Memo to: The New Zealand Law Society President and Board
From: The Rule of Law Committee
Date: 6 October 2021
Re: Judicial independence and complaints about judicial conduct

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1. Introduction

1.1 By letter dated 2 September 2021 from a practitioner, Dr Tony Ellis, to the Chief Justice and Attorney-General, copied to the Society and others, a potential rule of law issue has been raised. It has come before the Rule of Law Committee. [1] We have also been informed by associated media articles.

1.2 This reflects the usual way in which matters come before the Committee, which include a referral or the seeking of advice by the President, the Board or the Council, the raising of an issue by a practitioner, the seeking of support by a law society outside of New Zealand or of the Committee's own instigation.

1.3 The Committee's Terms of Reference are to:

> *"1. advise and assist the legal profession in meeting the fundamental obligation of lawyers expressed in s 4(a) of the Lawyers and Conveyancers Act 2006;*
> *2. promote the continued separation of the legislative, executive and judicial functions of government and, in particular, to promote and protect judicial independence;*
> *3. monitor and respond to rule of law issues arising from proposals, decisions or actions of the New Zealand government or government agencies;*
> *4. monitor the mechanisms of government, including constitutional conventions;*
> *5. maintain a neutral political position;*
> *6. respond, as appropriate, to requests for advice and assistance from international legal associations on rule of law issues; and*
> *7. assist the Law Commission in its goal to achieve laws that are just, principled and accessible."*

1.4 The Committee's usual process is to consider whether an issue falls within its Terms of Reference and if so to engage substantively. This may include giving advice within the Society, responding to the practitioner and engaging with other societies and agencies.

1.5 Dr Ellis' reference and the associated material raise rule of law issues falling within our Terms of Reference,[2] in particular Term of Reference 1 insofar as they raise issues

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[1] Being the current members of the Committee at the time of substantive consideration, rather than the incoming new member, those then current members being Austin Forbes QC (chair), Gregor Allan, Christopher Griggs, Isaac Hikaka, Sarah Jerebine, Professor Philip Joseph, Professor Geoff McLay, Sir Geoffrey Palmer and James Wilding QC.
[2] Here "TOR".

regarding how concerns about alleged inappropriate judicial conduct are best addressed by practitioners; and Terms of Reference 2 and 3 insofar as they raise issues regarding the separation of the powers and judicial independence and how concerns about alleged inappropriate judicial conduct ought to be dealt with.

2. The factual background

2.1 We set out our understanding of the factual background. Oranga Tamariki was a party to a Family Court proceeding, which was being heard before Judge Peter Callinicos, to whom we refer as the "sitting judge". At all relevant times it was part-heard.

2.2 The then Interim Chief Executive of Oranga Tamariki, Sir Wira Gardiner, communicated with Chief District Court Judge, Judge Hemi Taumaunu, and the Principal Family Court Judge, Judge Jackie Moran. We refer to Judge Taumaunu and Judge Moran collectively as the "Heads of Bench".

2.3 Those communications were about the part-heard case. They reportedly involved an expression of concern about the conduct of the sitting judge towards witnesses of or from Oranga Tamariki.

2.4 The Heads of Bench sought to engage with the sitting judge regarding those concerns. He declined to do so.

2.5 Dr Ellis referred the matter to the Judicial Conduct Commissioner, by way of his letter of 2 September 2021, raising concern about the involvement of the Heads of Bench. It appears from media articles that, in the context of the Commissioner's investigation:[3]

(a) the Chief District Court Judge denied any attempt to direct the sitting judge and said that the Heads of Bench wanted to engage with him regarding *"in-court conduct"*, not decision-making, because of the sitting judge appearing to have engaged in a pattern of bullying behaviour;

(b) the Chief District Court Judge also said that he had become involved with the sitting judge when concerns about a case, the *"Mrs P"* case, were raised in the media. We note that case was determined on appeal far earlier, in July 2020;

[3] https://www.stuff.co.nz/national/126524973/judges-involvement-in-moana-case-not-inappropriate-commissioner-says

