ACCOUNTABILITY FOR THE ADMINISTRATION AND ORGANISATION OF THE JUDICIARY

How Should the Judiciary be Accountable for their Work beyond the Courtroom?

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Summary

The judiciary is, as an institution, accountable to society to administer and organise itself so as to provide the resolution of disputes in a way that is not only fair, just and in accordance with the law, but also efficient, cost effective, and with a high degree of professionalism and skill. Judicial independence means that Judges cannot be accountable in a sacrificial sense, in the way that public servants would be accountable to their minister. However, the judiciary is a branch of government which makes decisions in individual cases which determine and uphold peoples’ rights, and makes administrative decisions at the Head of Bench level which have a significant impact on the efficiency and quality of the justice process. Growing attention is being paid to these administrative decisions and to the organisation of the judiciary as an institution. In a modern democracy, Judges must therefore be accountable to society in an explanatory way for their organisation and administration. This accountability should mirror judicial accountability in respect of judicial decisions, where reasons must be provided which the public can scrutinise and comment on, while preserving judicial independence. To withstand scrutiny, it is imperative that the efforts of the judiciary are fully supported and resourced by the executive, particularly in an institutional model where the judiciary has no independent budgetary or resource control. The appropriate level of detail to be divulged will depend on the nature of the administrative information. It is important that sufficient information be available to the public so that the public confidence in the judiciary as a well-organised, professional, efficient and independent institution is not misplaced. Without that confidence, the legitimacy of courts will be undermined. This is in concert with the democratic principle that no branch of government should have power without accountability. In recognition of this accountability, a minimum set of performance measurement areas for the judicial administration is posed for discussion.
I. Why the Judiciary Must be Accountable for their Administration and Organisation

1. Traditional Judicial Independence and Accountability

Judicial independence is a fundamental and essential part of modern democracy. The constituent elements of judicial independence are well known. They consist of both protections and restrictions. Protections include tenure of office, legislation prohibiting decrease in salary, and inability to be sanctioned apart from removal in cases of serious misconduct. Restrictions include laws or conventions prohibiting Judges from determining cases in which they have, or may appear to have, a pecuniary or non-pecuniary interest, inability to hold positions and offices inconsistent with judicial office, and restrictions on public comment on cases or issues which have a political element.

While these elements of judicial independence are well known, their justification is less understood. Judicial independence is not a private right of Judges designed to protect them personally. It is a private right of citizens, who all have a vested interest in having a neutral, independent court system to protect their fundamental rights from interference by the state and others. Modern democracy is founded on the rule of law, whereby every action of both citizen and government is subject to the law. Judicial independence gives this precept effect, by removing the judiciary from the sphere of influence projected by the executive and legislative arms of government. Executive action is kept within its legal bounds and individual rights are upheld because Judges can make decisions, even manifestly unpopular ones, without fear of losing their position or other adverse consequences. This is the separation of powers in operation, with each of the legislative, executive and judicial arms of government acting as a check and balance on the other.

When accepting judicial office in New Zealand, Judges swear an oath that they will do right to all manner of people according to the laws of New Zealand “without fear or favour, affection or ill will.” Judicial independence enables Judges to execute this oath and uphold the law by removing factors which may influence their decision. Judges can act with complete impartiality when there is no threat of penalty or offer of benefit for them personally. The public must have confidence that the judiciary will act with such impartiality in every decision before them. That confidence is critical, as the legitimacy of the courts depends upon public acceptance of them as the final and authoritative arbiter of disputes. Such confidence, and thus legitimacy, is lost not only if Judges fail

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2 s 18, Oaths and Declarations Act 1957.
to decide cases impartially, but also if they appear not to decide cases impartially. That is why judicial independence is protected in a risk-averse fashion, and underpins the statement that “... justice should not only be done, but should manifestly and undoubtedly be seen to be done.”

