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 [Judge]

On the papers

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

REDACTED DECISION OF THE PANEL (SUPPRESSION)

Counsel:
D R La Hood, Luke Cunningham Clere, Wellington
K L Kensington, Luke Cunningham Clere, Wellington
P F Wicks QC, Auckland

Solicitors:
D C S Morris and J L Libbey, Cook Morris Quinn, Auckland for the Judge

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Introduction

[1] In our contemporaneous decision on jurisdiction, we concluded that the Panel cannot proceed with any inquiry by reason of lack of jurisdiction and mootness. In order to preserve the position pending our decision, we had earlier made interim non-publication orders in respect of the identity of the former Judge the subject of our decision, and the background circumstances surrounding the complaint to the Judicial Conduct Commissioner (the Complaint).[1] We now turn to consider whether those orders should be made permanent.

[2] The former Judge (the applicant) seeks permanent non-publication orders (the application) preventing publication of:

(a) the identity of the person the [redacted] which resulted in the Complaint (the affected person);

(b) the applicant's identity and [their] former judicial position; and

(c) the details of the Complaint.

[3] Mr La Hood, appointed by the Attorney-General as Special Counsel in the inquiry,[2] supports the application as it relates to the affected person but opposes permanent non-publication orders in respect of the applicant's identity and former judicial position, and considers some details of the Complaint should be made public.

[4] Neither the applicant nor Special Counsel sought a hearing in respect of the application.

Relevant law

The Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004

[5] We discussed the statutory scheme of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (the Act) in some detail in the decision on jurisdiction. When it comes to the issue of confidentiality, the Act creates a clear distinction between the situation when

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1 Minute dated 8 November 2021.
2 Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 28.

matters are within the jurisdiction of the Judicial Conduct Commissioner (the Commissioner) and when a complaint has left his jurisdiction upon his recommendation that the Attorney-General appoint a judicial conduct panel.[3]

[6] 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.[4]

[7] The Act requires the Commissioner to provide a report to the Attorney-General each year on the exercise of his functions under the Act. The Attorney-General must lay a copy of the report before the House of Representatives as soon as practicable after receipt.[5] Amongst other matters, the report must include the number and types of complaints received during the year and their outcomes. However:[6]

> A report by the Commissioner under this section must not identify any person against whom a complaint has been made under this Act, unless the person has been the subject of a public hearing under this Act, has been the subject of a report by the Judicial Conduct Panel to the Attorney-General, or has been convicted of an offence connected with the complaint.

[8] Notably, these provisions apply only to the Commissioner and his annual report.

[9] In contrast, there is a presumption that every hearing of a judicial conduct panel will be held in public:

> **29 Hearing to be in public**
>
> (1) Every hearing of a Judicial Conduct Panel must be held in public.
>
> (2) Despite subsection (1),—
>
> (a) if the Panel is of the opinion that it is proper to do so, having regard to the interest of any person (including, without limitation, the privacy of the complainant) and to the public interest, the Panel may order that a hearing or part of a hearing be held in private:
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> (b) the Panel may, in any case, deliberate in private as to its recommendation or as to any question arising in the course of a hearing.

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3 Section 18. We use the masculine gender as the position is currently held by a man.
4 Section 19.
5 Schedule 2 pt 1 cl 9.
6 Schedule 2 pt 1 cl 10(2).

[10] The Panel is authorised to make non-publication orders as follows:

> **30 Restrictions on publication**
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> (1) If a Judicial Conduct Panel is of the opinion that it is proper to do so, having regard to the interest of any person (including, without limitation, the privacy of the complainant) and to the public interest, the Panel may make any 1 or more of the following orders:
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> (a) an order prohibiting the publication of any report or account of any part of the proceedings before the Panel, whether held in public or in private:
>
> (b) an order prohibiting the publication of the whole or any part of any books, papers, or documents produced at any hearing:
>
> (c) an order prohibiting the publication of the name or any particulars of the affairs of the Judge concerned or any other person.
>
> (2) An order made under subsection (1) continues in force—
>
> (a) until the time specified in the order; or
>
> (b) if no time is specified in the order, until revoked under subsection (3) or section 31.
>
> …

[11] A Full Court of the High Court briefly discussed the Act's provisions on confidentiality in *Wilson v Attorney-General* and made the following observation:[7]

> 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 else except for the purpose of carrying out their functions under, or giving effect to, the Act. Every hearing of a panel must be held in public unless the panel orders otherwise. The legislation thus envisages that a complaint will not become public until a panel holds its first hearing into the matters of judicial conduct referred to it by the Attorney.