(c) the Principal Family Court Judge said there had been numerous complaints about the sitting judge, that they had to be addressed promptly by the Heads of Bench to prevent their recurrence and to maintain public confidence in the court, and that she held monthly meetings with Oranga Tamariki staff which frequently involved discussion about difficulties experienced with the sitting judge;

(d) the Heads of Bench had been advised about how to deal with Judge Callinicos by Justice Young, it seems possibly by arrangement with the Chief Justice, Dame Helen Winkelmann. Justice Young considered that there had been excessive, partisan and at times demeaning conduct by the sitting judge towards witnesses. He considered that the Heads of Bench and the sitting judge could discuss the in-court conduct without encroaching into the independence of the sitting judge's decision-making.

2.6 The sitting judge said that he had not been approached by the Judicial Conduct Commissioner, which we take to mean he had not been involved in the preliminary investigation.

2.7 The Judicial Conduct Commissioner made a preliminary finding. He considered that the involvement of the Heads of Bench was not inappropriate and referred the matter to the Chief Justice. He reportedly stated:

"I have confidence that she will ensure that the whole of the circumstances will be subject to appropriate scrutiny not just by her but by the judiciary as a whole so that there is a prospect of these crucial issues of judicial independence being fully understood at all levels".

and

"It may be that the Guidelines for Judicial Conduct or other guidance offered to Judges can be reviewed and improvements made to aspects of intervention by Heads of Bench when proceedings have not been completed"

2.8 No doubt there is further detail of which we are unaware, but the above is broadly sufficient for the purposes of the views we express herein.

3.0 Some relevant principles and mechanisms

3.1 Fundamental to New Zealand's constitutional arrangements and its commitment to the rule of law are the following principles and rights:

(a) *Separation of the powers.* This requires that there is a separation between the three powers or branches of Government: the legislature, the executive and the judiciary. This includes the principle that the executive ought not to inappropriately intrude into the functioning of the judiciary;

(b) *The independence of the judiciary.* This includes the principle that an individual judge hearing a case must be free from of the influence of others;

(c) *Equality of access to the courts.* This includes the principle that no person or entity can have a right to greater access to the courts than another;

(d) *The right to natural justice.* This includes the right to a fair and unbiased hearing, the right to have access to the same information that a hearing judge has in a proceeding, the right to be heard and the right of review;

(e) *Open justice.* This includes a restriction on a party having private communications with a judge hearing a case and on a judge having communications regarding, or receiving material bearing on, the proceeding, to which all parties do not have access.

3.2 These principles and rights are long-established. They are reflected in constitutional convention, in treaties to which New Zealand is a party and in the common law. The right to natural justice is affirmed by s27 New Zealand Bill of Rights Act 1990.

3.3 They are, to an extent, reflected in *The Bangalore Principles of Judicial Conduct*[4] and the New Zealand Guidelines for Judicial Conduct 2019.[5] The Guidelines include:

> **" Independence in the discharge of judicial duties**
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> *19. Judges are independent in the performance of judicial function not only from the other branches of government, but from each other. Judicial decision-making is the responsibility of the individual judge, even in a collegiate appellate court. The Chief Justice or Head of Bench has no authority over the discharge of judicial function by other judges.*

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[4] Endorsed at the 59th session of the United Nations Human Rights Commission, Geneva 2003.
[5] Herein "the Guidelines".

20. *Judges should always take care that their conduct, official or private, does not undermine their institutional or individual independence, or the public appearance of independence. Judges should bear in mind that the principle of judicial independence 6 extends beyond the traditional separation of powers and requires the judge to be, and be seen to be, independent of all sources of power or influence in society, including the media and commercial interests. Judges should protect independence by rejecting any attempts to influence them except by public advocacy in the courtroom.*

...

