

Judicial Matters Bill

Government Bill

Explanatory note

General policy statement

Overview

This Bill implements Government policy on a number of matters relating to the judiciary. Collectively, the measures—

- are aimed at maintaining and enhancing public confidence in the judiciary; and
- recognise the fundamental importance in a democracy of ensuring an independent judiciary and addressing judicial resources.

Judicial Conduct Commissioner and Judicial Conduct Panel

Part 1 amends the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 (the **principal Act**). The purpose of the principal Act is to enhance public confidence in, and to protect the impartiality and integrity of, the judicial system by—

- providing a robust investigation process to enable informed decisions to be made about the removal of Judges from office;
- establishing the office of the Judicial Conduct Commissioner for the receipt and assessment of complaints about the conduct of Judges:

- providing a fair process that recognises and protects the requirements of judicial independence and natural justice.

The complaints-handling process introduced by the principal Act came into force on 1 August 2005.

Deputy Judicial Conduct Commissioner

The principal Act does not provide for the appointment of a Deputy Commissioner. Nor does it enable the Commissioner to delegate to another person or body the preliminary examination and determination of complaints. That causes difficulty when the Commissioner has a conflict of interest, is absent from office, or is incapacitated.

This Bill will enable a Deputy Commissioner to be appointed who can perform the Commissioner's functions when the Commissioner has a conflict of interest, is absent from office, or is incapacitated, and during a vacancy in the office of Commissioner.

Power to take no further action

The principal Act is prescriptive. The Commissioner can only dismiss a complaint on specified grounds, refer it to the Head of Bench, or recommend that the Attorney-General appoint a Judicial Conduct Panel to inquire into conduct that may warrant removal from office.

The Commissioner has identified cases involving genuine complaints that do not fall within the existing grounds for dismissal, but that nevertheless raise no concerns about judicial conduct that need to be considered by the relevant Head of Bench (let alone by a Judicial Conduct Panel). At present, these complaints must, strictly speaking, be referred to the Head of Bench, even though there is no conduct that would justify further consideration of these complaints.

This Bill will amend the principal Act to enable the Commissioner to take no further action on a complaint if, in all the circumstances, further consideration of the complaint would be unjustified (for example, where the complaint is resolved to the complainant's satisfaction following an explanation from the Judge who is the subject of the complaint).

Associate Judges of High Court

Part 2 amends section 26C(2) of the Judicature Act 1908 to increase, from 6 to 9, the maximum number of Associate Judges of the High Court.

Clause by clause analysis

Clause 1 states the Bill's Title. It is intended that, during its committee of the whole House stage, this Bill will be divided as follows:

- *Part 1* and *Schedules 1 and 2* will become a separate Judicial Conduct Commissioner and Judicial Conduct Panel (Deputy Commissioner and Disposal of Complaints) Amendment Bill:
- *Part 2* will become a separate Judicature (Associate Judges) Amendment Bill.

Clause 2 relates to commencement. The Bills divided from this Bill, when enacted, will come into force on the day after Royal assent.

Part 1

Amendments to Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004

Principal Act amended

Clause 3 indicates that *Part 1* amends the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004. (A reference in this analysis to a section is, unless the context otherwise requires, a reference to a section of that principal Act.)

Deputy Commissioner

Clause 4 amends section 5, which relates to interpretation. A new definition is inserted, and a revised one substituted, to recognise the new office of Deputy Judicial Conduct Commissioner established by *new section 8A* (inserted by *clause 7*).

Clause 5 ensures the Deputy Commissioner is referred to in the heading above section 7.

Clause 6 amends section 8, which states functions and powers. The amendments—

- make clear that the functions and powers stated are those of the Commissioner; and
- insert a *new section 8(1A)* enabling the Commissioner, in carrying out his or her functions in relation to a complaint, to decide that he or she has a conflict of interest in relation to the complaint; and
- insert a *new section 8(1B)* providing that the functions of the Commissioner—
 - must not be carried out by the Commissioner if they relate to a complaint in relation to which the Commissioner has decided that he or she has a conflict of interest; and
 - are not carried out by the Commissioner in relation to any complaints in the situations specified in *new section 8B(1)(b)(i) and (ii)* (inserted by *clause 7*); and
- insert a *new section 8(1C)* requiring the Commissioner to refer promptly to the Head of Bench a complaint—
 - referred to the Commissioner by the Deputy Commissioner under *new section 8B(4)* (inserted by *clause 7*); and
 - in relation to which the Commissioner has decided that he or she has a conflict of interest.