Independence, however, does not mean that Judges are beyond control and can do as they please. The former Chief Justice of the High Court of Australia, Sir Murray Gleeson, explains that uncontrolled power is unacceptable in a modern democracy. All power, including that of Judges, should be responsible and responsive to the community. Thus, Judges must be accountable. Judicial independence determines the form, not the presence of accountability. The two are complementary concepts.

The idea of “accountability” has traditionally been understood in the context of a relationship whereby one actor is subordinate to a superior. The subordinate actor must account to their superior for their actions and omissions, in respect of which the superior has authority to impose reward or sanction as appropriate. The paradigm reward and sanction, respectively financial incentives and demand for resignation, are obviously inconsistent with judicial independence. Their imposition would make Judges subordinate to the executive and compromise impartiality. Justice Jack Beatson of the High Court of England and Wales puts it thus:

Neither individual judges nor the judiciary as a body should be subject to forms of accountability prejudicing their core responsibility as the branch of the state responsible for providing the fair and impartial resolution of disputes between citizens, and between citizens and the state in accordance with the prevailing rules of statutory and common law.

The question of what forms of accountability should apply to the judiciary can be answered with reference to the purpose of holding Judges to account: to ensure that the public confidence in the courts as independent and neutral arbiters of disputes is not misplaced. This being so, Judges are accountable by conducting their judicial role in the public eye. Apart from a few specified exceptions, courts are open to the public and the media. Judges must give reasons for all of their decisions, and these must be accessible by the public. The public is free to scrutinise and voice their agreement or disagreement. Legal academics are free to dissect and critique the reasoning of each Judge. A wrong decision can be corrected on appeal or review. Allegations of judicial misconduct can be submitted to the Judicial Conduct Commissioner for investigation. Former Chief Justice of New South Wales, Sir James Spigelman, explains the combined effect of these mechanisms:

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7. Justice J J Spigelman, Chief Justice of New South Wales “Seen to be Done: The Principle of Open Justice” (keynote address to the 31st Australian Legal Convention, Canberra, 9 October 1999).
The principle of open justice, in its various manifestations, is the basic mechanism of ensuring judicial accountability. The cumulative effect of the requirements ... is the way the judiciary is held accountable to the public.

Conducting the function of judging in the public eye allows the public to satisfy themselves that this function is being performed to an acceptable standard. The mere knowledge that one’s decisions will be open to public scrutiny tends to encourage high level decision making. As Justice Gleeson notes, because judges are unique amongst decision makers in that they are compelled to give public reasons for every decision they make, this is an extremely powerful form of accountability.8 Civil law countries in Europe have significantly more developed mechanisms for promulgating information about judicial decisions to the public, to the extent that in some nations, quality control mechanisms and review of substantive judicial decisions have been adopted as a matter of routine. These are usually in response to specific constitutional developments or in some cases, a loss of public confidence in the courts.9 These strong forms of accountability, and accompanying performance assessment mechanisms, are not aspired to for the New Zealand courts.

The explanatory form of accountability appropriate for common law nations does no offence to judicial independence, as it involves no direct punitive or incentivising consequences for the individual Judge that might affect their impartiality. This is not, however, accountability without teeth; though Judges cannot be held directly accountable to the public in the sense that they can be removed from office, the public may at any time lose their confidence in the courts as a legitimate institution. In a plea to judges to “speak as clearly as possible to the public”, Lord Neuberger recently observed:10

... a clearly reasoned judgment enables the public to understand the law and to see what is being done and said by the judges in the courts, to see how justice is being dispensed. Accordingly publically pronounced judgments represent an important means through which public confidence in, and understanding of, the courts, and therefore in the rule of law, can be secured.

This form of accountability has long applied to decisions that Judges make on the bench. There is, however, a growing appreciation that the work of Judges extends beyond the courtroom. This has necessitated consideration of how Judges, and the judiciary as a whole, should be accountable for these wider functions.