(b) Private communications

36. *Once a case is underway, there should be no communication or discussion between the judge and one of the parties (or the legal advisers or witnesses of a party). Any communication should be with all parties unless the other party has given previous consent to the communication.*

37. *On some occasions counsel may correspond with judges associates about fixtures and other routine matters. Judges should ensure that their associates understand what is and is not permitted. Neither lawyers nor litigants are permitted to seek guidance from the judge on practical or procedural points that arise in relation to a particular case, other than with the consent of the other parties or on notice to the other parties."*

3.4 The Guidelines recognise the importance of judges supporting fellow judges:[6] *"Collegiate support is important to the maintenance of judicial independence."* Judges should respect and support each other and not denigrate other judges publicly or privately.[7] They ought to consider seriously what action ought to be taken if they become aware of reliable evidence of unprofessional conduct by another judge. Heads of Bench have a role when a judge is unable to discharge his or her duties by reason of health or welfare.[8]

3.5 The Guidelines articulate a range of acceptable and unacceptable conduct in court and outside of court. This includes judges displaying personal attributes such as punctuality, courtesy, patience, tolerance and good humour. Everyone who comes to court must be treated in a way which respects their dignity. *"Bullying by the judge is unacceptable. Judges must conduct themselves with courtesy to all and must require similar courtesy from those appearing in court."*[9]

3.6 New Zealand has a broad range of conventional mechanisms for addressing concerns about judicial conduct. They include:

(a) by a party or counsel seeking to raise the concern in chambers. This occurs in the presence of all parties or their counsel;

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[6] The Guidelines, para 93.
[7] The Guidelines, para 96.
[8] The Guidelines, para 99.
[9] The Guidelines, para 33.

(b) by a party or counsel making an objection directly to the judge hearing the case;

(c) by a party seeking the recusal of the judge at any time before a decision is issued;

(d) by a party seeking a judicial review. This can occur before or after a decision is issued;

(e) by a party appealing a decision. For interim decisions, leave is usually required. For substantive decisions, an appeal is usually available as of right;

(f) making a complaint to the Judicial Conduct Commissioner, pursuant to the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.[10]

3.7 *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd* [2010] NZLR 35 and the associated cases show the ability of the courts to deal with apparent and actual bias, which can include partisan and bullying behaviour.

3.8 They also show the problems that arise when matters which are best dealt with formally and using conventional mechanisms are dealt with differently. In *Saxmere*, some days prior to the Court of Appeal hearing a judge phoned counsel for one of the parties to disclose certain information, seemingly bearing on the business relationship between the judge and counsel for another party, presumably to check whether there was objection to him sitting. No objection was taken.

3.9 This communication, being informal and with counsel for only one party present, was an irregular way of disclosing such an issue. It is apparent there was uncertainty about exactly what was disclosed during that phone call. The case involved the judge having to file written material regarding what was said and the circumstances, and then further material.

3.10 The Supreme Court originally found that a fair minded lay-observer would not reasonably apprehend that the judge might not be impartial. At a later stage it had to recall its judgment when allegedly new information came to light.

3.11 *Saxmere* is, in our view, a strong caution against informal processes being used, including private communications with a judge, whether by a Head of Bench or by or on behalf of a party, when formality and communication with all parties are required.

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[10] Herein the "JCCJCPA."

3.12 We express this view cognisant of a seemingly informal process adopted in September 2019 which is outlined on the Courts of New Zealand website for when lawyers have certain concerns about judicial conduct. https://www.courtsofnz.govt.nz/about-the-judiciary/judicialconduct/#complaints

4. The Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004

4.1 New Zealand has legislation designed expressly to ensure that complaints about judicial conduct are dealt with in a way which is robust and protects the impartiality and integrity of the judicial system and the independence of judges: the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004. Section 4 states its purpose:

> *"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—*
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> *(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."*

4.2 The mechanisms contained in the JCCJCPA were seemingly not used by the acting chief-executive of a state agency, who directly approached a Head of Bench, nor seemingly by the two Heads of Bench who approached a sitting judge, while a case was part-heard.

4.3 If media reports are correct, a Supreme Court judge has advised one if not two of the relevant Heads of Bench.

4.4 There is undesirable opacity and concern in the media.

4.5 It is conceivable that litigants will wonder whether similar discussions have occurred in proceedings in which they have been involved, and whether, in the context of an appeal, an appellate judge might have had some involvement.

