# Symposium Paper On Judicial Accountability

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# Introduction

In 2011, eighteen-year-old Christie Marceau was kidnapped and assaulted by Akshay Chand. Despite pleas from both Christie and the police, Judge David McNaughton released Chand on bail to a house within 300m of Christie's family home while awaiting trial on the charges. Within days of that decision, Chand burst into Christie's house at 7am in the morning and stabbed her to death in a frenzied attack.[1] As well as revealing inadequacies of the Bail Act 2000, this case has come to epitomize public outrage at perceived poor judicial decisions and acted as a rallying call for greater judicial accountability.

In the aftermath of the tragedy, Christie's parents began a campaign in conjunction with the Sensible Sentencing Trust ('SST') - a victims' rights lobby group – for stricter bail laws and greater judicial accountability.[2] The "Christie's Law" campaign suggested implementing practical methods of increasing judicial accountability for bail decisions, such as internal benchmarking and performance review. The rationale for this proposal is that judges' decisions and performance remain insulated from scrutiny, despite those decisions having potentially fatal results. The Government has since proposed some improvements to the Bail Act, such as reversing the burden of proof, but the Trust continues to lobby for increased transparency.[3]

The Christie's Law campaign has invigorated public interest in the judiciary, which has been reinforced by media analysis. In April 2013, the New Zealand Herald published a weeklong "special investigation" on judicial accountability featuring interviews with the judiciary, victims of crime, legislators, and watchdogs. The series was entitled 'Judging the Judges' in anticipation of an SST initiative of the same name.

The SST's recent unveiling of its controversial website, 'Judge the Judges', is the next step in its on-going campaign for greater judicial accountability. The site is designed to showcase and evaluate decisions made by District Court and High Court judges across the country. Its creators insist that the website is not just about "naming and shaming judges", but also about educating the public on how the court system works.[4] The stated goals include advocacy for a more open and transparent justice system, and provision of a single source of reference for high-profile judicial decisions.[5]

However, the launch of the website has come under some scrutiny. Justice Minister Judith Collins for one does not condone the SST's approach, partly due to its practice

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[1] Anna Leask "Christie Marceau's last plea" (18 October 2012) The New Zealand Herald

[2] Sensible Sentencing Trust "Christie's Law – Help Change the Bail Act" <www.christieslaw.co.nz>.

[3] Bail Amendment Bill 2013 (17-2).

[4] Anna Leask "Victims' website keeps eye on judges' rulings" (6 May 2013) The New Zealand Herald <www.nzherald.co.nz>.

[5] Sensible Sentencing Trust "Judge the Judges" (6 May 2013) http://judgethejudges.co.nz.

of personal attacks on judges.[6] The Minister has noted that judges are already accountable for their decisions through their written judgements, which are open to public scrutiny, and by the nature of the appellate court system. There exist further controls, such as the ability to lay a complaint about a judge's conduct with the independent Judicial Conduct Commissioner, as well as the process of judicial review. Other criticisms comprise concerns that the website undermines the rule of law, appeals to a mob mentality, and leaves out crucial information so as to influence opinions on a decision's morality (rather than legality).[7]

This SST approach elevates the issue of public protection from crime by way of scrutiny of judicial decisions above the many important issues raised by the topic of judicial accountability. Among these are public confidence in the judiciary and the corollary effects on legitimacy of the courts; public understanding of courts and court processes; personal effects of criticism on judges and its influence on judicial recruitment; and the relationship between government policies and court functioning.

In this paper, the Equal Justice Project seeks to elucidate the role of the judiciary in the New Zealand legal system, the principle of judicial independence and judicial analyses of this in the leading cases of *Chapman* and *Saxmere*, and to assess appointment and accountability of judges in context and in contrast to other professional regimes.

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[6] Leask "Victims' website keeps eye on judges' rulings", above n 4.

[7] Sandra Conchie "Judgemental site stirs debate" (8 May 2013) The New Zealand Herald <www.nzherald.co.nz>.

# The role of judiciary in the legal system

## *I Separation of Powers*

There are three distinct interests in the political-judicial relationship: the executive, the legislature and the judiciary. Each branch is interdependent on the others and together they make up our legal system. The executive comprises Ministers of the Crown and government departments. The executive's function involves framing policy for legislative enactment (putting forward laws) and the general administration of the government. The legislature comprises MPs in Parliament and Select Committees. The legislature formally enacts laws by examining and debating Bills. Bills are proposed laws and when passed by Parliament become law. The judiciary applies and interprets the law by deciding cases. The judiciary compromises the Courts and the Judges.

Each branch of the New Zealand Government has a separate primary function. The Executive is primarily concerned with development and implementation of policy, the legislature with law-making, and the judiciary with interpretation and application of law. This principle of allocation is known as the separation of powers.[8] This principle limits and disperses government power between different bodies in order to prevent abuse of power. Separation establishes checks and balances within the system to guarantee accountability and impartiality are maintained. In theory each branch operates as a brake on the power of the others.

## *II Importance of Judicial Independence*

The judiciary, through its application of the law, resolves conflicts between citizens, and between citizens and the State. They give authoritative rulings on questions of law and their decisions are binding (subject to appeal to higher courts). In New Zealand the court functions independently from policy makers, the executive and legislature. This independence is important to prevent policy makers placing undue influence on judicial decision makers and directing their judgment. To ensure their independence, Judges of the High Court are protected from removal of office and reduction in salary. [9]

Judicial independence allows the courts a degree of control over the executive. Under the Judicature Amendment Act 1972, in applications for review the courts may restrain Parliament from exceeding their powers and order them to perform public duties.[10] Judicial review of the executive is an application of checks and balances in the separation of powers. Judicial review can remedy situations where Parliament commits a procedural error, unreasonably impinges on fundamental rights, or

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[8] Philip A Joseph *Constitution & Administrative Law in New Zealand* (3rd ed, Brookers, Wellington, 2007) at 193.

[9] Constitution Act 1986, ss23 and 24.