[12] The Panel has already observed that, given its context, the *Wilson* decision should not be read as indicating that the presumption of a public hearing applies only to a hearing into the alleged conduct but can include any hearing conducted by a judicial conduct panel, including a hearing on jurisdictional issues. We determined that the hearing into the question of whether the Panel had jurisdiction to proceed with the inquiry into the alleged conduct of the applicant should take place in public.[8]

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7 *Wilson v Attorney-General* [2011] 1 NZLR 339 at [35].

8 *Re a Judicial Conduct Panel* JCP, 2 December 2021. Decision in relation to preliminary issue.

[13] When exercising its powers under the Act, a judicial conduct panel will be guided by the purpose of the Act:

> **4 Purpose**
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> 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.

The principle of open justice

[14] A judicial conduct panel is a special tribunal and, as with any court or tribunal, the starting point when it comes to questions of suppression is the principle of open justice. The importance of the principle of open justice has been discussed at length in case law.

[15] In *R v Liddell*, the Court of Appeal said:[9]

> [T]he starting point must always be the importance in a democracy of freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as "surrogates of the public".

[16] In *Erceg v Erceg*, the Supreme Court explained:[10]

> The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance, and has been described as "an almost priceless inheritance". The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts … it is well established that there are circumstances in which the interests of justice require that the general rule of open justice may be departed from, but only to the extent necessary to serve the ends of justice.

[17] We turn now to address the three orders sought.

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9 *R v Liddell* [1995] 1 NZLR 538 at 546.

10 *Erceg v Erceg* [2016] NZSC 135, [2017] 1 NZLR 310 at [2]-[3].

Should the identity of the affected person be permanently suppressed?

[18] The affected person is not in fact the "complainant" in the true sense of the word, as they are not the person who made the Complaint to the Commissioner. They are, however, the person adversely affected by the alleged conduct and, as such, within the intent of the reference to complainant in s 30 of the Act. That means the Panel must have regard to the affected person's interest, including their privacy.

[19] The affected person has been consulted and seeks suppression of their name and identifying details, including any connection between them and the applicant.

[20] Counsel agree that the Panel should make permanent non-publication orders in respect of the affected person as sought.

[21] The Panel is satisfied that public interest in the affected person's identity is low and outweighed by their interest and privacy. It is therefore proper to make an order permanently prohibiting publication of the affected person's name and identifying particulars, including the nature of any connection with the applicant.

Should the applicant's identity and former judicial position be permanently suppressed?

[22] The applicant seeks permanent non-publication orders on the following grounds:

(a) the Act does not intend that the identity of a judge who is the subject of a complaint, nor the details of the alleged conduct, be made publicly available prior to any substantive hearing before a judicial conduct panel and explicitly requires that complaints regarding judicial conduct are to be kept confidential;

(b) any publication of the applicant's name and/or former judicial office or background circumstances of the Complaint would create a serious risk the affected person's name will be able to be identified;

(c) if the Panel does not have the jurisdiction to proceed with the inquiry into the substantive allegations, the identity of the Judge and the alleged conduct are not properly matters of public interest;

(d) the public interest is further attenuated by the fact the applicant is no longer a judge, the alleged conduct occurred some years ago and the alleged conduct involved private matters rather than conduct in the performance of the applicant's judicial duties.

[23] Special Counsel's position is that:

(a) non-publication of the identity of the affected person should not necessarily lead to non-publication of the identity of the applicant, [their] judicial position and any details of the Complaint;

(b) the presumption and starting point is open justice and transparent proceedings, and there is a strong public interest in disclosure of the applicant's name and at least some details of the Complaint; and

(c) no personal or private factors of the applicant have been raised that are of sufficient weight to displace the presumption in favour of publication.