Clause 7 inserts *new sections 8A and 8B*.

New section 8A establishes the office of Deputy Judicial Conduct Commissioner. Appointments to the office are made in the same way as appointments to the office of Commissioner. In particular,—

- the Deputy Commissioner is appointed by the Governor-General on the recommendation of the House of Representatives; and
- before a recommendation may be made, the Attorney-General must consult the Chief Justice about the proposed appointment and must advise the House of Representatives that the Chief Justice has been consulted.

New section 8B relates to the Deputy Commissioner's function and powers. The Deputy Commissioner's function is, under *subsection*

(1), to carry out the functions of the Commissioner in relation to the following complaints (and no others):

- complaints (other than those that the Deputy Commissioner has referred to the Commissioner under *subsection (4)*) in relation to which the Commissioner has decided that he or she has a conflict of interest; and
- complaints of any kind in 1 or more of the following situations:
 - during the absence from office of the Commissioner;
 - if the Commissioner is incapacitated in a way that affects the carrying out of his or her functions;
 - during a vacancy in the office of Commissioner.

Subsection (2) enables the Deputy Commissioner, in carrying out his or her function in relation to a complaint, to decide that he or she has a conflict of interest in relation to the complaint.

Subsection (3) applies if the Deputy Commissioner decides that he or she has a conflict of interest in relation to a complaint. It requires the Deputy Commissioner—

- not to carry out his or her function in relation to the complaint; and
- to promptly refer the complaint to the Head of Bench (unless the Deputy Commissioner refers the complaint to the Commissioner as soon as practicable under *subsection (4)*).

Subsection (4) enables the Deputy Commissioner to refer a complaint to the Commissioner as soon as practicable (instead of referring it promptly to the Head of Bench under *subsection (3)*) if the Deputy Commissioner—

- is carrying out the Commissioner's functions in relation to the complaint during the Commissioner's absence from office or incapacity, or a vacancy in the office of Commissioner; and
- decides that he or she has, in relation to the complaint, a conflict of interest; but
- believes on reasonable grounds, after consulting the complainant (if any), that the Commissioner is likely to be able to begin to deal with the complaint within a reasonable time.

Subsection (5) confers on the Deputy Commissioner all the powers necessary for carrying out his or her function.

Subsection (6) provides that the fact that the Deputy Commissioner carries out a function or exercises a power is, in the absence of proof to the contrary, sufficient evidence of the Deputy Commissioner's authority to do so.

Clause 8 adds a *new section 9(2)* which requires the Deputy Commissioner to act independently in carrying out his or her function.

Clause 9(1) and (2) amend section 10 to apply Part 1 of Schedule 2 (which contains official and administrative provisions) to the Deputy Commissioner. *Clause 9(3)* and *Schedule 1* amend Part 1 of Schedule 2 so that the official and administrative provisions that it contains apply to the Deputy Commissioner.

Disposal of complaints

Clause 10 amends section 15. Section 15(1) requires the Commissioner to conduct a preliminary examination of each complaint and to form an opinion as to whether—

- the subject matter of the complaint, if substantiated, could warrant consideration of the removal of the Judge from office; or
- there are any grounds for dismissing the complaint under section 16(1).

Clause 10(1) inserts a *new section 15(1)(ab)*. The amendment enables the opinion that the Commissioner must form under section 15(1) to be that there are grounds for exercising his or her power under *new section 15A* (inserted by *clause 11*) to take no further action in respect of the complaint.