[10] Judicature Amendment Act 1972, s4.

misinterprets a statutory power. In these circumstances, judicial review function to ascertain the legality of the impugned acts.[11]

## *III Constraint of Judiciary*

If judicial decisions result in an interpretation of the law that the Executive considers does not reflect the intention of the policy, the Executive can simply amend the law, or pass a new law to overrule the judge's decision. Correspondingly, judicial decision makers do not craft or determine the law; they simply interpret and apply it. Furthermore, they are required not to comment publicly on the merit of a policy, or have a view on what should be amended or become law. Judicial decision makers are simply required to apply the law that Parliament has passed.

In recent times, as noted in the introduction to this paper, public criticism of the judiciary has become more apparent – for example by way of the SST's "Judging the Judges" initative. The majority of this criticism is aimed at judges being too lenient towards offenders or alleged offenders. However, Judges are restricted in their duty; they can only apply laws and have no power to execute or amend laws as they see fit. Judges must analyse the facts put before them and make a decision based on a predetermined set of rules. If New Zealand society desires harsher sentences, the executive can be influenced by public perception to draft legislation. When enacted by the legislature, the harsher penalties will become law and the judiciary will then be bound to apply them – but not before.

Judges are not free from reprimand. They are held accountable to their oath of office, and if their conduct has breached this solemn pledge, the Judicial Conduct Commissioner will intervene. The edifice of justice depends on the public having confidence in judges. Not only must justice be done, it must be seen to be done.

## *IV Hierarchy of the Courts*

The court system in New Zealand is hierarchical. From the bottom up, we have various tribunals, the District Court, High Court, Court of Appeal and Supreme Court. Legal proceedings start at the base of the hierarchy either in the District Court, or if it is a more serious case, the High Court. Cases then move up the system when decisions in lower courts are appealed. Due to the hierarchy of the Courts, a decision made in a higher court is binding on lower courts. Supreme Court decisions are binding on all other courts.

Decisions of the Courts are important, because where Parliament has not made explicit the law it is left to the judiciary to interpret it. Decisions by courts on cases are referred to as common law and, where inconsistent, are inferior to Statute.

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[11] Philip A Joseph, above n 8, at 821.

## *V Conclusion*

The executive, the legislature and the judiciary do not always agree. Judges sometimes find during judicial review proceedings that Parliament has acted illegally. Parliamentarians, in return, can become frustrated when judges make decisions they disagree with. The executive occasionally finds that the legislature will not pass the laws for which they ask. These disagreements are not signs that something is wrong with the system; in fact, exactly the opposite. They are positive signals that the balance of power is working.

# Analysis of the current appointment process and accountability process for judges

## *I Judicial Appointment Process*

The current judicial appointment process has been in place since 1999 as a result of a report from the Cabinet Strategy Committee.[12] The Attorney-General is responsible for most judicial appointments, recommending suitable candidates to the Governor-General.[13] Unlike the process for determination of judicial complaints, the judicial appointment process is not codified in legislation.

By convention, the Attorney-General receives advice from the Chief Justice and the Solicitor-General before making recommendations to the Governor-General on appointments to the superior courts. Similarly, for appointments to the District Court, the Attorney-General takes advice from the Chief District Court Judge and the Secretary for Justice. [14] For other judicial offices, the Prime Minister recommends the appointment of the Chief Justice, and the Minister of Maori Affairs recommends appointments to the Maori Land Court and the Maori Appellate Court.[15]

The Judicial Appointments Unit (established in 1997, and attached to the Ministry of Justice) initiates the judicial appointments process for all courts, except the Maori Land and Appellate Courts.[16] The unit advertises for nominations or expressions of interest from lawyers who wish to be considered for appointment to the judiciary. The Solicitor-General supervises the process for appointment to the superior courts while the Secretary for Justice supervises the appointments process for District Court, Employment Court and Environment Court judges.[17] The consultation process varies: the Attorney-General will consult with Ministers whose portfolios are considered relevant and the process is dependent on the level of court involved.[18] For superior court appointments, the Chief Justice and President of the Court of Appeal produce a list of potential candidates. When there is a vacancy, a short-list is prepared with further consultation with the judiciary, the profession and the Solicitor-General who investigates the personal criteria of potential candidates. The Attorney-General makes the final decision.[19] The appointment process for the lower courts proceeds in a similar fashion.[20]

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[12] *Judicial Appointments, Report to the Cabinet Strategy Committee,* STR (98) 245, 12 October 1998.
[13] A P Stockley "Constitutional Law" [1999] NZ L Rev 173 at 182.
[14] Courts of New Zealand "Judicial Appointments" <www.courtsofnz.govt.nz>.
[15] Stockley, above n 14, at 182.
[16] Phillip A Joseph*,* above n 8, at 790.
[17] At 790.
[18] Stockley, above n 14, at 183.
[19] Joseph, above n 8, at 790.
[20] At 791.

While the Executive makes judicial appointments, there is a strong constitutional convention that the Attorney-General makes recommendations independently of political considerations.[21] The appointments are not discussed or approved by Cabinet. While the judicial appointment procedures instituted in 1999 provide for greater transparency and consistency than previous procedures, there remain two major criticisms. The first concern is the potential that the Attorney-General is incapable of true political independence, and may be swayed by political considerations. A second concern arises from a perceived lack of diversity in the judiciary.[22]

## *II Judicial Complaints Process*

The Judicial Conduct Panel Act 2004 came into force on 1 August 2005,[23] and introduced new procedures for the investigation of judicial conduct, establishing the office of the Judicial Conduct Commissioner.[24] The stated purpose of the Act is to enhance public confidence in, and to protect the impartiality and integrity of, the judicial system by providing for a robust investigation process of complaints that recognises and protects the requirements of judicial independence and natural justice.[25]

The Judicial Conduct Commissioner receives all complaints and conducts a preliminary investigation to determine whether there is any substance to the complaint.[26] After this preliminary investigation, the Commissioner decides whether or not to uphold the complaint. If it is upheld, the complaint is either referred to the relevant Head of Bench or to a Judicial Conduct Panel appointed by the Attorney-General on the Commissioner's recommendation. Alternatively, the Commissioner may dismiss the complaint.[27] A complaint may be dismissed if it is frivolous, vexatious or trivial, is unrelated to judicial functions or judicial duties, or is about a decision the judge has made.[28] The Judicial Conduct Commissioner may also decide to take no action in respect of a complaint if satisfied that further consideration of the complaint would be unjustified.[29]

Where a complaint is referred to a Head of Bench, it is considered in accordance with the internal complaints process that existed before the Judicial Conduct

[21] "Judicial Appointments" above n 15.
[22] Stockley, above n 14, at 183.
[23] Judicial Conduct Commissioner and Judicial Conduct Panel Act Commencement Order 2005, s 2.
[24] Joseph, above n 8, at 793.
[25] Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 4.
[26] Section 8(1).
[27] Sections 16, 17 and 18.
[28] Section 15.
[29] Section 15A.