The Act

[24] We have already discussed the provisions of the Act and reject the first ground of the application, that is, that the Act does not intend the identity of a judge to be made public prior to any substantive hearing of a judicial conduct panel. To reiterate, there is a clear distinction between the confidentiality provisions which apply when a complaint is before the Commissioner and the presumption of open justice which applies once it has left the Commissioner's jurisdiction.

Potential impact on the affected person

[25] Mr Wicks QC, for the applicant, submits there would be a substantial risk that the affected person would become known due to an inevitable "joining of the dots". As against that, however, the affected person has been consulted and is satisfied that, as long as all their identifying details are suppressed, there would be minimal risk that identification of the applicant would lead to their identification. As Mr La Hood acknowledges, some people close

to one or other of the parties might be able to identify the affected person. That does not, in our assessment, outweigh the public interest in identification of the applicant.

What of the interest of the applicant?

[26] The Panel must have regard to the interest of any person and that includes the applicant.

[27] The submissions in support of the application refer to the applicant's concerns. Mr Wicks contends that, if the Panel determines it does not have jurisdiction, the applicant will be subject to publicity and conjecture as to unsubstantiated allegations concerning [their] conduct. He suggests that publication would likely result in unproven allegations being aired and cause the applicant serious mental distress as well as irreparable harm to [their] professional reputation and financial position. Any such publicity, he says, would invariably also negatively impact the applicant's family.

[28] Mr Wicks relies on comments in our decision to hold the jurisdiction hearing in public, where we noted that the hearing would not be concerned with the substance of the Complaint and there would be little, if any, need to refer to the allegations. Our purpose in making these comments was simply to note that any concerns about the impact on the applicant were not in issue when considering whether the hearing into jurisdiction should be in private or in public, as the hearing would not involve any discussion of the allegations.

[29] Mr La Hood, in his submissions, points out that there is no evidential foundation to support the concerns about the impact of publishing the applicant's name, including no evidence from the applicant. Mr Wicks did not address this aspect in his submissions in reply, simply reiterating that publication would damage the applicant professionally and financially, saying the Panel does not require evidence to take notice that, should [their] name and details of the Complaint be publicly released, there will be "serious detrimental effects on [the applicant] personally and professionally".

[30] Without any evidence from the applicant and without any expert evidence as to any impact on the applicant's mental health, the Panel is left in the position where it can do no more than agree with the general observation that publication of the applicant's name and details of the Complaint will likely cause [them] some distress, embarrassment and adverse personal and financial consequences. That is, of course, the case in all criminal and professional disciplinary

proceedings prior to there being any hearing into an allegation. That does not affect, however, the starting point of the presumption of open justice.

[31] We understand that in the cases in comparable jurisdictions which we discuss in our decision on jurisdiction, the names of the judges and allegations against them all appear to be in the public domain.

[32] The Commissioner's decision to refer the Complaint to the Attorney-General was dated 2 July 2021. The Attorney-General appointed the Panel on 30 August 2021. The applicant had [ceased holding judicial office,] recording that [they did] not [accept] any of the allegations against [them]. Notwithstanding that [redacted], the Attorney-General accepted the Commissioner's recommendation to appoint a judicial conduct panel. We note that almost two months had elapsed between the date of the Commissioner's decision and the Attorney-General's appointment of the Panel. It was only when [redacted].

[33] In those circumstances, we have some sympathy with Mr La Hood's submission that it is the applicant's choices which have brought [them] to the point where the Complaint is no longer within the Commissioner's jurisdiction. A judicial conduct panel has been appointed to investigate the Complaint and provide its opinion to the Attorney-General as to whether removal from office is justified. The fact there is to be no testing of the allegations is a result of [the applicant ceasing to hold judicial office] before a hearing into the Complaint could be held.

[34] We are also somewhat surprised by the submission that [redacted]. We are not aware of any evidence from the applicant's head of bench in support of this proposition or the desirability of it. In the circumstances, we put that submission to one side.

The public interest

[35] In Mr Wicks' submission, the public interest and the principle of open justice could be properly and legitimately engaged only if the Panel determines it has jurisdiction.