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8 Gleeson, above n 4 at 122. Quoted with approval in Spigelman, above n 7.

9 Slovenia is a particular example of the latter, where in response to a loss of public confidence Judges are now subject to strict performance requirements which are directly tied to their career progression and salary. For a recent overview of various forms of European judicial quality assessment systems, see Philip M Langbroek (ed) Quality Management in Courts and in the Judicial Organisations in 8 Council of Europe Member States: A Qualitative Inventory to Hypothesise Factors for Success or Failure (2010) CEPEJ 3.

10 Lord Neuberger “No Judgment – No Justice” (First Annual BAILII Lecture, 20 November 2012) at [11] and [13]. See also Flannery v Halifax Estate Agencies Ltd [2000] 1 WLR 377 (CA) at 381, confirming that the duty to give reasons is a function of due process which is necessary to explain to the losing party why they lost, and also raises the quality of reasoning.
2. Accountability of the Judiciary as an Institution

Writing in 1998, then-Chief District Court Judge Ronald Young observed that the fiction that Judges sat in court and decided cases, and nothing more, had been dispelled. Judges had a vital interest in the administration of the courts, and best served the public by taking an active interest in how courts were run. The idea, echoed by Australian Heads of Bench and the Australian Institute of Judicial Administration, was that Judges should take some responsibility, and thus be accountable for wider standards of judicial professionalism and efficiency. New approaches to public management and increasing volume and complexity of litigation have brought the efficiency with which Judges resolve cases under scrutiny. Increased attention is now being paid to the accountability, not of individual judges, but of the judiciary as a well organised and trained institution.

Cross-jurisdictional comparison in this area is difficult, as different jurisdictions feature different division of responsibility between the judiciary and the executive for the administration of the courts. In New Zealand, the division is highly traditional. The Ministry of Justice has full responsibility for court registry functions, counter services, upkeep of courthouses, scheduling of cases to Judges, staffing structures and the supply of support services to the judiciary. The judiciary has no responsibility, and therefore no accountability, in respect of these tasks.

In New Zealand the judiciary has relatively little administrative control over the wider courts and no independent financial or budgetary control. This means that the judiciary relies heavily on the executive to provide an adequate level of administrative support, facilities and infrastructure within

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14 Chief Justice Gleeson noted in North Australian Aboriginal Legal Aid Service Inc v Bradley (2004) 206 ALR 315 (HCA) at [3]: “Within the Australian judiciary, there are substantial differences in arrangements concerning the appointment and tenure of judges and magistrates, terms and conditions of service, procedures for dealing with complaints against judicial officers, and court administration. All those arrangement are relevant to independence. The differences exist because there is no single ideal model of judicial; independence, personal or institutional.”

which to conduct their public function.\textsuperscript{16} If this level of support is not forthcoming, discharge of the judicial function in an orderly, timely and efficient manner becomes difficult, with little ability to remedy due to the lack of control. For example, the desire of Judges to resolve disputes is frustrated if the executive cannot provide sufficient numbers of courtrooms, or court staff for those courtrooms, for those disputes to be heard. A lack of support raises issues for accountability and public confidence. In the context of substantive judicial decisions, a current issue is how District Court Judges can be accountable, and public confidence maintained, when the Ministry of Justice cannot spare staff to support the publication of District Court judgments. The lack of public access poses a major accountability issue. The same accountability issues arise where the judiciary is inadequately supported in its organisational and administrative function. The lack of public understanding about the degree to which the judiciary rely on executive support creates further risks to public confidence in the judiciary when delays are caused by limited infrastructure and funding.