Commissioner and Judicial Conduct Panel Act 2004 came into force.[30] A complaint is referred to a Head of Bench where, after preliminary investigation, it is determined that it would not justify the dismissal of the judge.[31] The Head of Bench can either decide to take no further action or require the judge to make an apology to the complainant or undertake counselling or training.[32] A complainant not satisfied with the response of the Head of Bench may refer their complaint to the Judicial Complaints Lay Observer, who may investigate and request the Head of Bench to reconsider the complaint.[33]

The Judicial Conduct Commissioner will recommend that the Attorney-General appoint a Judicial Conduct Panel if the offending conduct may warrant removal of the judge.[34] The Judicial Conduct Panel is made up of one lay member and either two judges, one of which may be retired, or a judge and a legal practitioner.[35] A special counsel is appointed to present the case against the judge, while the judge complained of may appear with representation by a lawyer.[36] The hearing is typically held in public, though part or all of it may be in private to protect the privacy of the complainant, the judge, or if such privacy is in the public interest.[37] Upon completion of the hearing the Panel presents its findings of fact to the Attorney-General, which includes whether it is of the opinion that the dismissal of the judge is justified, and the reasons for those conclusions.[38]

If the Judicial Conduct Panel concludes that the removal of a judge is justified, the Attorney-General retains absolute discretion as to whether to initiate the removal of the judge.[39] If the Attorney-General agrees that a superior court judge should be removed from the bench then they must address Parliament to propose that it recommend to the Governor-General that the judge be removed. If Parliament makes that recommendation then the Governor-General will dismiss the judge. For judges from the lower courts, the Attorney-General advises the Governor-General who can then formally remove the judge from office.[40]

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[30] Courts of New Zealand "Complaints" <www.courtsofnz.govt.nz>.

[31] Office of the Judicial Conduct Commissioner "Referring a Complaint" <www.jcc.govt.nz>.

[32] Stockley, above n 14, at 186.

[33] Joseph, above n 8, at 184.

[34] Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 18.

[35] Joseph, above n 8, at 184.

[36] Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004, s 22.

[37] Section 29.

[38] Section 32.

[39] Section 33.

[40] Office of the Judicial Conduct Commissioner "Recommending a Panel" <www.jcc.govt.nz>.

## *III Comparison with other Professional Accountability Regimes*

The judiciary have a special role to play as a branch of government. It is important that the independence of the judiciary is maintained. However, it is arguably desirable that the judicial accountability regime should be comparable with the transparent regimes governing other professionals within the community, for example, those governing health practitioners and lawyers generally.

Lawyers generally are governed by the Lawyers and Conveyancers Act 2006 and the subsidiary Rules published in pursuance of the Act. Under the Act, the Law Society is obliged to establish a complaints service to hear and determine complaints relating to lawyer conduct.[41] The complaints process is intended to be transparent as between the parties.[42] Upon receipt of a complaint ascertained to be valid, the Law Society submits it to an appointed regional Standards Committee for consideration. In a similar capacity to the Judicial Conduct Commissioner, the Standards Committee may or may not decide to inquire into the complaint.[43] If it does, it may make a finding of unsatisfactory conduct;[44] decide that no further action is required; or that the complaint is sufficiently serious to warrant referral to the national Disciplinary Tribunal. In respect of serious complaints, the public interest will generally justify the publication of the impugned lawyer's name. It has been affirmed that the Act is intended to promote public confidence in the legal profession through open disciplinary matters.[45] Both the Standards Committees and the Disciplinary Tribunal have a range of powers in terms of the orders they may make, reflecting the seriousness of the complaint. Similarly to the judicial complaints process, an unsatisfied complainant may bring an appeal from a Standards Committee decision to the Legal Complaints Review Officer, who then may make recommendations for the further direction of the complaint.

The provision of services by health practitioners and medical professionals has a similar accountability regime. Under the Health and Disability Commissioner Act 1994, there is a general right to submit complaints about the provision of healthcare services to the established Commissioner.[46] Usually such complaints will be made in relation to an alleged breach of the associated Code of Rights, which governs the standards of healthcare practice. Upon receipt of a complaint, the Commissioner has the discretion to take no action in relation to the complaint, especially where it appears to be trivial, frivolous or vexatious.[47] Where the complaint appears to suggest

[41] Lawyers and Conveyancers Act 2006, s 121.
[42] Lawyers Complaints Service http://www.lawsociety.org.nz.
[43] Lawyers and Conveyancers Act 2006, s 137.
[44] Section 12.
[45] *X v Standards Committee (No 1) of the New Zealand Law Society* [2011] NZCA 676 at [18].
[46] Health and Disability Commissioner Act 1996, s 31.
[47] Section 38.

a breach of the Code, the Commissioner may investigate the complaint.[48] Following investigation of a complaint, the Commissioner may make recommendations directed at the healthcare provider or the relevant professional body or authority (for example the Medical Council for doctors), for further disciplinary proceedings. Such authorities usually manage matters concerning professional competence internally. They may also make recommendations that the Director of Proceedings take the complaint further.[49] The Director of Proceedings may take the complaint to the Health Practitioners Disciplinary Tribunal. Unlike Standards Committees under the Lawyers and Conveyancers regime, the Commissioner has no powers to award compensation. Prior to 2006, there was a general blanket name suppression policy. However, since 2006, this has been thought to undermine the public confidence that the Act seeks to establish.[50]

Ostensibly, the current judicial complaints process reflects the modern concern for public accountability and transparency. However, it is arguable that the various limbs of the judicial appointment and accountability process are not sufficiently separate. Transparency and independence may be diminished in the process where the Head of Bench makes recommendations to judges behind "closed doors". In terms of serious complaints, the decision to initiate the removal of judges is made by the same office concerned with their appointment, the Attorney-General. In the light of the accountability procedures for health practitioners and lawyers generally, the current judicial regime arguably does not meet the same expectations of transparency, independence, and public accountability.