Section 15(5) requires the Commissioner, having completed the preliminary examination and formed the opinion required by section 15(1), to take 1 of the following steps:

- dismiss the complaint (section 16); or
- refer the complaint to the Head of Bench (section 17); or
- recommend that the Attorney-General appoint a Judicial Conduct Panel to inquire into any matter or matters concerning the conduct of a Judge (section 18).

Clause 10(2) inserts a *new section 15(5)(aa)*. The amendment ensures that the list in section 15(5) of steps, 1 of which must be taken by the Commissioner, includes the exercise of his or her power under

new section 15A (inserted by *clause 11*) to take no further action in respect of the complaint.

Clause 10(3) and *Schedule 2* substitute a *new Schedule 1* which amends the diagrammatic overview, in *Schedule 1*, of the process established by the principal Act. The amendments are only to ensure that the diagram reflects accurately the Commissioner's power (under *new section 15A*) to take no further action in respect of a complaint.

Clause 11 inserts a *new section 15A*. *Subsection (1)* empowers the Commissioner to take no further action in respect of a complaint if satisfied that further consideration of the complaint would, in all the circumstances, be unjustified. *Subsection (2)* specifies reasons why further consideration of a complaint would, in all the circumstances, be unjustified. Those reasons may be or include all or any of the following that apply to the complaint:

- that the complaint has been resolved to the complainant's satisfaction following an explanation from the Judge who is the subject of the complaint;
- that the complaint is genuine and made in good faith, but is based on a misunderstanding;
- that the complaint is one in respect of which the Commissioner, having made all reasonable efforts to complete the preliminary examination required by section 15 and form the opinion required by section 15(1), does not have, and is unlikely to be able to obtain, enough information to form that opinion.

Subsection (3) ensures that the fact that a complaint has been resolved to the complainant's satisfaction because of an apology by the Judge who is the subject of the complaint is not, by itself, a reason why further consideration of a complaint would, in all the circumstances, be unjustified.

Subsection (4) ensures *subsection (2)* does not limit *subsection (1)*.

Subsection (5) applies if the Commissioner exercises his or her power under *new section 15A* to take no further action in respect of a complaint. It requires the Commissioner to give the complainant and the Judge who is the subject of the complaint written notification stating—

- that the Commissioner has exercised that power; and

- the grounds on which the Commissioner is satisfied that further consideration of the complaint would, in all the circumstances, be unjustified.

Clause 12 amends section 16, which relates to dismissal of complaints that fail to meet specified required threshold criteria. Section 16(1)(i) requires the Commissioner to dismiss a complaint if he or she is of the opinion that he or she has previously considered the subject matter of the complaint, and there are no grounds to justify the Commissioner taking any steps under—

- section 17 (which relates to him or her referring complaints to the Head of Bench); or
- section 18 (which relates to him or her recommending that the Attorney-General appoint a Judicial Conduct Panel).

New section 16(1A) ensures that the Commissioner has previously considered the subject matter of the complaint for the purposes of section 16(1)(i) if he or she has exercised his or her power under *new section 15A* (inserted by *clause 11*) to take no further action in respect of the complaint. *New section 16(1B)* ensures that *new section 16(1A)* does not limit section 16(1)(i).

Savings provision

Clause 13 inserts a new heading and *new section 36*. *New section 36* is a savings provision relating to complaints made before the Bill, when enacted, comes into force. It requires those complaints to be dealt with as if the Bill had not been enacted.

Related amendments to other Acts

Clauses 14 and 15 amend references to the Commissioner in the Coroners Act 2006 and the Official Information Act 1982. The amendments expressly extend those references to the Deputy Commissioner.

Part 2

Amendment to Judicature Act 1908

Principal Act amended

Clause 16 indicates that *Part 2* amends the Judicature Act 1908.

Associate Judges of High Court

Clause 17 amends section 26C(2) of the Judicature Act 1908 to increase, from 6 to 9, the maximum number of Associate Judges of the High Court.