Consistent with judicial independence but subject to appropriate funding support, Judges have full control over their own training, education, organisation of workloads, rostering to sit in particular courts and jurisdictions at particular times, case management, timeframes for delivery of decisions, court hours, and personal staff (though those staff are employed by the Ministry of Justice). These matters of “judicial administration” are, in the case of the District Courts, officially the responsibility of the Chief District Court Judge as set out in s 9 of the District Courts Act 1947 (our emphasis):

\begin{enumerate}
\item Assignment and rostering of District Court Judges
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\item The Chief District Court Judge shall be responsible for ensuring the orderly and expeditious discharge of the business of District Courts throughout New Zealand, and accordingly may ... give all such directions as are contemplated by subjection (2).
\item Each Judge shall sit in such jurisdictions at such times as the Chief District Court Judge may from time to time direct.
\end{enumerate}
\end{enumerate}

The italicised phrase encompasses the above matters of judicial administration. The relationship between a Head of Bench and other Judges is somewhat delicate, as judicial independence requires judges to perform their adjudicative function free from the influence of other judges. A Head of Bench has no inherent ability to discipline Judges in respect of their decisions, beyond any specific provision made in legislation or informal internal processes.\textsuperscript{17} For example, the judicial complaints process in New Zealand is governed by the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004. All complaints about Judges are directed to the Judicial Conduct Commissioner, who conducts a preliminary assessment. The Commissioner may dismiss the complaint, refer the complaint to the Head of Bench if the complaint has substance but does not justify the removal of a Judge, or recommend that a Judicial Conduct Panel be appointed to inquire into complaints which may require removal of a Judge. Where a complaint is referred to a Head of Bench, the Head of Bench can only deal with the complaint through internal measures that are voluntarily adhered to,

\textsuperscript{16} The Ministry of Justice recognises the importance of judicial independence, the need to provide adequate support to the judiciary and the lack of ability to direct staff who exercise judicial functions. See Ministry of Justice Annual Report: 1 July 2011 – 30 June 2012 (E.64, 2012) at 4.

\textsuperscript{17} Gleeson, above n 1.
given judicial independence. The Head of Bench is not given any specific authority under the Act to administer penalties. If a Judicial Conduct Panel is appointed, the Head of Bench may or may not be a member, depending on which Judges the Attorney-General appoints. Thus, the role of the Head of Bench to informally investigate and address complaints is recognised in legislation, but no specific powers are conferred to do so.\footnote{Complaints from the public informally sent directly to a Head of Bench are dealt with in the same way informal way. Other common law jurisdictions essentially work the same way, though they may lack the intervening step of a Judicial Conduct Commissioner (as in Victoria), or have an equivalent Judicial Commission (as in New South Wales).}

The concept of internal independence from other Judges does not, however, apply to the administrative aspects of the judicial role. Supervision and leadership is needed over the rostering of Judges and matters of judicial organisation in order to promote the expeditious delivery of a high quality of justice. The Head of Bench fulfils this role, though the line between the judicial administrative and adjudicative functions is often difficult to draw.\footnote{Shimon Shetreet “The Challenge of Judicial Independence in the Twenty-First Century” (2000) 8 Asia Pacific Law Review 153 at 157-158.}

The Canadian Federal Court of Appeal has expressly set out the obligations of a Head of Bench in relation to judicial administration (our emphasis):\footnote{Canada (Minister of Citizenship and Immigration) v Tobiass (1997) 142 DLR (4th) 270 (Federal Court of Canada at 282-283 per Marceau JA. Cited with approval by Chief Justice Spigelman in Bruce v Cole (1998) 45 NSWLR 163 (NSWCA) at 195-196.}

\begin{quote}
In my judgment, a chief justice cannot entirely disinterest himself or herself from the pace of progress and the timeliness of disposition of the cases the Court has to deal with. He or she has a responsibility to ensure that the Court provides “timely justice”. Indeed, it is his or her duty to take an active and supervisory role in this respect.
\end{quote}

