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PUBLIC ISSUES COMMITTEE

JUDICIAL CONDUCT

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**Public Issues Committee
Auckland District Law Society
Discussion Paper**

JUDICIAL CONDUCT – PRÉCIS

Overview

One of the key principles of the rule of law is the independence, impartiality and objectivity of judges. There are several procedures to preserve the independence of judges, including safeguarding their tenure, and protecting them from criticism for their judicial actions.

However, it is also necessary to ensure that this protection is balanced with appropriate and measured processes for responding to judicial misconduct. The Office of the Judicial Conduct Commissioner, was established 1st August 2005 under the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 to deal with complaints about the conduct of Judges. Complaints may be made against Judges of the various Courts set out in Section 5 of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, including temporary, associate, and acting Judges but not retired or former Judges. This may not, however, deal effectively with cases of relatively minor judicial misconduct, such as rudeness to counsel or parties.

The response to any instances of serious misconduct by judges is well-covered by new statutory provisions, and by long-standing procedures. There remains little by way of effective response to lesser misbehaviour, such as rudeness. Referring such cases to the relevant head of bench will perhaps provide a remedy in individual cases, but may not provide a sufficient response to any wider concerns. That is a matter which can probably only be addressed by the judges, in a collegial context, and through such fora as the Judicial Studies Institute.

While deference to, and respect for the bench should not in any way be allowed to be diminished, it cannot be suggested that this would be the result of a more transparent and more responsive complaints process. Indeed, if anything it would likely lead to a greater appreciation of the “humanness” of the bench and, in turn, a greater respect for its members – particularly amongst the legal profession.

There is little likelihood of finding a simple solution to these problems. However, there needs to be public debate over the question of how to deal with judicial misconduct in a manner which preserves confidence in the system.

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JUDICIAL CONDUCT

Introduction

One of the key principles of the rule of law is the independence, impartiality and objectivity of judges. There are several procedures to preserve the independence of judges, including safeguarding their tenure, and protecting them from criticism for their judicial actions.

However, it is also necessary to ensure that this protection is balanced with appropriate and measured processes for responding to judicial misconduct. The Office of the Judicial Conduct Commissioner, was established 1st August 2005 under the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 to deal with complaints about the conduct of Judges. Complaints may be made against Judges of the various Courts set out in Section 5 of the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, including temporary, associate, and acting Judges but not retired or former Judges.

The Judicial Conduct Commissioner

The purpose of the Judicial Conduct Commissioner is to enhance public confidence in, and protect the impartiality and integrity of, the judicial system. The Judicial Conduct Commissioner receives written complaints; and conducts a preliminary examination of the complaint.

Section 13 of the Act provides that the complaint must be in writing; identify the Judge who is the subject of the complaint; identify the complainant; and state the subject matter of the complaint.

Under section 14 of the Act, the Commissioner must notify the Judge concerned of a complaint and may send a copy of the complaint to the Judge.

The procedure followed by the Commissioner following the receipt of a written complaint about the conduct of a Judge is to notify the Judge of the complaint and seek any comment which the Judge may wish to make. The Commissioner can obtain any Court documents, including transcripts of hearings, and can listen to any sound recordings. The Commissioner may also make other enquiries as the Commissioner deems appropriate. In carrying out his or her functions, the Commissioner must act independently and must also act in accordance with the principles of natural justice.

He or she may dismiss the complaint on one or more of nine specified grounds (s 16(1)); refer the complaint to the Head of Bench; or recommend that the Attorney-General appoint a Judicial Conduct Panel to enquire into the matter. The most common ground for the dismissal of complaints occurred where essentially the

complaint called into question the correctness of a decision made by a Judge. Section 8(2) of the Act provides that it is not a function of the Commissioner to challenge or call into question the legality or correctness of any judgment or other decision made by a Judge in relation to any legal proceedings. The proper avenue for that is by way of appeal or application for judicial review.

Other common grounds for dismissal were: that the complaint was about a decision that was subject to a right of appeal or to apply for judicial review; s 16(1)(f), the matter had already been considered by the Head of Bench; or s 16(1)(h), the matter was frivolous, vexatious or not in good faith: section 16(1)(d).