Hon Dr Michael Cullen

Judicial Matters Bill

Government Bill

Contents

		Page
1	Title	2
2	Commencement	2
Part 1		
Amendments to Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004		
<i>Principal Act amended</i>		
3	Principal Act amended	3
<i>Deputy Commissioner</i>		
4	Interpretation	3
5	Heading above section 7 amended	3
6	Functions and powers	3
7	New sections 8A and 8B inserted	4
	8A Deputy Judicial Conduct Commissioner	4
	8B Function and powers of Deputy Commissioner	4
8	Duty to act independently	6
9	Other provisions relating to Commissioner	6
<i>Disposal of complaints</i>		
10	Commissioner must conduct preliminary examination	6
11	New section 15A inserted	6
	15A Commissioner's power in certain circumstances to take no further action in respect of complaints	7
12	Commissioner must dismiss complaints that fail to meet required threshold	7

	<i>Savings provision</i>	
13	New heading and new section 36 inserted	8
	<i>Savings provision</i>	
36	Amendments do not apply to certain complaints	8
	<i>Related amendments to other Acts</i>	
14	Coroners Act 2006 amended	8
15	Official Information Act 1982 amended	8
	Part 2	
	Amendment to Judicature Act 1908	
	<i>Principal Act amended</i>	
16	Principal Act amended	9
	<i>Associate Judges of High Court</i>	
17	Appointment of Associate Judges	9
	Schedule 1	10
	Amendments to Part 1 of Schedule 2	
	Schedule 2	12
	New Schedule 1 substituted	

The Parliament of New Zealand enacts as follows:

- 1 Title**
This Act is the Judicial Matters Act **2008**.
- 2 Commencement**
This Act comes into force on the day after the date on which it receives the Royal assent. 5

Part 1
Amendments to Judicial Conduct
Commissioner and Judicial Conduct
Panel Act 2004

Principal Act amended 5

3 Principal Act amended

This **Part** amends the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.

Deputy Commissioner

4 Interpretation 10

(1) Section 5 is amended by inserting the following definition in its appropriate alphabetical order:

“**Deputy Commissioner** means a Deputy Judicial Conduct Commissioner appointed under **section 8A**”.

(2) Section 5 is amended by repealing the definition of **Judicial Conduct Commissioner** or **Commissioner** and substituting the following definition: 15

“**Judicial Conduct Commissioner** or **Commissioner**—

“(a) means a Judicial Conduct Commissioner appointed under section 7; and 20

“(b) in sections 11 to 20 and 34, and clauses 7, 9, and 10 of Schedule 2, includes a Deputy Judicial Conduct Commissioner appointed under **section 8A** and carrying out his or her function under **section 8B**”.

5 Heading above section 7 amended 25

The heading above section 7 is amended by adding “*and Deputy Judicial Conduct Commissioner*”.

6 Functions and powers

(1) The heading to section 8 is amended by adding “**of Commissioner**” 30

(2) Section 8 is amended by inserting the following subsections after subsection (1):

- “(1A) In carrying out his or her functions in relation to a complaint, the Commissioner may decide that he or she has a conflict of interest in relation to the complaint.
- “(1B) The functions of the Commissioner—
- “(a) must not be carried out by the Commissioner if they relate to a complaint in relation to which the Commissioner has decided that he or she has a conflict of interest; and
 - “(b) are not carried out by the Commissioner in relation to any complaints in the situations specified in **section 8B(1)(b)(i) and (ii)**.
- “(1C) The Commissioner must refer promptly to the Head of Bench a complaint—
- “(a) referred to the Commissioner by the Deputy Commissioner under **section 8B(4)**; and
 - “(b) in relation to which the Commissioner has decided that he or she has a conflict of interest.”

7 New sections 8A and 8B inserted

The following sections are inserted after section 8:

- “**8A Deputy Judicial Conduct Commissioner** 20
- “(1) An office called the Deputy Judicial Conduct Commissioner is established.
- “(2) The Deputy Commissioner is appointed by the Governor-General on the recommendation of the House of Representatives.
- “(3) Before a recommendation may be made under **subsection (2)**, the Attorney-General must consult the Chief Justice about the proposed appointment and must advise the House of Representatives that the Chief Justice has been consulted. 25
- “(4) A person is not to be regarded as being employed in the service of the Crown for the purposes of the State Sector Act 1988 or the Government Superannuation Fund Act 1956 solely because of his or her appointment as the Deputy Commissioner. 30
- “**8B Function and powers of Deputy Commissioner**
- “(1) The function of the Deputy Commissioner is to carry out the functions of the Commissioner in relation to the following complaints (and no others): 35