A Head of Bench takes on the bulk of judicial administrative functions out of necessity, to enable Judges to focus on their case loads.\footnote{Mason, above n 12 at 130.} But while a Head of Bench has the function of oversight, the Head of Bench is not a manager or superior in the sense that they can call other judges to account. For the judicial administration to be effective, every Judge must take a share in the responsibility for the judicial administration of the court. Following significant reforms occasioned by the passing of Constitutional Reform Act 2005 (UK), the Judiciary for England and Wales, in a public document explaining in what ways the judiciary is accountable, expressly accepted that the responsibilities of the Lord Chief Justice as head of the judiciary have equivalents applicable to the judiciary as a whole:\footnote{Judiciary of England and Wales “The Accountability of the Judiciary” (2007) at 4. The Lord Chief Justice’s responsibilities as head of the judiciary are to represent the views of the Judiciary to Parliament, the Lord Chancellor and the Ministers of the Crown; maintain the appropriate arrangements for the welfare, training and guidance of the judiciary within the resources made available by the Lord Chancellor; and maintain}
Within the resources provided ... the responsibility of the Lord Chief Justice for deployment of individual judges, the allocation of work within the courts, and the well-being, training and guidance of serving (full and part-time) judges, mean that the judiciary is responsible for:—

i. An effective judicial system, including the correction of errors;

ii. Training judges in the light of changes in law and practice; and

iii. Identifying and dealing with pastoral, equality, and health and safety issues concerning serving judges.

By taking on these responsibilities at an institutional level, the Judiciary for England and Wales have made themselves accountable for the delivery of those responsibilities.

As an institution, the judiciary must be as independent in their administration as individual Judges are when making decisions in court. This is inherent in the separation of powers. If the judiciary were not independent in the management of their administrative tasks, outside interference would inevitably impact on the impartiality of individual Judges in the courtroom, whether in fact or in appearance. For example, public confidence in the impartial delivery of justice would be lost if the executive had involvement in assigning Judges to cases, particularly where a government department was involved.

Conversely however, the administrative decisions that Judges make regarding rostering and case management have a very real impact on access to and the efficiency of justice, which is inherently a political matter. Thus the English Judiciary has recognised that it is appropriate for them to be subject to some form of accountability in respect of these decisions.

The form of accountability should depend upon the objective: to ensure that the public confidence in the judiciary as a well organised, professional, efficient, and independent institution is not misplaced. Just as the maintenance of public confidence can be maintained in respect of individual judicial decisions by making those decisions in public, so can public confidence in the administrative aspects of the judiciary be maintained by making details available to the public. Chief Justice Gleeson observes:

The best practical solution to the problem lies in the recognition, by the judiciary, of the right of the legislature, and the executive, and the public, to know what administrative decisions are being taken by the judiciary, and why. Judges have traditionally accepted that the corollary of their adjudicative independence is an obligation to make their decisions openly and with full reasons. The same reasoning must apply to their administrative independence.

appropriate arrangements for the deployment of the judiciary and the allocation of work within courts. See s 7, Constitutional Reform Act 2005 (UK).

23 Shetreet, above n 19 at 156.

24 Gleeson, above n 4 at 135.

25 Judiciary of England and Wales, above n 22 at 8.

26 Gleeson, above n 4 at 135.
The English Judiciary has taken voluntary steps to make significant amounts of information about its own function, limits and internal organisation available to the public.27 A major initiative has been the judiciary’s own website www.judiciary.gov.uk which aims to increase the public’s understanding of the judicial role and constitutional position. It contains the statement on judicial accountability already referred to, as well as important decisions, updates on the work of the Judicial Office, practice directions, protocols, and reports from Judges tasked with reviewing aspects of the administration of justice. More detailed qualitative and statistical data on the performance of the judiciary is contained in an annual report prepared by the Lord Chief Justice. This report contains detail on delays, workloads, training, appeals, conduct issues, and other administrative matters that are within the responsibility of the judiciary.

