissions of Inquiry Act 1908. We do not need to decide whether or not the broad wording incorporates the powers of the District Court civil jurisdiction. We are satisfied the Panel must have inherent powers to dismiss, stay or strike out a reference to it and this was not disputed by Mr La Hood.

⁵⁷ This view is reinforced by the absence of any case in comparable jurisdictions where an inquiry has continued after a judge ceased to hold judicial office. We leave open the question of whether an inquiry should continue if the judge the subject of a referral ceases to hold judicial office at a time when a judicial conduct panel's inquiry is advanced, as is the position in England, Wales and Northern Ireland: the Judicial Discipline (Prescribed Procedures) Regulations 2014, r 23.

[99] However, courts can, and sometimes do, issue judgments where the issue is moot, but only in circumstances where there is good reason in the public interest for the court to determine the issue. As the Supreme Court in *Gordon-Smith v R* said:⁵⁸

The Court's primary responsibility is to determine live controversies between citizens and to develop the law of New Zealand in that context. ... That concern is met, however, if the question arising in a moot case is one of significant public importance which is likely to come before the court again at some point.

[100] While that proposition has no application in the present circumstances given the Panel's prescribed function and jurisdiction under the Act, for the sake of completeness we now address the issue of public interest.

Is it nevertheless in the public interest that the Panel continue with its inquiry?

[101] In Mr La Hood's submission, despite the fact the applicant no longer holds judicial office, there is high public interest in investigating the allegations against her. In contrast, Mr Wicks submits that the public interest is not engaged because removal of a judge from office is not a live issue. There is, he says, no public utility in the Panel undertaking an inquiry and reporting to the Attorney-General on findings of fact upon which he cannot act.

[102] Mr La Hood submits that, given how rare it is in New Zealand that a judicial conduct panel has been appointed, there is high public interest in a general assessment of the alleged conduct at issue and discussion of the rules applying to judges. He refers by analogy to professional disciplinary regimes which are focused on upholding the standards of a profession in order to maintain public confidence in that profession.

[103] Mr La Hood refers, by way of example, to a recent High Court decision in *Attorney-General v Institution of Professional Engineers New Zealand Inc.*⁵⁹ In that case, Collins J held that the Institution erred in law when it dismissed a complaint against an engineer before the disciplinary process could be completed on the basis the engineer's resignation left it with no option. Amongst relevant considerations for the High Court was the need to maintain the public's trust in the engineering profession. The High Court held it was in the public interest to allow the Institution to determine whether or not it wished to proceed with the complaint.

⁵⁸ *Gordon-Smith v R* [2008] NZSC 56 at [24].

⁵⁹ *Attorney-General v Institution of Professional Engineers NZ Inc* [2018] NZHC 3211, [2019] 2 NZLR 731.

[104] We attach little weight to this case in our analysis because the circumstances are readily distinguishable. The case essentially came down to a question of contractual interpretation as the disciplinary procedures were governed by the contract between the Institution and its members. The High Court interpreted the definition of “member” in the Rules and Regulations as including a person who resigned later. This is distinguishable from the present case and we refer to our earlier discussion on the definition of “Judge”. Also relevant is the fact that the powers of the Institution included other disciplinary measures, including punitive aspects (a fine) and rehabilitative aspects (ordering further training). And most pertinently, an engineer can continue to practise as an engineer even if not a member of the Institution, thus elevating significantly the public interest.

[105] In this respect the Act may be compared, in two ways relevant for present purposes, to the legislation governing disciplinary processes relating to lawyers – the Lawyers and Conveyancers Act 2006 (LCA). First, while s 6 of the LCA defines “lawyer” as a person who holds a current practising certificate,⁶⁰ it goes on to state explicitly that the jurisdiction of the Lawyers and Conveyancers Disciplinary Tribunal (Disciplinary Tribunal) extends to “former lawyers”.⁶¹ Secondly, the powers of a judicial conduct panel and the Disciplinary Tribunal may be contrasted. A judicial conduct panel has only one (disciplinary) option available under the Act, namely the recommendation of consideration of removal. In contrast, the Disciplinary Tribunal may make a number of orders short of striking the lawyer’s name off the roll, including the payment of a fine to the New Zealand Law Society, an order prohibiting the lawyer or former lawyer from practising on their own account, or a suspension from practice.⁶²

[106] Given the express provisions of the Act, we have considerable difficulty with Mr La Hood’s argument that the Panel should proceed in the public interest to set standards of acceptable behaviour and provide an example of what constitutes misconduct. Of course, this would not be achieved under the Act in respect of complaints before the Commissioner, for reasons of confidentiality. A judicial conduct panel is not bound by the same provisions of confidentiality, meaning that, where there has been an inquiry, there might well be publicity about the appropriateness or otherwise of the alleged behaviour. But a decision whether and

⁶⁰ Lawyers and Conveyancers Act 2006, s 6.

⁶¹ Lawyers and Conveyancers Act 2006, s 227.

⁶² Lawyers and Conveyancers Act 2006, s 242.

the extent to which there is any publication of the allegations is a separate consideration. It cannot dictate whether or not the Panel has jurisdiction to proceed in the present circumstances.

[107] We accept that, under the current framework, a judge can avoid or sidestep the process through early retirement or resignation. But that has always been the case, explicitly so when a complaint is before the Commissioner, no matter how serious the alleged conduct. It is in the public interest that a long drawn out process is avoided by what some would describe as a judge doing the honourable thing and resigning.⁶³

[108] Similarly, we are not persuaded that the fact a former judge might seek to use their position as a former judge in pursuing other opportunities, for example arbitration, mediation, appointment to a board or to carry out advisory work, changes the position. The first and most obvious point is that any prudent person looking to make an appointment at a high level would likely undertake due diligence on prospective appointees. An early retirement from the position of a judge could be expected to be questioned. Had the applicant resigned when the matter was before the Commissioner, everything about the complaint, including the identity of the judge, would be subject to statutory confidentiality provisions. There are no such statutory confidentiality provisions which apply when a matter is before a judicial conduct panel.

[109] The purpose of the Act is not punitive. What is in the public interest is not the same as what is interesting to the public.⁶⁴

[110] Finally, on this point, we would reiterate that our function and jurisdiction is limited by the Act. If it is felt, as Mr La Hood suggests, that there is a public interest in resolving factual contests and recording a judicial conduct panel's opinion as to whether behaviour would warrant a judge's removal from office, despite the judge in question no longer holding judicial office, then that is for Parliament to address.

[111] The public interest has been met because the applicant no longer holds judicial office. The public interest is no longer engaged because removal of the applicant from judicial office is not a live issue. As Mr Wicks put it, the public interest is not a key that opens jurisdictional doors that are closed.

⁶³ (11 May 2004) 617 NZPD (Judicial Matters Bill – Second Reading – Stephen Franks).

⁶⁴ *TV3 Network Services Ltd v Broadcasting Standards Authority* [1995] 2 NZLR 720 at 733 applied by the Court of Appeal in *Hosking v Runting* [2005]1 NZLR 1 at [133].

Result

[112] The Panel cannot proceed with the inquiry by reason of lack of jurisdiction and mootness.

[113] The Panel's interim orders prohibiting publication of the identifying particulars of the applicant and background circumstances surrounding the Complaint to the Judicial Conduct Commissioner have been lifted but remain in force for 20 working days from the date of the contemporaneous decision on suppression to allow the applicant time to consider whether to exercise her right of appeal under s 31(1) of the Act.

[114] The Panel has made a permanent order prohibiting the publication of the name and identifying particulars of the affected person, including the nature of any connection with the applicant.

Thomas J (Chair)