[48] Section 40.
[49] Section 45.
[50] Health and Disability Commissioner "Naming Policy" <http://www.hdc.org.nz>.

# Key Cases

# *Saxmere Company Ltd v Wool Board Disestablishment Company Ltd*

Judicial impartiality is fundamental in any valid legal system. This principle was tested in New Zealand's first decision on apparent bias relating to legal counsel in *Saxmere v Wool Board Disestablishment Company Ltd*[51] and *Saxmere v Wool Board Disestablishment Company Ltd (No*.2).[52] Following the *Saxmere* decisions, the Judicial Conduct Commissioner (JCC) became involved, and recommended a Judicial Conduct Panel (JCP) be appointed to fully address the issue.[53] Before this could take place, however, Justice Wilson resigned, bringing investigation proceedings to an end.

*I Background*

Justice Wilson was to hear an appeal of the case *Saxmere v Wool Board Disestablishment Company*. Alain Galbraith QC was counsel for the Wool Board and a good friend of Mr. Wilson. Additionally, Mr. Wilson and Mr. Galbraith were the sole shareholders in, and directors of, the company Rich Hill Ltd. Prior to the hearing, Mr. Wilson contacted counsel for the appellant and disclosed his friendship and shared business interest with Mr. Galbraith.[54] Saxmere had no issue with the judge sitting in the case. Only later through court proceedings did it transpire that Mr. Wilson had not contributed equally to the shareholders account, and was indirectly indebted by some $74,000.[55]

*II Saxmere No.1*

*Saxmere No.1* was preceded by the Court of Appeal decision where the Court unanimously found for the Wool Board.[56] Saxmere appealed to the Supreme Court, alleging that Mr. Wilson's friendship with Mr. Galbraith, coupled with their joint business venture may have resulted in an apparent bias toward the Wool Board's interests. Mr Wilson's affidavit disclosed the extent of his business relationship with Mr Galbraith, but importantly, did not disclose any information relating to unequal shareholder's contributions.

[51] *Saxmere v Wool Board Disestablishment Company Ltd* [2009] NZSC 72'[2010] 1 NZLR 76 [*Saxmere (No.1)]*.

[52] *Saxmere v Wool Board Disestablishment Company Ltd (No*.2) [2009] NZSC 122; [2010] 1 NZLR 35 [*Saxmere (No.2)*].

[53] Office of the Judicial Conduct Commissioner "Decision of the Judicial Conduct Commissioner as to Three Complaints Concerning Justice Wilson" (2010) <http://www.jcc.goct.nz>.

[54] *Saxmere (No.1)*, above n 52, at [17].

[55] *Saxmere (No.2),* above n 53, at [17].

[56] *Wool Board Disestablishment Co Ltd v Saxmere Co Ltd* [2007] NZCA 349.

The Supreme Court applied the test for apparent bias established in *Ebner v Official Trustee in Bankruptcy*:[57]

> "*Whether the fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.*"

Applying this test, the court found against the possibility of apparent bias. This conclusion was based on the lack of "logical connection" between the outcome of the appeal and the affairs of the business enterprise.[58] The existence of a business relationship between a judge and legal counsel, without more, was insufficient to give rise to an apparent bias.[59] It was held that such a relationship *could* give rise to an issue of apparent bias where a judge was "beholden" or financially indebted to counsel.[60] No evidence of this kind was before the court, and as such, the appeal was dismissed. Although the manner in which Mr. Wilson disclosed his relationship with Mr. Galbraith was not approved of, it was concluded that a fair-minded observer would not have had a reasonable apprehension of Mr. Wilson's impartiality.

The outcome of the decision was coloured by the realities of the legal community in New Zealand. Judges are appointed from senior legal counsel, and due to the small size of the profession, it is inevitable that there are personal friendships (or business interests as in this case) between members of the judiciary and legal counsel.[61] It was held that in most cases, the mere presence of such relationships would not affect the judicial oath of independence and impartiality.

*III Saxmere No.2*

Following *Saxmere (No.1*), more detailed information, particularly in regards to the Judge's indebtedness to Mr. Galbraith, was presented. The quantum of indebtedness was held to be "well above the level at which a direct or indirect indebtedness from Judge to counsel could be regarded as so minimal as to be immaterial..."[62] An issue also arose regarding funding arrangements which were being sought by Rich Hill Ltd during the Court of Appeal hearing. This factor was seen to require mutual cooperation by Mr. Galbraith and Mr. Wilson, indicating that the Judge's interest in the company was not merely passive.[63] The evidence was sufficient to establish that Mr. Wilson was "beholden" to Mr. Galbraith.[64] Collectively, these matters would give rise to doubts in the mind of an objective lay observer as to whether the Judge would not be unconsciously affected by his business relationship with counsel.

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[57] *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.
[58] At [27].
[59] At [29].
[60] At [25]. See also McGrath J's judgment at [115].
[61] At [100]-[105].
[62] *Saxmere (No.2),* above n 53, at [17].
[63] At [18].
[64] At [17].

Consequently, the Supreme Court recalled their decision in *Saxmere (No.1)* issued just two months earlier. The case was remitted to the Court of Appeal for a rehearing.

*IV Judicial Conduct Commissioner's decision*

Three complaints were made to the JCC about the conduct of Wilson J in relation to the *Saxmere* cases. Following the rules in the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 ("the Act"), the Commissioner released his decision on the appropriate response to the complaints. Despite the ordinary rules of confidentiality, the decision was made publicly available due to the extent of media coverage and public interest.[65]

Pursuant to the Act, [66] the Commissioner conducted extensive preliminary examination of the alleged misconduct. For example, he conducted interviews with people involved, obtained written information and confirmation from other parties, read a large quantity of written material and obtained supplementary explanations.[67]

After an extensive preliminary examination, the Commissioner was required to take one of three steps:[68]

(a) dismiss Saxmere's complaints;
(b) refer the matter to the Head of Bench (Chief Justice Elias); or
(c) recommend that a Judicial Conduct Panel be appointed for further inquiry.