5. Our preliminary view

5.1 The circumstances raise rule of law issues of sufficient importance to justify the involvement of the Society, in respect of the following issues.

5.2 ***First, under what circumstances can a Head of Bench engage with a judge in respect of a case which he or she is hearing?*** The conventional categories are to clarify whether a hearing judge is able to continue with a case, for example because he or she has

a serious illness which impacts on the discharge of his or her duties, or to provide a prompt when the delivery of a judgment falls outside of the expected timeframe.

5.3 Engagement to discuss judicial conduct, in this case alleged bullying in a proceeding, when that proceeding is ongoing, is highly unconventional. It is made even more so by the attempted communication, based on our understanding, not involving all parties to the proceeding.

5.4 It circumvents the broad range of conventional mechanisms referred to earlier to deal with judicial conduct and sits uneasily with the Guidelines. It raises vexed issues, for example:

(a) the purpose of a head of bench approaching a hearing judge about a conduct issue is necessarily to influence that judge, at least to not engage in such conduct. Where does that influence stop? It must be a more than remote possibility that the mere fact of an approach will impact at least subconsciously on the sitting judge's substantive decision-making;

(b) how is the line between alleged bullying and substance drawn? Some knowledge of and discussion about the context in which the alleged conduct occurred would often be necessary in order to inform a full view about the appropriateness of some types of alleged inappropriate conduct. If so, surely that touches on substantive issues?;

(c) discussion devoid of the context and of the views of all parties would carry potential for imbalance. Conduct which is viewed as bullying by one party may be seen in a different light by another.

5.5 ***Secondly, can a private meeting be reconciled with relevant principles and the Guidelines?*** A discussion, in this case between a party (Oranga Tamariki) and the Heads of Bench, and then (if it had not been rejected by the sitting judge) a consequential discussion between the Heads of Bench and the sitting judge, in the absence of every party, or without their prior consent, cannot be reconciled with the right to natural justice and to open justice.

5.6 One party, at least indirectly, and the sitting judge if he or she does not rebuff the Heads of Bench, have been privy to discussions which, at the very least, bear on the conduct of a proceeding and have potential to impact, at least subconsciously, on the substantive issues. But the other parties have not been involved.

5.7 We have no doubt that if an unsuccessful litigant later discovered that the successful litigant had approached and had a series of private meetings with the Heads of Bench involving discussion about the conduct of the sitting judge while the case was part-heard, and those Heads of Bench in turn had a meeting with the sitting judge while the case was part-heard, then that unsuccessful litigant would be deeply aggrieved.

5.8 An application for judicial review would be vexed and, if resisted, may have to involve affidavit evidence from the successful litigant, the Heads of Bench and the sitting judge, as to what occurred.

5.9 This is highly undesirable. If communications between Heads of Bench and a sitting judge can occur, in the context of an ongoing case, then in our view natural justice and open justice require that all parties be involved or consent.

5.10 ***Thirdly, is there equality of access to justice?*** In our view equality of access to justice includes equality of right of access to raise matters concerning the conduct of a judge and have them responded to in the same way.

5.11 If, as occurred here, a party in a proceeding (Oranga Tamariki), can secure meetings with the Heads of Bench, and in turn the attempted intervention of the Heads of Bench with the sitting judge while a case is part-heard, in the context of alleged inappropriate judicial conduct, then the same access should be available to all litigants and across all courts. Otherwise, there is inequality of access to justice.

5.12 This would mean:

(a) any party to proceedings in any court, including the Coroner's Court, the District Courts Civil, Criminal and Family, the Environment Court, the High Court, the Court of Appeal, the Supreme Court and the Specialist Courts;

(b) could directly or through his or her lawyer or McKenzie friend, while any proceedings were part-heard, approach the Head of Bench to complain about the sitting judge's conduct; and

(c) be assured of access to the Head of Bench, including the opportunity to meet with him or her, more than once if need be, to explain the concerns; and

(d) be assured that the Head of Bench will seek to intervene, while the case is part-heard, if the concern is considered to have merit; and

(e) this would be kept private from the other parties.