- “(a) complaints (other than those that the Deputy Commissioner has referred to the Commissioner under **subsection (4)**) in relation to which the Commissioner has decided that he or she has a conflict of interest; and
- “(b) complaints of any kind in 1 or more of the following situations:
 - “(i) during the absence from office of the Commissioner;
 - “(ii) if the Commissioner is incapacitated in a way that affects the carrying out of his or her functions;
 - “(iii) during a vacancy in the office of Commissioner.
- “(2) In carrying out his or her function in relation to a complaint, the Deputy Commissioner may decide that he or she has a conflict of interest in relation to the complaint.
- “(3) After deciding that he or she has a conflict of interest in relation to a complaint, the Deputy Commissioner must—
 - “(a) not carry out his or her function in relation to the complaint; and
 - “(b) promptly refer the complaint to the Head of Bench (unless the Deputy Commissioner refers the complaint to the Commissioner as soon as practicable under **subsection (4)**).
- “(4) The Deputy Commissioner may refer a complaint to the Commissioner as soon as practicable (instead of referring it promptly to the Head of Bench under **subsection (3)(b)**) if the Deputy Commissioner—
 - “(a) is carrying out the Commissioner’s functions in relation to the complaint in 1 or more of the situations specified in **subsection (1)(b)(i) to (iii)**; and
 - “(b) decides that he or she has, in relation to the complaint, a conflict of interest; but
 - “(c) believes on reasonable grounds, after consulting the complainant (if any), that the Commissioner is likely to be able to begin to deal with the complaint within a reasonable time.
- “(5) The Deputy Commissioner has all the powers necessary for carrying out his or her function.
- “(6) The fact that the Deputy Commissioner carries out a function or exercises a power is, in the absence of proof to the contrary,

sufficient evidence of the Deputy Commissioner’s authority to do so.”

8 Duty to act independently

Section 9 is amended by adding the following subsection as subsection (2):

- “(2) The Deputy Commissioner must act independently in carrying out his or her function.”

9 Other provisions relating to Commissioner

- (1) The heading to section 10 is amended by adding “**and Deputy Commissioner**”.

- (2) Section 10 is amended by adding “and the Deputy Commissioner”.

- (3) Part 1 of Schedule 2 is amended in the manner indicated in **Schedule 1**.

Disposal of complaints

10 Commissioner must conduct preliminary examination

- (1) Section 15(1) is amended by inserting the following paragraph after paragraph (a):

“(ab) there are any grounds for exercising his or her power under **section 15A** to take no further action in respect of the complaint; or”.

- (2) Section 15(5) is amended by inserting the following paragraph before paragraph (a):

“(aa) exercise his or her power to take no further action in respect of the complaint (**section 15A**); or”.

- (3) Schedule 1 is repealed and the Schedule 1 set out in **Schedule 2** of this Act substituted.

11 New section 15A inserted

The following section is inserted after section 15:

- “**15A Commissioner’s power in certain circumstances to take no further action in respect of complaints**
- “(1) The Commissioner may take no further action in respect of a complaint if satisfied that further consideration of the complaint would, in all the circumstances, be unjustified. 5
- “(2) Reasons why further consideration of a complaint would, in all the circumstances, be unjustified, may be or include all or any of the following that apply to the complaint:
- “(a) that the complaint has been resolved to the complainant’s satisfaction following an explanation from the Judge who is the subject of the complaint: 10
- “(b) that the complaint is genuine and made in good faith, but is based on a misunderstanding:
- “(c) that the complaint is one in respect of which the Commissioner, having made all reasonable efforts to complete the preliminary examination required by section 15 and form the opinion required by section 15(1), does not have, and is unlikely to be able to obtain, enough information to form that opinion. 15
- “(3) The fact that a complaint has been resolved to the complainant’s satisfaction because of an apology by the Judge who is the subject of the complaint is not, by itself, a reason why further consideration of a complaint would, in all the circumstances, be unjustified. 20
- “(4) **Subsection (2)** does not limit **subsection (1)**. 25
- “(5) If the Commissioner exercises his or her power under this section to take no further action in respect of a complaint, he or she must give the complainant and the Judge who is the subject of the complaint written notification stating—
- “(a) that the Commissioner has exercised that power; and 30
- “(b) the grounds on which he or she is satisfied that further consideration of the complaint would, in all the circumstances, be unjustified.”
- 12 Commissioner must dismiss complaints that fail to meet required threshold** 35
- Section 16 is amended by inserting the following subsections after subsection (1):

