

MEDIA STATEMENT OF JUDICIAL CONDUCT PANEL

25 July 2022

(JCP 1/2022)

PRESS SUMMARY

This summary is provided to assist in the understanding of the Panel's decisions. It does not comprise part of the reasons for those decisions. The full decisions are the only authoritative documents and can be found at [Decisions | New Zealand Ministry of Justice](#)

Jurisdiction and Suppression decisions

On 23 June 2022, a Judicial Conduct Panel issued two decisions in respect of a complaint made about the conduct of Coroner Sarn Herdson. Those decisions addressed:

1. The question of jurisdiction. The issue before the Panel was whether, having been appointed to inquire into a complaint against Coroner Herdson and provide an opinion on whether consideration of her removal from office was justified, it could undertake its task given she had resigned. The Panel found it did not have jurisdiction to do this.
2. Coroner Herdson's application for permanent non-publication orders. The Panel lifted interim orders suppressing Coroner Herdson's identity and former judicial role, and the background details of the complaint. However, interim orders remained in place until 22 July 2022, to allow Coroner Herdson time to consider whether to exercise her right of appeal under s 31(1) of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (the Act). Coroner Herdson has not exercised this appeal right and the interim orders have now expired.

Terminology

In this media statement, and the decisions of the Panel, the following terminology is used:

- *Affected person* is the person adversely affected by the alleged conduct which was the subject of the complaint.
- *The applicant* (in the decisions) is Coroner Herdson.
- *Moot, or mootness* means having no practical relevance. The issue has been resolved, leaving no live dispute for a court or decision-maker to resolve.

Background

[1] The Act establishes the office of the Judicial Conduct Commissioner (the Commissioner) to receive and assess complaints about the conduct of judges (as they are defined in the Act).

[2] A complaint is made to the Commissioner, who conducts a preliminary examination. This is a confidential process. If the Commissioner is of the view that an inquiry is required, the Commissioner can recommend to the Attorney-General that a judicial conduct panel be appointed. If the person who is the subject of the complaint ceases to be a judge while the complaint is before the Commissioner, the Commissioner must dismiss the complaint.

[3] After receiving a complaint regarding the conduct of Coroner Herdson, on 2 July 2021 the Commissioner issued a decision recommending the Attorney-General appoint a judicial conduct panel to inquire into Coroner Herdson's conduct. On 5 August 2021, Coroner Herdson gave notice of her resignation from office effective 30 November 2021.

[4] On 30 August 2021, the Attorney-General appointed a judicial conduct panel (the Panel) to inquire into and report on matters concerning the alleged conduct of Coroner Herdson. The Panel was chaired by Chief High Court Judge, Justice Susan Thomas, with District Court Judge Lawrence Hinton, and former diplomat Jacqueline Caine. On the same day, Coroner Herdson informed the Attorney-General she intended to bring forward the date of her resignation to the following day.

[5] Coroner Herdson then challenged the Panel's jurisdiction to proceed with its inquiry on the basis that, because she had resigned, she was no longer a judge to whom the Act applied, and that consideration of her removal from judicial office was no longer relevant. A hearing on the question of jurisdiction was held on 5 April 2022.

[6] The Panel released two decisions, one addressing the question of jurisdiction and one considering Coroner Herdson's application for permanent non-publication orders under s 30 of the Act.

Jurisdiction decision

[7] The question for the Panel was whether, having been appointed to inquire into a complaint against a judge and provide an opinion as to whether consideration of removal of the judge from office was justified, it could undertake its task given the judge had resigned. The Panel reached its decision following its interpretation of the Act and its purpose, including the historical underpinnings of judicial independence and the tenure of judges.

[8] 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.

[9] The purpose of the Act is to enhance public confidence in, and to protect the impartiality and integrity of, the judicial system by: providing for an investigation process to enable informed decisions to be made about the removal of judges from office; establishing the Commissioner's office to receive and assess complaints about the conduct of judges; and providing a fair process.

[10] The Panel said that, in passing the Act, Parliament sought to increase the accountability of judges while at the same time adopting a fair process that protects the requirements of judicial independence and natural justice. The Act presumes that public confidence not only results from increased accountability but also from protecting judicial independence and treating judges fairly. The processes and standards contained in the Act seek to regulate and manage the power of removal in a way which achieves a safe balance between the two interests.

[11] The Panel concluded that the Act makes the purpose of a judicial conduct panel 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 of removal of a judge from judicial office is warranted.

[12] When this purpose and the definition of judge, which excludes former and retired judges, are taken together in context, it is apparent 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. The Panel determined that it had no jurisdiction to take any further steps in this case.

[13] This analysis equally applies to the question of mootness. The ultimate outcome of a report by a panel to the Attorney-General would be the potential removal of the judge. Because Coroner Herdson had resigned, the Attorney-General would have no power to take any action in relation to a report by the Panel. The purpose of the Panel could not be fulfilled and to continue with the inquiry would be futile. This is the same approach taken in both Australia and Canada by bodies equivalent to a judicial conduct panel.

[14] Courts will occasionally hear moot cases where there is good reason in the public interest for the court to determine the issue. The Panel found that this did not apply in this case, because the public interest had already been met – Coroner Herdson had resigned and no longer held judicial office. The public interest in the inquiry continuing was no longer engaged because removal of Coroner Herdson was no longer a live issue.

[15] The Panel was satisfied that it would be an abuse of process to proceed with its inquiry in circumstances where the result would not lead to any practical outcome.

[16] The Panel noted that its function and jurisdiction was limited by the Act. If it were felt that there is public interest in a judicial conduct panel continuing with an inquiry once a judge has ceased holding judicial office, then that is for Parliament to address.

Suppression decision

[17] Coroner Herdson sought permanent non-publication orders preventing publication of the identity of the affected person, her own identity and former position as Coroner, and the details of the complaint.

[18] The Panel made permanent non-publication orders prohibiting publication of the affected person's name and identifying particulars, including the nature of any connection with Coroner Herdson. The public interest in the affected person's identity is low and is outweighed by their interests and privacy.

[19] The Panel lifted the interim non-publication orders in relation to Coroner Herdson. It was not satisfied that reputational or other damage to Coroner Herdson would be disproportionate to the public interest and the presumption of open justice. The Panel considered that, if all details were suppressed, the impartiality and integrity of the judicial system may be brought into question. The Act's purpose is to enhance public confidence and protect the impartiality and integrity of the judicial system through the processes provided for in the Act. In the Panel's view, the purpose of the Act would not be met, and indeed would be potentially undermined, were there to be uncertainty and speculation about the identity of the judge and her former judicial role.

[20] The Panel also lifted the interim non-publication orders in relation to the background details of the complaint. However, because it had not needed to consider the complaint, the Panel determined it would not be appropriate for it to publish any details about it. The Panel's decision included the excerpt from the Attorney-General's letter appointing the Panel, which briefly set out the matters concerning Coroner Herdson's conduct which the Attorney-General had referred to the Panel:

The matters concerning Coroner Herdson's conduct I am referring to the Panel are:

1. Whether Coroner Sarn Herdson was the author of, or otherwise involved in, drafting or sending any of the letters attached as Appendices to the letter from [a person] to the Judicial Conduct Commissioner dated 19 March 2021 – particularly the letters where there appears to have been an attempt to give them instant credibility through false authorship, such as Appendices A and B.
2. Any other matters concerning Coroner Herdson's conduct that arise in the course of dealing with the matter referred at paragraph 1 above (s 24(3)).

[21] Coroner Herdson does not accept the allegations, which concern conduct in her personal capacity rather than in her capacity as a coroner.

Ends

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