[36] He submits that the public interest in this case is further attenuated by the fact that:

(a) the applicant is no longer a judge;

(b) the alleged conduct occurred some years ago; and

(c) the alleged conduct involved private matters rather than conduct in the performance of the applicant's duties.

[37] The fact that the applicant is no longer a judge is not relevant. The applicant was a judge at the time the alleged conduct occurred and the Panel was established. The fact that the applicant is a former Judge is relevant to jurisdiction but does not mean there is no public interest in the applicant's identity.

[38] The applicant, as a former Judge presumably well aware of the provisions of the Act, made an informed decision that [redacted]. [They were] entitled to take that course but, having done so, is still subject to the operational provisions of the Act. The fact [redacted] does not mean it is not in the public interest for [their] name to be published.

[39] We take issue with the attempt to frame the alleged conduct as essentially historical in nature. That is simply not accurate on our understanding.

[40] It is also not relevant that the alleged conduct in question occurred in the Judge's personal capacity rather than as part of [their] judicial role. The Act explicitly allows complaints about the conduct of a judge, regardless of whether the subject matter of the complaint arises in the exercise of their judicial duties or not.[11] In order for the Commissioner to refer a complaint to the Attorney-General, it must involve alleged conduct which falls so far below the standard of behaviour expected of a judicial officer as to warrant consideration of removal from office. As Mr La Hood observes, an allegation of misbehaviour in relation to someone who holds a professional role or is a member of a professional body will inevitably be relevant to the person's conduct within their profession.

[41] Mr La Hood submits that open justice is crucial to maintaining public confidence in a profession. He refers to several cases concerning professional disciplinary proceedings[12]

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[11] Section 11(1):

> The Commissioner must receive and deal with every complaint made under this section about the conduct of a Judge regardless of whether the subject matter of the complaint arises in the exercise of the Judge's judicial duties or otherwise.

[12] *H and F v Waikato Bay of Plenty Standards Committee 1 of the New Zealand Law Society* [2013] NZHC 2090 at [18]-[20]; *Bolton v Law Society* [1994] 2 All ER 492 (cited in *H and F*); and *Y v Attorney-General* [2016] NZCA 474, (2016) 23 PRNZ 452 at [32]-[33].

where it is suggested that public interest considerations include the fact that open and transparent disciplinary processes enhance public confidence in the relevant profession.[13]

[42] Mr Wicks contends that the Panel's inquiry is not analogous to a professional disciplinary process. Rather that it is a process to ensure that the independence of the judiciary and natural justice are observed when inquiring into a judge's conduct and considering whether that conduct might warrant removal.

[43] While a judicial conduct panel inquiry is not a disciplinary process per se, a disciplinary proceeding and a judicial conduct panel's inquiry both aim to enhance public confidence in a particular profession or system (in this case the judicial system). Professions depend on the collective reputation of their members and the confidence it inspires. So too does the judiciary. Cases relating to disciplinary proceedings may therefore be relevant by analogy. That said, we have not needed to refer to any such decisions in our analysis.

[44] We agree too that there is a degree of mana and prestige attached to the role of former judge and public interest in disclosing the applicant's identity so that the public and those who might be considering engaging the applicant for [their] services may make informed choices. The Court of Appeal's observations in *Parker v R* are apposite, despite that case concerning criminal proceedings. Mr Parker, a boxer of international renown, had not himself been charged with any criminal offending but was allegedly involved with others convicted of serious drug charges. He sought permanent suppression of his name and connection with the charges. The Court of Appeal said that, while:[14]

> … hardship may be exacerbated by the fact that the individual concerned is a prominent public figure trading on his or her good reputation … the more prominent the public figure, the greater bona fide public interest there is in knowing facts relevant to that person's conduct, so that an informed judgement may be made about the reputation they trade upon.

[45] While hardly celebrities, judges are public figures of some status and importance. Their good reputation underpins public confidence in the judiciary. There is, therefore, bona fide public interest in knowing some facts relevant to their reputation. This is particularly so where, as here, there has been an assessment of a prima facie case of conduct serious enough to warrant

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13 *H and F v Waikato Bay of Plenty Standards Committee 1 of the New Zealand Law Society*, above n 12, at [19].