The Commissioner concluded that there was no basis for dismissing the complaints as they focused directly on the conduct of the Judge.[69] Hence, none of the statutory grounds in section 16 of the Act were satisfied. Furthermore, the option of referring the matter to the Chief Justice was not open to the Commissioner as the subject matter of the complaints went beyond Wilson J's conduct up to and including the hearing of the *Saxmere* case in the Court of Appeal.[70] There were added aspects of the complaints, which related directly to the Judge's conduct in the period leading up to the *Saxmere (No. 1)* decision. Issues regarding the adequacy of Justice Wilson's disclosure and the Court's misapprehension about the nature, scale and finances of Rich Hill Ltd made the Commissioner decide that it was inappropriate to merely refer the matter to the Head of Bench.[71]

The complexity of the complaints meant that a preliminary examination would struggle to take the issues further. Consequently, the Commissioner recommended to

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[65] David Gascoigne *Decision of the Judicial Conduct Commissioner as to three complaints concerning Justice Wilson* (Judicial Conduct Commissioner, 7 May 2010) at [12].
[66] Section 15(4)
[67] Decision of the Judicial Conduct Commissioner, above n 54, at [22].
[68] As per s 15(5) of the Act.
[69] At [26]-[27].
[70] At [133].
[71] At [134].

the Attorney-General that a Judicial Conduct Panel (JCP) be appointed[72] to enquire further.[73]

*V Wilson's Appeal by Judicial Review*

After the Commissioner released his decision, Justice Wilson applied for judicial review.[74] Wilson claimed that the Commissioner's recommendation to the Attorney-General was vitiated by error of law, as was the Attorney-General's decision to appoint the JCP to inquire into his conduct.[75] The pleaded grounds of review raised the following issues:[76]

(a) Whether the Commissioner failed to correctly identify the standard of misconduct warranting removal from office;
(b) Whether the Commissioner failed to apply the standard to the Judge's identified conduct;
(c) Whether there was procedural impropriety, particularly breach of natural justice, during the Commissioner's investigation; and
(d) Whether the Commissioner erred in taking into account information that was hearsay, confidential and subject to legal privilege.

After analysing Wilson J's claims, the court held that the Commissioner had identified the appropriate standard against which the Judge's conduct was to be considered. A judge of the High Court could be removed by the House of Representatives on the grounds of misbehaviour or incapacity.[77] To determine whether Wilson J's conduct amounted to misbehaviour, the Commissioner had to be satisfied that the matters were sufficiently serious to warrant recommending to the Attorney-General that a JCP should be appointed.[78] This threshold is met where the Commissioner believed that the conduct, if established, was serious enough to warrant consideration of the Judge's removal, rather than referral of the matter to the Head of Bench.[79]

Furthermore, the Commissioner had not committed an error of law in considering information that was hearsay, confidential or subject to legal privilege. Statutory power enabled the Commissioner to make any inquiries that he thought appropriate.[80]

[72] As per s 18(1) of the Act.
[73] Decision of the Judicial Conduct Commissioner, above n 54, at [135].
[74] *Wilson v Attorney-General* [2011] 1 NZLR 399 (HC).
[75] At [5].
[76] At [6].
[77] Constitution Act 1986, s 23.
[78] *Wilson v Attorney-General*, above n 76, at [54].
[79] At [44].
[80] Judicial Conduct Commissioner and Judicial Conduct Panel Act, s 15(4).

The Commissioner was not required to conduct an investigation where the rules of evidence applied.[81]

However, the court did find that the Commissioner committed an error of law when he failed to identify the matter or matters concerning the Judge's conduct that were to be the subject of an inquiry by the JCP.[82] The Commissioner also committed an error of law when he failed to evaluate and form an opinion about the Judge's conduct during the period after *Saxmere (No. 1)*.[83] Therefore, it was not sufficient for the Commissioner to recommend to the Attorney-General that a JCP be appointed to inquire into an entire complaint. The Commissioner's recommendation should have excluded those matters which he had found had no substance and any matter which would not warrant consideration of removal. The Commissioner had to form a clear opinion about which complaints should be dismissed, which complaints should be referred to the Head of Bench, and which complaints were sufficiently serious to be referred to the Attorney-General with a recommendation that a JCP be appointed.[84] The Commissioner is not a mere conduit for complaints made, but ought to be a decision-maker.[85]

Based on those considerations, the court granted Justice Wilson's application. The decision to appoint the JCP was thus set aside.

Following the High Court decision, Justice Wilson resigned in October 2010. His resignation, coupled with the High Court decision, meant that investigations into his alleged misconduct came to an abrupt end.

*VI Conclusion*

The controversy surrounding Justice Wilson's conduct was a novel one. Prior to the *Saxmere* decisions, the perception that New Zealand's judiciary were faithfully independent and impartial was undoubted. Ultimately, the outcome of the Judicial Conduct Commissioner proceedings are unsatisfactory. A respected, appellate judge lost his career and reputation without any substantive investigation as to whether this was merited. What the decisions do shed light on however, is the informality with which members of the judiciary can raise issues of the appropriateness of their sitting in a particular decision. If anything is to be learned from the Justice Wilson saga, it is surely that reform that implements effective and transparent mechanisms for raising potential issues of judicial bias must be addressed.

[81] *Wilson v Attorney-General*, above n 76, at [124].
[82] At [76].
[83] At [96].
[84] Judicial Conduct Commissioner and Judicial Conduct Panel Act, s 15(1).
[85] *Wilson v Attorney-General*, above n 76, at [42].

# ***Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462**

## *I Case summary*

### *A Facts*

Following trial by jury, the claimant Mr. Chapman was convicted and sentenced to six years imprisonment on four counts of committing sexual offences. The claimant's appeal against convictions, as well as his application for legal aid, were both dismissed pursuant to the *ex parte* appeal process executed by senior judges of the New Zealand Court of Appeal (CA) between 1991 and 2001.

The Privy Council in *R v Taito* ruled the *ex parte* appeal process as "a fundamentally flawed and unlawful system", as the procedure implemented by the CA deprived appellants of "fundamental rights" to fairness and natural justice.[86] This process was believed to discriminate only against the disadvantaged in that it was solely applied to appellants seeking legal aid to appeal. The regime could not deny appeal rights to those who could financially afford private representation.