“(1A) The Commissioner has previously considered the subject matter of the complaint for the purposes of subsection (1)(i) if he or she has exercised his or her power under **section 15A** to take no further action in respect of the complaint.

“(1B) **Subsection (1A)** does not limit subsection (1)(i).” 5

Savings provision

13 New heading and new section 36 inserted

The following heading and section are inserted after section 35:

“*Savings provision* 10

“36 Amendments do not apply to certain complaints

Complaints made before the commencement of the **Judicial Conduct Commissioner and Judicial Conduct Panel (Deputy Commissioner and Disposal of Complaints) Amendment Act 2008** must be dealt with as if that Act had not been enacted.” 15

Related amendments to other Acts

14 Coroners Act 2006 amended

(1) This section amends the Coroners Act 2006.

(2) Section 113(2) is amended by inserting “or the Deputy Commissioner” after “the Commissioner” in each place where it appears. 20

15 Official Information Act 1982 amended

(1) This section amends the Official Information Act 1982.

(2) Paragraph (1)(i) of the definition of **official information** in section 2(1) is amended by inserting “the Deputy Judicial Conduct Commissioner,” after “the Judicial Conduct Commissioner,”. 25

(3) Section 2(6)(f) is amended by inserting “, the Deputy Judicial Conduct Commissioner,” after “the Judicial Conduct Commissioner” in the first place where it appears. 30

Part 2
Amendment to Judicature Act 1908

Principal Act amended

16 Principal Act amended

This **Part** amends the Judicature Act 1908.

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Associate Judges of High Court

17 Appointment of Associate Judges

Section 26C(2) is amended by omitting “6” and substituting “9”.

Schedule 1		s 9(3)
Amendments to Part 1 of Schedule 2		
Heading to Part 1 of Schedule 2		
Add “and Deputy Judicial Conduct Commissioner”.		
Heading to clause 1		5
Add “and Deputy Commissioner”.		
Clause 1(1)		
Insert “or as the Deputy Judicial Conduct Commissioner” after “Commissioner”.		
Clause 1(2)		10
Add “or as the Deputy Commissioner”.		
Clause 1(3)		
Insert “or the Deputy Commissioner” after “The Commissioner”.		
Clause 1(3)(a)		15
Insert “or the Deputy Commissioner” after “the Commissioner”.		
Clause 1(4)		
Insert “or the Deputy Commissioner” after “The Commissioner”.		
Clause 2		
Insert after subclause (1):		
“(1A) If a vacancy occurs in the office of Deputy Commissioner,		20
the vacancy may be filled by the appointment of a successor		
by the Governor-General on the recommendation of the House		
of Representatives.”		
Clause 2(2)(a)		25
Insert “specified in subclause (1) or (1A) ” after “a vacancy”.		
Heading to clause 3		
Add “or Deputy Commissioner”.		

Clause 3

Insert “or the Deputy Commissioner” after “the Commissioner”.

Heading to clause 4

Insert “and Deputy Commissioner” after “Commissioner”.

Clause 4(1)

5

Repeal and substitute:

“(1) This clause applies to the Commissioner, to the Deputy Commissioner, and to every person engaged or employed in connection with the work of the Commissioner or the Deputy Commissioner.”

10

Clause 4(5)

Insert “or the Deputy Commissioner” after “the Commissioner”.

Clause 4(6)

Insert “or the Deputy Commissioner” after “the Commissioner”.