The Commissioner considers that he or she should have a fourth option, namely to decide to take no further action. An instance where this option would be useful is where a complainant has expressed himself or herself as satisfied following an explanation or apology by the Judge. In circumstances of this kind, it is not desirable that the complaint be dismissed on the grounds that it is frivolous or vexatious, but at the same time it is not appropriate to refer it to the Head of Bench. In the Commissioner's view, it is very desirable that in appropriate cases he or she should have the power to decide to take no further action.

The Commissioner should be entitled to dismiss a complaint where the complainant unjustifiably declines or fails to provide further information requested by the Commissioner. This situation has arisen in practice and the Commissioner needs to be able to dispose of a complaint in these circumstances.

In the first annual report from the Commissioner he reported that he had received a total of 106 complaints for the year from 1st August 2005 to 31st July 2006. Of these complaints, 89 were dismissed. In four instances complaints were referred to the relevant Head of Bench under s 17 of the Act. In two instances complaints were referred to the Head of Bench at the outset with consent of complainant because of conflict of interests. No recommendation was made to the Attorney-General to appoint a Judicial Conduct Panel in respect of any complaint. Eleven complaints remained outstanding at 31st July 2006.

The majority of complaints related to judges in the inferior courts. There were 45 complaints against the conduct of District Court Judges, and 34 for Family Court Judges.

There were seven complaints against High Court Judge, and 17 against the Court of Appeal – as well as one each against judges in the Environment Court, Employment Court, and Maori Land Court.

If judicial misconduct is sufficient that the Commissioner concludes that an inquiry is necessary and recommends to the Attorney-General that a Judicial Conduct Panel be appointed, the panel conducts a hearing – in public – to examine the manner. The Judicial Conduct Panel reports to the Attorney-General, its findings of fact; its opinion as to whether conduct justified consideration of removal; and the reasons for its conclusion. The Attorney-General decides whether to initiate steps for the removal of the judge.

High Court, Supreme Court and Employment Court Judges may only be removed by motion in Parliament for an address to the Governor-General to remove the judge in question. For Associate Judges and other judges the Attorney-General advises the Governor-General directly. In both cases the removal of the judge from office by the Governor-General constitutes the final stage in the process.

The first annual report from the Judicial Conduct Commissioner suggests that only rarely will a Judicial Conduct Panel be appointed; the removal of a judge might be expected to be even rarer. The difficulty is that where misconduct is insufficiently serious to warrant removal, but sufficiently bad that it might damage the reputation of the judicial system, the sanctions are perhaps insufficient.

Response to judicial misconduct

The Judicial Conduct Commissioner is empowered to refer a complaint to the Head of Bench, or recommend that the Attorney-General convene a Judicial Conduct Panel. But the former may result in undefined censure, and the latter possibly the commencement of removal proceedings. Most misconduct by judges is of a less extreme form that would warrant consideration of removal, let alone removal, whilst still warranting some form of formal or informal censure.

Ill-temper, rudeness, and inattention, have all been charges that have been laid at the door of judges in the past. None of this conduct necessarily qualifies as terminal misbehaviour.

Complaints processes in the USA

The US Judicial Conduct and Disability Act 1980 provides for a complaint procedure against federal judges. It has been described as a good balance between judicial independence and accountability.¹ Holland and Gray suggest that people should refrain from overreacting against judicial misconduct.² But this should not mean that there is a licence for judges to misbehave with impunity. A similar balance is needed in New Zealand. The Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 may have achieved this, but it may well be that conduct which is the subject of complaints merely reflects underlying tensions which should properly be relieved by other means.

Processes in the UK

In the United Kingdom the Office for Judicial Complaints (OJC) was established under the Constitutional Reform Act 2005. This Act gives the Lord Chancellor and the Lord Chief Justice joint responsibility for a new system for considering and determining complaints about the personal conduct of all judicial office holders in

¹ Edward Re, "Article III Federal Judges" (1999) 14 St John's J L Comm 79, 96.

² Randy Holland and Cynthia Gray, "Judicial Discipline: Independence with Accountability" (2000) 5 Wid L Symp J 117.