Mr. Chapman was serving his sentence when he brought a second appeal through the extraordinary process that allowed re-hearings to appellants whose appeal rights had been dismissed ex parte. In November 2003, Mr. Chapman's appeal was allowed. His convictions were quashed and he was released on bail pending retrial.

Although a rehearing of the charges was ordered, the Police misplaced the complainant's statement and the complained refused to give evidence again. The prosecution was unable to proceed and Mr. Chapman was discharged under s 347(1) of the Crimes Act 1961 in July 2004 due to insufficiency of evidence.

Subsequently, Mr. Chapman brought an action alleging breaches of ss 26 and 27 of the New Zealand Bill of Rights Act 1990 (NZBORA) committed by the judges sitting on the CA. He sought public law compensation from the Attorney-General for a sum of $900,000.

### *B Issue*

The appeal came before the Court on preliminary questions of law that would prevent damages being awarded, in situations where they would provide an effective remedy if the breach of rights was caused by judicial action.

[86] *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 577.

*C Arguments*

In response, the Attorney-General on appeal argued that under the public law remedy adopted in *Simpson v Attorney-General (Baigent's Case),*[87] the Crown is not liable for acts of the judiciary. Further, that NZ domestic law does not provide for the liability of the State for wrongs extending beyond the liability of the Crown for its servants. The Attorney-General contended that direct liability of the judicial branch of government for breaches of rights would undermine pivotal constitutional principles such as judicial independence and the common law (principle of judicial immunity.

Essentially, the argument was that this rationale, which underpins the principle of judicial immunity, ought to be extended to the A-G for public law liability. Therefore, the Attorney-General was not the appropriate defendant.

*D Judgment*

The Supreme Court was deeply divided in deciding this case. The decisions in *Baigent's Case,*[88] and the Privy Council's decision in *Maharai v Attorney-General of Trinidad and Tobago* were closely analyzed.[89] The minority (Elias CJ and Anderson J) strongly argued in favour of permitting claims for judicial wrongdoing. They held the view that *Baigent* provided for remedies for NZBORA breaches by all three branches of government as the terms State and Crown were held to be interchangeable. Article 3 of the International Covenant on Civil and Political Rights (ICCPR) had great influence over their judgment. The ICCPR imposes obligations on effective states to provide effective remedies for breaches of the ICCPR, creating an obligation on the courts to remedy situations where persons have suffered loss resulting from a breach of the NZBORA by any branch of government.

However, by a bare majority (McGrath, William Young and Gault JJ), it was held that there was no longer an avenue for monetary compensation available for judicial wrongdoing in breach of the NZBORA. The majority reasoned that *Baigent* stood for the proposition that the Attorney-General could only be liable for NZBORA breaches by the executive branch of government.

The majority used policy reasons in order to justify the maintenance of judicial independence, and immunity of the Crown from judicial breach of NZBORA. For example, actions against the Crown could be used to harass judges; it allows for

[87] *Simpson v AG* [1994] 3 NZLR 667 [aka Baigent's Case].

[88] Ibid.

[89] *Maharaj v Attorney-General of Trinidad and Tobago* (No 2) Privy Council [1979] AC 385, [1978] 2 All ER 670, [1978] 2 WLR 902.

collateral action threatening finality in litigation; it gives rise to fear distracting and preventing judges from dealing with cases dispassionately; it discourages suitable candidates from becoming judges; and there are alternative remedies available.

The two crucial policy factors were judicial independence and the desirability of finality in litigation. The Court was split on how these impacted on the rule of law and public confidence in the judiciary.

McGrath and William Young JJ captured the majority judgment at [172]:[90]

"[G]eneral exposure of judges to the threat of lawsuits for judicial errors will create pressure for defensive judicial behaviour and in the long run will be more harmful to independent adjudication than accepting that there will be very rare cases where no adequate remedy is available for judicial wrongdoing".

### *E Conclusion*

By a bare majority, the Supreme Court (McGrath, William Young and Gault JJ) held that there is not a remedy available for loss resulting from wrongdoing by the judicial branch of government in breach of the NZBORA.

## *II Discussion*

Elias CJ's argument largely hinged on the concept of the necessity for a right to have a remedy, and the argument that extending NZBORA damages to judicial breaches would not impinge on judicial immunity. Rather than suggest that judicial immunity should be limited, she accepted its importance (though noted that immunities have always been viewed with suspicion due to the concept of the rule of law). Her point of distinction was that private judicial immunity and damages claimed from the state for a breach of a BORA right are two entirely separate things. Secondly, she considered that providing a remedy for a breached right is fundamental to the NZBORA scheme and cannot be overridden, in cases such as the one before her, by policy considerations. Another notable and convincing point made by the Chief Justice – and one not rebutted by the majority – is the fact that excluding breaches by the judicial branch from the availability of NZBORA can have confusing and arbitrary results. Certain breaches may be caused due to a combination of state and judicial actors – for example, unreasonable delay may be due to the actions of both the police and the judiciary.

The main difference, then, between the Chief Justice's judgment and that of McGrath and William Young JJ is how the concept of judicial immunity is approached. The

[90] *Attorney-General v Chapman* [2011] NZSC 110, [2012] 1 NZLR 462.

latter judgment (and that of Gault J) views granting NZBORA damages for judicial breaches as uncomfortably similar to allowing private suits of judges. There is something of a slippery slope argument in the position advanced in this judgment that were NZBORA damages extended to judicial breaches, this would be a step towards allowing personal suits against judges. McGrath and William Young JJ suggest that the effects of allowing NZBORA damages would be similar to a breakdown of judicial immunity, that judges would find their decision-making affected by concerns of action taken against the State. This is something Elias CJ, and more emphatically Anderson J, sees as unlikely; it is arguable that the minority's view, that the judiciary is not as timid as the majority suggests, is a more realistic perspective.

Additionally, while Elias CJ placed much emphasis of the need for a right to have a remedy (in the judicial context, an NZBORA damages remedy where there are no remedies such as rights of appeal), McGrath and William Young JJ consider that there are adequate remedies in the judicial system to address most breaches of rights.