Clause 5(1)

15

Insert “and the Deputy Commissioner” after “The Commissioner”.

Clause 5(2)

Repeal and substitute:

“(2) The Commissioner or the Deputy Commissioner is entitled to receive from the funds of the Commissioner’s office the actual and reasonable costs for travelling and other expenses that relate to the performance of his or her duties and responsibilities as the Commissioner or as the Deputy Commissioner.”

20

Clause 6

Omit “has” and substitute “and Deputy Commissioner have”.

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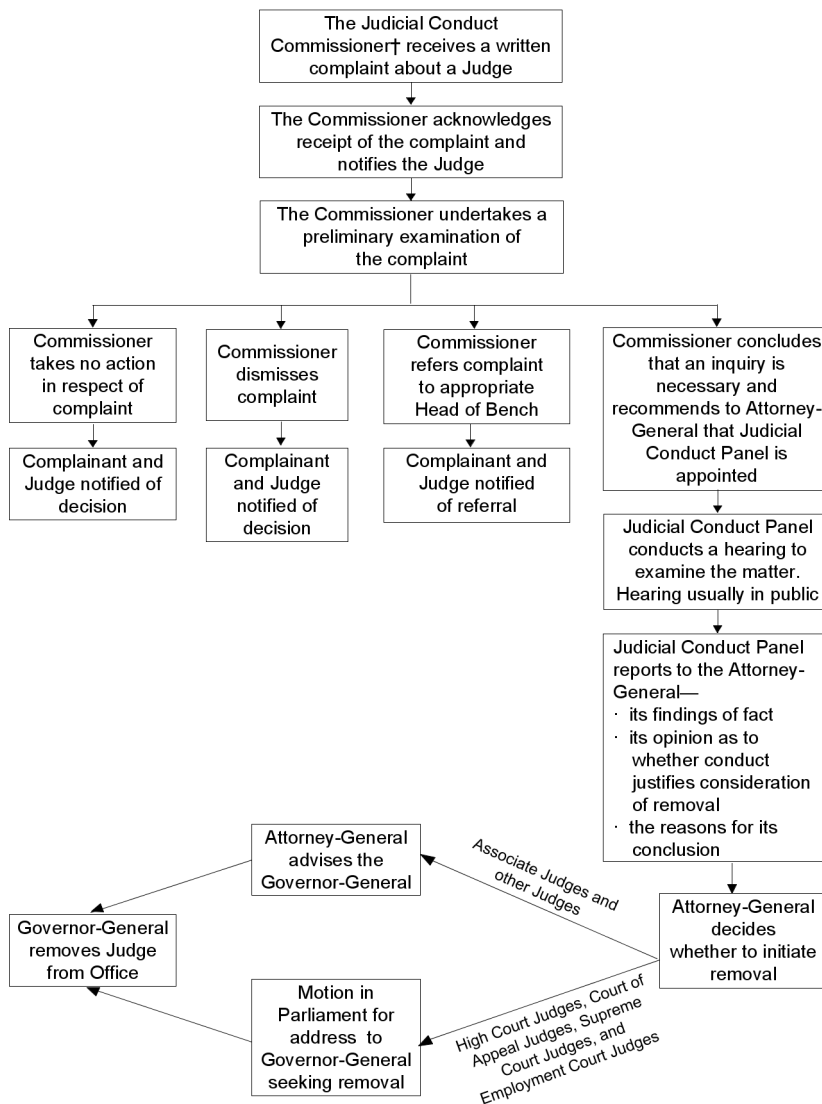
Omit “is located” and substitute “and the Deputy Commissioner are located”.

Schedule 2
New Schedule 1 substituted
Schedule 1
Overview of process for Judicial Conduct
Commissioner and Judicial Conduct
Panel

s 10(3)

s 3

5



†**Judicial Conduct Commissioner** or **Commissioner** includes a Deputy Judicial Conduct Commissioner carrying out the Commissioner’s functions when the Commissioner has a conflict of interest, is absent from office, or is incapacitated, and during a vacancy in the office of Commissioner.