England and Wales and some judicial office holders who sit in Tribunals in Scotland and Northern Ireland. The OJC is a new office that was set up on the 3rd April 2006, to handle these complaints and provide advice and assistance to the Lord Chancellor and Lord Chief Justice in the performance of their new joint role. The separate Judicial Appointments and Conduct Ombudsman investigates complaints about the judicial appointments process and the handling of matters involving judicial discipline or conduct.

Recently the OJC has had referred to it the case of Justice Peter Smith (best known for his judgment in the *Da Vinici Code* litigation). Justice Smith was referred after he refused to recuse himself from hearing a case in which he was found to have a personal animosity towards the solicitors for one party, despite his first instance decision having been unanimously overruled by the Court of Appeal.³

The advantage possessed by the OJC over New Zealand's JCC is the power that the Lord Chancellor has to warn judges following an adverse OJC decision against them. While the power remain to be exercised, it is nonetheless notable for its availability as a response to conduct falling short of that which would warrant removal.

Parallels with processes for dealing with parliamentary language

The arrangements for control of business in Parliament include provisions for dealing with unparliamentary language. Exactly what constitutes unparliamentary language is generally left to the discretion of the Speaker of the House of Representatives. Members of Parliament do need to have freedom of speech in the Chamber, but this is not, and never has been, unqualified. As Lord Bingham of Cornhill observed in *Jennings v Buchanan*:

The right of members of Parliament to speak their minds in Parliament without any risk of incurring liability as a result is absolute, and must be fully respected.⁴

Where conduct by members of Parliament does not meet the standard expected of them the Speaker has discretion to discipline the member. This can include asking them to leave the chamber, which would be equivalent to a judge being asked to remove themselves from a courtroom. However, whereas a member of Parliament is invariably one of many in the chamber, and the Speaker has jurisdiction over members, judges are often alone in the courtroom, and therefore in a quite different position. In cases of more serious misconduct a member of Parliament may be disciplined by the Privileges Committee, but this is rare, and can be seen as equivalent to the Judicial Conduct Panel. The response to misconduct of a lesser order in both the courts and in the highest court in the land, Parliament, is perhaps equally unsatisfactory.

As observed above, judicial misconduct, such as rudeness or aggression towards counsel, witnesses or parties, may well be the result of underlying tensions which

³ [2007] EWCA Civ 720.

⁴ [2004] UKPC 36 at para 17; [2005] 2 All ER 273 (New Zealand PC).

ought to be addressed. These cannot necessarily be relieved by formal complaints processes. Heads of Bench would probably benefit from greater guidance as to means of managing tension among their judicial personnel. The “dressing down” of counsel should, for instance, occur in chambers rather than in open court. More serious instances of judicial misconduct could be met with suspension, public censure, or supervised practice (where a judge would sit, for a time, with another judge). The importance of exemplary judicial behaviour is clear, as noted by the Canadian Bar Council:

Litigants and others scrutinize judges very closely for any indication of unfairness. Unjustified reprimands of counsel, insulting and improper remarks about litigants and witnesses, statements evidencing prejudgment and intemperate and impatient behaviour may destroy the appearance of impartiality.⁵

Greater Openness

Such openness would not diminish the respect for the bench generally or for its respective members – even those who are the subject of censure. Too often judges are the subject of criticism for their perceived aloofness, and the bench as a whole for its perceived inviolability. Increased openness would assist in refutation of such criticisms. Judges are of course human and susceptible to errors of judgment in the same way as any other person. Greater recognition of, and appreciation for, this fallibility – at all levels – particularly on the part of members of the judiciary themselves, would lead to a greater degree of respect for the bench from the general public.

One option that could be made available to the respective heads of Bench would be the ability to issue a formal reprimand to a judge under them for inappropriate behaviour – as is available to the Lord Chancellor in England and Wales. Of course, the effectiveness of such a measure would be greatly diminished were knowledge of it to be kept exclusively within judicial circles. Certainly some relatively trivial and uncharacteristic wrongdoing – such as rudeness towards counsel or a litigant – could be handled in this way provided it was not kept from aggrieved individual. However other, more serious actions – particularly those which attract media attention – could not be dealt with in such a secretive manner.