## *III Commentators' Reactions*

There has been little comment on the case in the media. Dr Rodney Harrison QC has written a detailed piece on the case for NZLawyer.[91] He agreed with Elias CJ's position that the majority judgment did not extend judicial immunity but created a new state immunity, and noted that "a fundamental constitutional question with the potential to place New Zealand squarely in breach of its international human rights obligations has effectively been determined by the casting vote of an Acting Judge."[92] The piece expressed concern about the human rights implications of this decision, and notes that though it may stand domestically, the matter – in light of New Zealand's international obligations to remedy judicial breaches – may be subject to some international discussion or scrutiny.[93]

In a blog post on the New Zealand Supreme Court blog, the decision was also viewed as creating a new state immunity. The author found it interesting that the Court developed this new immunity when the Law Commission's report suggested that such an immunity could only be created by statute.[94] The post expresses concern that the majority judgment is "a retreat from human rights values" in allowing serious rights breaches to go unremedied, and further suggests that "it is the majority's support for a

[91] Rodney Harrison "*Attorney-General v Chapman*: Negating Effective Remedies for Judicial Breach of the Bill of Rights" (20 January 2012) NZLawyer Online <http://www.nzlawyermagazine.co.nz/NZLawyerextraarchive/Bulletin41/extra41F1/tabid/3932/Default.aspx>.
[92] Rodney Harrison, above n 93.
[93] Rodney Harrison, above n 93.
[94] Justin Harder "*Attorney-General v Chapman*: Case comment" (21 September 2011) New Zealand Supreme Court Blog < http://nzscblog.com/2011/09/attorney-general-v-chapman-case-summary/>.

lack of accountability for violations of the Bill of Rights that is more likely to erode public confidence in the judiciary."[95]

A short piece on the case was also published on the Kiwis First website.[96] While the content of the piece is mainly a summary of the case, the title – "New Zealand Judges exempt their conduct from Bill of Rights Act guarantees: When the Law is Not the Law" – suggests public confidence in the judiciary may have been damaged by this decision.

[95] Ibid

[96] "New Zealand Judges exempt their conduct from Bill of Rights Act guarantees: When the Law is Not the Law" (12 October 2011) <http://www.kiwisfirst.com/news.asp?pageID=2145848073&RefID=2141732906>.

# Recommendations of the Law Commission

## “Linked” Accountability in the Structure of the Judiciary

The Law Commission made two key recommendations:[97]

“R35 Legislation should provide that the President of the Court of Appeal and the Chief High Court Judge are accountable to the Chief Justice for ensuring the orderly and efficient operation of the Court of Appeal and High Court respectively.

R36 Legislation should provide that the Principal Judges in the divisions of the District Courts are responsible to the Chief District Court Judge for ensuring the orderly and efficient operation of their divisions.”

Our focus is specifically on Recommendation 35 but it is important to note that both recommendations mirror each other in their underlying principles and purpose.

It must also be mentioned that there is limited controversy or debate in New Zealand on the issue of incorporating Recommendation 35 in the Judicature Act 1908. All the submissions that the Law Commission received on this issue, in the course of producing the report, agreed that the President of the Court of Appeal and Chief High Court judge should be statutorily required to account to the Chief Justice.[98]

There are two key principles driving this recommendation forward. Most importantly, a prevalent feature of the judicial system is the hierarchical system of the courts. This system allows review and appeal of court decisions as well as the facilitation of the doctrine of precedent, which essentially ensures consistency in the common law. The Law Commission refers to these characteristics as “linkages” in the structure of the judiciary.[99] The High Court, the Court of Appeal and the Supreme Court are all courts of the same system, albeit being at different levels. Since in the status quo the Chief High Court judge is accountable to the Chief Justice, the same should be required of the President of the Court of Appeal to ensure consistency and accountability within the single judicial system.[100]

Secondly, if the Judicature Act required the President of the Court of Appeal to be responsible to the Chief Justice for the administration of the Court of Appeal, this could also advance “orderly and *efficient operation*”[emphasis added] of the courts.[101] The Chief Justice would undertake a supervisory role of the overall operation of the Court of Appeal and there would no longer be any need to keep the accountability

[97] Law Commission *Review of the Judicature Act 1908* (NZLC R126, 2012) at 84.
[98] At 8.6.
[99] At 8.3.
[100] These are the purposes behind the Law Commission’s recommendations. See, generally, David Fisher “Special report: Judging the judges” *The New Zealand Herald* (online ed., New Zealand, 15 Apr 2013).
[101] *Review of the Judicature Act 1908*, above n 97, at 8.6.

mechanisms for the senior court separate from that of the High Court. Having a single agent in charge of judicial accountability is desirable for uniformity.

## *I What we can learn from the English judicial system*

We can compare aspects of the role of the Chief Justice to that of the Lord Chief Justice in the judiciary of England and Wales, in regards to accountability and efficiency in the judicial system.

The Constitutional Reform Act 2005 (UK) shifted paramount responsibilities from the Lord Chancellor to the Lord Chief Justice – that is, the Lord Chief Justice is now the head judge in England and Wales.[102] Accordingly, the Lord Chief Justice is empowered with some 400 statutory functions as the head administrator of the judiciary.[103] Notably, section 7 provides:[104]

**President of the Courts of England Wales**

(1) The *Lord Chief Justice* holds the office of the President of the Courts of England and Wales and is Head of the Judiciary of England and Wales.

(2) As President for the Courts of England and Wales he is responsible—

…

(b) for the maintenance of appropriate arrangements for the *welfare, training and guidance of the judiciary* of England and Wales within the resources made available by the Lord Chancellor;

(c) for the maintenance of appropriate arrangements for the deployment of the judiciary of England and Wales and the allocation of work within courts.

(3) The President of the Courts of England and Wales is president of the courts listed in subsection (4) and is *entitled to sit in any of those courts*.

(4) The courts are—

The Court of Appeal

The High Court

The Crown Court

The county courts

The magistrates' courts

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[102] "The justice system and the constitution" Judges, Tribunals and Magistrates <http://www.judiciary.gov.uk>.

[103] "Lord Chief Justice" Judges, Tribunals and Magistrates <http://www.judiciary.gov.uk>.

[104] Constitutional Reform Act (UK) 2005, s 7 (emphasis added).