14 *Parker v R* [2020] NZCA 502 at [2].

consideration of removal from judicial office if that conduct were established. The Attorney-General accepted that assessment and appointed the Panel. The establishment of a judicial conduct panel is so rare, and the alleged conduct is necessarily so serious, that there is a strong public interest in open justice in this case.

[46] Indeed, if all details are suppressed, there is the very real danger that the public will perceive that this is not an open or transparent process. The underlying rationale for the principle of open justice is to guard against arbitrariness or partiality, or the suspicion of arbitrariness and partiality.[15] If all details are suppressed, the impartiality and integrity of the judicial system may be brought into question.

[47] We return to the Act's purpose – to enhance public confidence in and protect the impartiality and integrity of the judicial system by providing a robust investigation process to enable informed decisions to be made about the removal of judges from office, establishing an office to receive and assess complaints, and providing a fair process that recognises and protects the requirements of judicial independence and natural justice. In our view, the purpose of the Act would not be met, and indeed would potentially be undermined, were there to be uncertainty and speculation about the identity of the Judge and the jurisdiction in which [they] sat. Speculation as to the Judge's identity and [their] bench is harmful to the whole judiciary and undermines public confidence in it.

Conclusion

[48] We have had regard to the interest of the applicant and to the public interest. We are not satisfied, and there is no evidence before us, that the reputational or other damage to the applicant would be out of the ordinary or disproportionate to the public interest such that the presumption in favour of open justice is displaced in the circumstances. We conclude there should be no permanent order prohibiting the publication of the applicant's name and the interim order should be lifted.

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15 *Erceg v Erceg,* above n 10,at [2].

Should the details of the Complaint be permanently suppressed?

[49] Similar arguments were raised on the issue of what, if any, details of the Complaint should be subject to permanent non-publication orders.

[50] It is already in the public domain by way of the Panel's media release that the Complaint did not involve the applicant's alleged conduct in [their] capacity as a Judge but rather concerned alleged conduct in [their] personal capacity.

[51] In Mr La Hood's submission, it is possible to anonymise the details of the Complaint but still capture the essence of what is alleged, while minimising any details that would identify the affected person. He has suggested possible wording. He suggests that the Panel may consider more information is required properly to inform the public of the nature of the Complaint. Furthermore, he submits that the limited information we make public should not prevent those with a genuine interest in the matter being provided with further information, for example the New Zealand Law Society.[16]

[52] When considering an application by a member of the media for access to the Panel's file, we noted that the Complaint had not been formally referred to the Panel at that time and would not be unless the Panel determined it had jurisdiction to proceed.[17]

[53] That remains the case. Although the Panel requested that Special Counsel provide a copy of the letter of complaint to the Commissioner and the Commissioner's recommendation, it did so in order to have that material available as background if required. There has, however, been no need for the Panel to refer to that material and nor have counsel drawn it to our attention. We have returned that material to Special Counsel.

[54] While counsel's submissions have at times made some passing references to the Complaint, the Panel has not been required to engage with those matters.

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16 See *ASG v Hayne* [2017] NZSC 59, [2017] 1 NZLR 777 where the Supreme Court held that non-publication orders under the Criminal Procedure Act 2011 did not operate to prevent the dissemination of information to persons with a genuine need to know, where the genuineness of the need or interest is objectively established.

17 Panel Minute 21 March 2022, at [28].

[55] In those circumstances, we do not consider it appropriate for the first time and at this stage in the proceeding, when we have concluded we do not have jurisdiction to proceed with the inquiry, to delve into or discuss the detail of the Complaint.

[56] Having had regard to the interest of the applicant and affected person, and the public interest, we have decided to lift our interim non-publication orders in relation to the background of the Complaint[18] and simply record the following excerpt from the Attorney-General's letter appointing the Panel. He said:

> [Redacted]

[57] We note that the applicant does not accept any of the allegations against [them] and, for the reasons set out in our decision on jurisdiction, the Panel has not inquired into any of those allegations.

Result

[58] 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 are lifted but remain in force for 20 working days from the date of this decision to allow the applicant time to consider whether to exercise [their] right of appeal under s 31(1) of the Act.

[59] The Panel makes 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)

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[18] The Commissioner and his office remain subject to the confidentiality provisions in the Act.