Judges are of course entitled to privacy in respect of employment matters just as other New Zealanders are. That said they are at the same time judicial officer is fulfilling a public office in the day-to-day administration of justice. This character does not lend itself to secrecy. It must also be remembered that certain information has a way of outing itself through rumour, gossip and speculation. The effects of this “whispering in the benches” are in many ways worse than public disclosure and arguably tend to linger longer. While judges should not be publicly pilloried for a momentary lapse of reason, at the same time “the healthy winds of publicity” should not stop blowing before they reach the bench. It is also worth noting that there is a distinct difference between being public and being publicised.

⁵ Canadian Judicial Council “*Ethical Principles for Judges*” ch 6B.

The fact of fallibility is something which is brought out in some countries by an inquisitorial appointment process. While it is obviously not being suggested that such a process should be adopted in New Zealand a greater degree of openness on the part of the judicial branch – traditionally the most closed of the three – should be welcomed.

Both currently and historically the judiciary has been the most secretive of the three branches of government by a considerable margin. Illustrative of this is the fact that, despite over a quarter of a century having passed since the enactment of the Official Information Act 1982, the judiciary (and indeed the entire courts system) still remain exempt from its provisions.

Freedom to Complain

Wilentz has noted the importance of judicial conduct, and its impact on litigants and others involved in the judicial process:

A judge may be brilliant and learned in the law, but if he is arbitrary and intolerant, that judge is a terrible judge. But a judge who has common sense and, in addition, invariably shows patience and courtesy to all who appear before him and treats them with dignity—that judge is a great judge. In the courts of this state, the poor, the ignorant, the illiterate, the uneducated and the disadvantaged will not get one bit less dignity, patience and courtesy than those who may be rich, important and powerful. The mistreatment, the humiliation of the powerless, the defenceless party, witness or attorney is ... absolutely intolerable.⁶

This means there must be appropriate complaint processes. There is an understandable reluctance on the part of many members of the bar to complain openly (let alone vociferously) about the conduct of members of the bench. After all, it would be unsurprising for counsel who did voice complaints about the conduct of a certain judge to find themselves appearing before that same judge shortly afterwards. That is not to suggest that some sort of grand conspiracy exists in the allocation of judges to cases; rather, it is simply the product of the close community that is New Zealand. This is particular so in the smaller regions of New Zealand where the regular bench is comprised of only about three or four judges.⁷ Nevertheless, this closeness does have the unintended effect of stifling complaint.

The same problem of course arises in cases of alleged bias, where it is, if anything, more acute. In such, failure to complain can ultimately be fatal to ones position (and could arguably amount to professional negligence); yet simply by raising the issue there is a perceived risk of alienating the decision maker.

⁶ Robert N. Wilentz “Standards of Judicial Conduct” (1981) 49 Rutg LR 795 at p 803.

⁷ The same could also be said of the Court of Appeal, comprised as it is of only nine permanent judges, with its considerable caseload.

Codes of Conduct

The Australasian Institute of Judicial Administration Incorporated's *Guide to Judicial Conduct* highlights the importance of codes of conduct:

The entitlement of everyone who comes to court – litigants and witnesses alike – to be treated in a way that respects their dignity should be constantly borne in mind ... The absence of any intention to offend ... does not lessen the impact.⁸

The Australasian Institute of Judicial Administration Incorporated *Guide to Judicial Conduct*, and the Canadian Judicial Council's *Ethical Principles for Judges* are two examples where key ethical principles which judicial officers are expected to adhere to are listed. They provide guidance for judges; but they do not outline means of enforcement.

Conclusions

The response to any instances of serious misconduct by judges is well-covered by new statutory provisions, and by long-standing procedures. There remains little by way of effective response to lesser misbehaviour, such as rudeness. Referring such cases to the relevant head of bench will perhaps provide a remedy in individual cases, but may not provide a sufficient response to any wider concerns. That is a matter which can probably only be addressed by the judges, in a collegial context, and through such fora as the Judicial Studies Institute.

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There is little likelihood of finding a simple solution to these problems. However, there needs to be public debate over the question of how to deal with judicial misconduct in a manner which preserves confidence in the system.

⁸ Australasian Institute of Judicial Administration Incorporated *Guide to Judicial Conduct* (2nd ed) Melbourne, 2007.

⁹ Cf. *Brown v. Allen* 344 U.S. 443, 540 (1953) per Jackson J – “We are not final because we are infallible, but we are infallible only because we are final”.