The Lord Chief Justice is also the Head of the Criminal Division of the Court of Appeal.[105] This judicial structure is obviously not identical to ours; the role and status of the Lord Chief Justice is broader than that of the Chief Justice in New Zealand. But there are ideas from this system that New Zealand could perhaps incorporate.

First, as the head judge as the President of the Courts, the Lord Chief Justice has numerous duties ranging from investigating complaints to hearing cases at different courts. This increases his or her prominence and reinforces consistency among the benches and how they operate.

Secondly, the Lord Chief Justice has oversight over all higher courts. This enables accountability of more senior judges (including the Court of Appeal) to the Lord Chief Justice and the Lord Chancellor through the complaints system.

## *II Support for the Recommendation*

A statutory requirement for the accountability of the President of the Court of Appeal could be phrased similarly to the existing provision:[106]

The President of the Court of Appeal is responsible to the Chief Justice for ensuring the orderly and prompt conduct of the Court of Appeal's business.

In England and Wales, the Lord Chief Justice has the capacity to check the overall business of senior courts, including the Court of Appeal. The Judicature Act 1908 should also require the President of the New Zealand Court of Appeal to account to the Chief Justice so that the Chief Justice can ensure consistency and linkage in all of the appeal courts and can supervise the senior Court of Appeal for the same accountability and transparency required in the High Court.

The same principles and themes behind the overall Law Commission review apply to this recommendation, which should be supported because it reinforces the purposes of enabling improved judicial accountability and clarity in New Zealand courts.

[105] Section 8.
[106] See, generally, section 4B(1) of the Judicature Act 1908.

# Should it be a statutory requirement for the Chief Justice to produce an annual report?

## *I Law Commission Report*

The Law Commission made two recommendations on this topic:

> "R38 There should be a statutory requirement for the Chief Justice to publish an annual report on the judiciary within six months of the end of the financial year of the Ministry of Justice (or such other date agreed by the Chief Justice and the Ministry of Justice).
>
> R39 The Ministry of Justice and the Chief Justice should agree the broad matters to be covered in the annual report on the judiciary, which should be specified in new courts legislation."[107]

The reasoning behind these recommendations was to make the judiciary "individually and collectively accountable for the proper discharge of its functions".[108] The Law Commissioners felt that, without such a report, there was no one place where the judiciary could present their views and opinions.[109] They looked at the reports of the Supreme Court of the United Kingdom, and the Chief Justice of the United States for guidance.

### *A The Supreme Court Annual Report and Accounts*

Section 54(1) of the Constitutional Reform Act 2005 (UK) requires the chief executive of the Supreme Court to prepare a report covering the business of the Supreme Court that year, and then give it to the Lord Chancellor, the First Minister in Scotland, the First Minister and the deputy First Minister in Northern Ireland and the First Minister for Wales.[110] It is then presented in Parliament.

This annual report allows the Supreme Court to make public all the goings-on of the court in a year, including such matters as the aims and goals of the Court, the appointment process of judges, how the Court interacts with other jurisdictions and even how many appeals they granted in a year.[111] It is part of the "UKSC's objectives to make its proceedings as accessible as possible, and to foster understanding of its work as the UK's highest domestic court".[112] It certainly achieves this goal, as it basically sets out everything that one could wish to know about the Supreme Court

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[107] *Review of the Judicature Act 1908*, above n 90, at 88.
[108] At 85.
[109] At 85.
[110] Constitutional Reform Act 2005 (UK), s 54(1).
[111] "The Supreme Court Annual Report and Accounts 2012-2013" (20 May 2013) Supreme Court of the United Kingdom <http://www.supremecourt.gov.uk/docs/annual-report-2012-13.pdf>.at 4-5.

[112] At 37.

and its role in the UK judiciary. Information is clearly and simply set out, so that a layperson could easily understand it.

### *B Chief Justice's Year-End Reports on the Federal Judiciary*

These reports also aim to give some insight into the sometimes mysterious world of the federal judiciary of the USA. They give similar information to the report of the UK Supreme Court, although it is much more limited. Each year, the Chief Justice focuses on one issue facing the judiciary, and chooses to address that, rather than taking a broader approach.[113] This, in effect, does not give much clarity to the business of the federal courts, because it is so limited.

If New Zealand did choose to adopt an annual report, they would be much better off adopting a system like that of the UK Supreme Court, rather than that of the USA. Although, it would probably require more work, it would be much more effective at achieving clarity and accessibility.

### *C Objections to the Law Commission Proposals*

The judges of the Senior Courts made a powerful submission in opposition to this proposal, citing the potential violation of the separation of powers as a reason. They claimed that it would be "constitutionally inappropriate for the judiciary to report to Parliament, as it is a separate branch of government".[114] They also argued that the New Zealand judiciary, unlike that of the UK and in Australia, does not have the required resources to be able to undertake such a task.[115]

Submissions from non-judges suggested that there should be a report, which would contain a report from each Head of Bench, with an overview by the Chief Justice. Dr Richard Cornes, an academic from the University of Essex, who has a research focus on the role of the Chief Justice of New Zealand, suggested creating a New Zealand Judicial Council. This would be headed by the Chief Justice and would report annually to Parliament. This Council would have such functions as "administration of the judicial bench", "a consultative role in judicial appointments and promotions", providing "communications for the judicial branch", "a role in appointing the Judicial Conduct Commissioner and associated panels", judicial training and "maintenance of links with equivalent judicial bodies on other countries".[116]

## *II Conclusion*

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[113] John G. Roberts, Jr. "2012 Year-End Report on the Federal Judiciary" (2012) Supreme Court of the United States < http://www.supremecourt.gov/publicinfo/year-end/2012year-endreport.pdf>.
[114] *Review of the Judicature Act 1908*, above n 90, at 86.
[115] At 86.
[116] At 87.

Given the current level of public mistrust in the judiciary following several controversial decisions, the Herald's "Judging the Judges" series,[117] and the Sensible Sentencing Trust's new website,[118] it may be beneficial to have a report along the lines of that of the UK Supreme Court. The public are clearly under-informed about the workings of the judiciary, and creating such a report might go some way towards alleviating this. Some more funding would have to be given to the judiciary to progress this, but it would be worth it to increase the public level of confidence in the judiciary.

[117] Leask, above n 4.
[118] "Judge the Judges", above n 5.

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