

MEDIA STATEMENT OF JUDICIAL CONDUCT PANEL

27 June 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. The full text of the decisions (redacted to protect appeal rights) can be obtained from the Panel's secretariat.

Jurisdiction and Suppression decisions

A Judicial Conduct Panel has issued two decisions in respect of a complaint made about the conduct of a former judge. These decisions, outlined below, address:

1. The question of jurisdiction. The issue before the Panel was whether, having been appointed to inquire into a complaint against a judge and provide an opinion on whether consideration of the removal of the judge from office was justified, it could undertake its task given that the judge concerned no longer held judicial office. The Panel found it did not have jurisdiction to do this.
2. The former judge's application for permanent non-publication orders. The Panel lifted interim suppression of the former judge's identity and former judicial role, and the background details of the complaint. However, suppression remains in place until **22 July 2022** to allow the former judge time to consider whether to appeal the decision. The Panel has made permanent non-publication orders in relation to the affected person's name and identifying particulars, including the nature of any connection with the former judge.

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 the former judge.
- *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 Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (the Act) states that its purpose 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 an office to assess complaints; and by providing a fair process that recognises and protects the requirements of judicial independence and natural justice. It 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 necessary, and that, if the conduct is established, consideration of removal of the judge from office may be warranted, 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] On 30 August 2021, following a recommendation from the Commissioner, the Attorney-General appointed a judicial conduct panel (the Panel). The Panel was chaired by Chief High Court Judge, Justice Susan Thomas, with District Court Judge Lawrence Hinton, and former diplomat Jacqueline Caine. The Panel was appointed to inquire into and report on matters concerning the alleged conduct of a judge who has since ceased to hold judicial office.

[4] The former judge does not accept the allegations, which concern the former judge's conduct in their personal capacity rather than in their capacity as a judge.

[5] The former judge challenged the Panel's jurisdiction to proceed with its inquiry on the basis that, because they ceased to hold judicial office, they are no longer a judge to whom the Act applies, and that consideration of their removal from judicial office is no longer relevant. A hearing on the question of jurisdiction was held on 5 April 2022.

[6] The Panel has released two decisions, one addressing the question of jurisdiction and one considering the former judge'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 concerned has ceased to hold judicial office. The Panel reached its decision following its interpretation of the Act and its purpose. The Panel considered 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 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 of a judge in a way which achieves a safe balance between the two interests.

[10] 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.

[11] 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 has no jurisdiction to take any further steps in this case.

[12] 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 in question. In this case, because the former judge is no longer a judge, the Attorney-General would have no power to take any action in relation to a report by the Panel. The purpose of the Panel cannot 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.

[13] 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 has already been met – the former judge no longer holds judicial office, and the public interest in the inquiry continuing is no longer engaged because removal of the former judge is no longer a live issue.

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

Suppression decision

[15] The former judge sought permanent non-publication orders preventing publication of the identity of the affected person, the former judge's own identity and former judicial position, and the details of the complaint.

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

[17] The Panel has lifted the interim non-publication orders in relation to the former judge's identity and former judicial role. It is not satisfied that reputational or other damage to the former judge 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 in 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 their former judicial role.

[18] The Panel has also lifted the interim non-publication orders in relation to the background details of the complaint. However, because it has not needed to consider the complaint, the Panel has determined it would not be appropriate to record any details about it. The Panel's decision includes the excerpt from the Attorney-General's letter appointing the Panel, which briefly sets out the matters concerning the former judge's alleged conduct which the Attorney-General referred to the Panel. Because of the interim suppression order in place to protect the former judge's right of appeal, that excerpt cannot be published and has been redacted from the decision.

[19] 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 place until **22 July 2022**, to allow the former judge time to consider whether to exercise the right of appeal under s 31(1) of the Act.

Ends

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