5.13 We do not consider this reflects a proper or the best approach to concerns about judicial conduct when a proceeding is part-heard. It has potential to undermine public confidence in the independence of the judiciary and in open justice.

5.14 But if this right exists, then it ought to be reflected in written material and publicised widely so that all litigants may avail themselves of it.

5.15 ***Fourthly, what is the status of informal meetings between the judiciary and litigants and the information provided at those?*** It appears that Oranga Tamariki staff were able to meet monthly with a Head of Bench and to complain in that setting about the conduct of the sitting judge. The information gathered was used as part of the justification for the attempted private judicial intervention by the Heads of Bench during a part-heard case.

5.16 It is unclear on what basis any particular litigant might be selected for or excluded from regular meetings. For example, is it based on the frequency of their litigation; or based on the interests at stake; or based on whether an entity is private, public or state? The basis on which such meeting occurs and who can attend ought to be made known.

5.17 We agree that meetings between the judiciary and those involved generally in court processes can be beneficial, but these should focus on high level procedural and administrative issues, not on particular cases. They would not usually be allowed to transgress into a forum for complaint about judicial conduct. That would warrant a more meaningful and formal approach.

5.18 It is unclear whether the allegations made at such meetings were recorded and properly assessed in a context which included the sitting judge having an opportunity to answer them. Had complaints been dealt with formally as and when they arose, by one of the conventional mechanisms referred to earlier, then alleged inappropriate conduct may have been able to be identified and responded to in a proper manner, and earlier. The most unfortunate current position may not have arisen.

6. Conclusion and recommendation

6.1 Important rule of law issues are raised. In our view:

(a) the informal way in which the allegations of inappropriate judicial conduct have been dealt with is highly undesirable. The potential results include:

- failing to ensure proper, timely and effective responses to any inappropriate conduct;
- failing to ensure that the sitting judge was properly heard before matters reached the point they did, in turn undermining the ability for him or others to have an opportunity for change or redress if required;
- undermining public confidence in the judicial system;

(b) private meetings between a party to a current proceeding and a Head of Bench, and any subsequent attempt by a Head of Bench to meet with a sitting judge while the relevant proceeding is part-heard, to discuss conduct in that proceeding, are inappropriate. Amongst other things:

- it is unlikely that a stark line can always be drawn between alleged inappropriate conduct and substantive decision-making;
- such meetings, held privately from other parties, cannot be reconciled with natural justice and open justice;
- unless all litigants in all courts have the right to meet a Head of Bench and expect the same response, while their cases are part-heard, then an issue of preferential access arises;
- it undermines the separation of powers and the independence of the judiciary;
- it has potential to undermine public confidence in the judicial system;

(c) the conventional mechanisms for dealing with concerns in proceedings ought to be used. If used in a timely manner, this would assure transparency of process, a fair process and better retain the integrity of the justice system. It would better protect alleged victims and provide a proper opportunity for the sitting judge to consider concerns and, if need be, for his or her conduct to be considered and addressed objectively;

(d) if the conventional mechanisms are ineffective, then they need to be reviewed. If they are not used, then the reasons for that needs to be considered.

6.2 We recommend that the Society:

(a) write to the Chief Justice and Attorney-General:

- raising the concerns outlined;
- urging the use of conventional mechanisms which are consistent with the principles and Guidelines when dealing with alleged inappropriate judicial conduct;
- recommending a review of those mechanisms to the extent they are deficient;

(b) publish an article in LawTalk:

- raising the concerns outlined;
- informing or reminding readers of the conventional mechanisms for addressing concerns about judicial conduct;
- seeking feedback regarding the efficacy of those. That feedback can help inform the next steps;

(c) advocate for written protocols addressing the role of public servants and the judiciary, including the Heads of Bench, when they become aware of issues regarding judicial conduct;

(d) write to Dr Ellis in response to his correspondence, advising him of our view and of the action the Society is taking.

6.3 We are happy to meet with you, the Board or the Council to discuss these issues. Ngā mihi nui.