Annual reports are a feature of other jurisdictions. All courts in the Australian states of Victoria and Queensland, and the Supreme Court of South Australia, submit and publish annual reports to the relevant Minister or Attorney General in accordance with legislative requirements. Courts in New South Wales and Western Australia28 publish annual reviews of their own volition, without any legislative requirement.29 In Canada, legislative requirements for reporting are present in British Columbia, Manitoba, Ontario, and the Alberta Court of Queen’s Bench. In some instances, the legislative requirements set out specific matters for the annual report to include which relate to judicial administration.30 In Singapore, both the Subordinate Courts and the Supreme Court publish annual reports. These contain an abundance of information on the judiciary and statistics on court performance, due to the judiciary in that jurisdiction having wide responsibility for court administration.

These practices offer explanatory accountability for the various matters that the judiciary is responsible for. Exposing these matters to public comment and scrutiny provides an incentive for the judiciary to develop appropriate and effective management, leadership and training practices, in the same way that exposing individual judicial decisions to public comment raises the quality of those decisions. This is as applicable to the New Zealand District Court bench as it is to the English judiciary, given the responsibilities flowing from s 9. The need to develop modern administrative systems and communicate these to the public, to an appropriate extent, has become more pressing in light of recent media attention on the functioning and efficiency of the courts,31 and

27 See generally Beatson, above n 6 at 13-15.

28 Except the Magistrates Court of Western Australia.

29 Notably these use a different nomenclature of “annual review”, likely because there is no authority that the judiciary is “reporting” to.

30 For example, section 11.2(2) of the Provincial Court Act (Manitoba) requires the annual report to include numbers of cases, availability of trial dates, unused public funds from unused judicial vacation leave or retirement allowances, the effective utilisation of courtrooms, and any other information, including statistical information, concerning the operation, functioning and administration of the court.

31 For example, Bevan Hurley “Judge attacks delays and throws out drink case” The New Zealand Herald (online ed, Auckland, 4 November 2012); Bevan Hurley “Courts in ‘crisis’ as trials delayed” The New Zealand Herald
recommendations from the Law Commission for formal reporting requirements being placed on the judiciary.32 It is necessary to respond to these developments in order to maintain public confidence in New Zealand today.

There is an obvious tension between the acknowledgement of the need for and existence of this principle in a modern democracy, and its practical implementation in the context of the New Zealand District Courts. Because the judiciary relies on the executive for support, the performance of the judiciary is inextricably linked to the degree, extent and quality of that support. Inadequate support not only has a direct impact on performance, but also limits the means by which the judiciary can unilaterally organise and deploy themselves to enhance their performance.

3. Maintaining Public Confidence in the Judiciary in 2013

The need for public confidence in the administrative functions of the judiciary has become more significant over time. Although judicial independence is an important factor, other important factors include procedural fairness, efficiency, accessibility and professionalism. These factors have a fluid relationship. At any one time they may complement each other or conflict, or one may be a precondition for or consequence of another.33 These other factors must be given proper regard in order for judicial independence to be of any worth or value to the public. As Justice Nicholson explains (our emphasis):34

> The quality of independence given to the judicial branch is unique in the political spectrum and in turn requires of the branch that it be accountable in the sense that it perform its functions efficiently. A judicial branch which is (for example) years behind in disposal of its caseload may be independent but it has no political relevance. The quality of independence ceases to matter to citizens if they cannot have it applied in prompt resolution of their disputes. The principle of judicial independence requires of the judicial branch that it be efficient in the dispatch of its business for without efficiency the preservation of public confidence necessary to the existence of the principle will not occur. Public confidence is diminished by delay in the administration of justice.35

Public confidence in Judges and in the judiciary now requires more than simply satisfaction with the independence of the judiciary. The judiciary must, as an arm of government, adapt and respond to


33 Shetreet, above n 19 at 154.


35 Gallagher v Durack (1983) 152 CLR 238 (HCA) at 243.
changing demands of the public in an era of unprecedented access to and expectation of information. More than a decade ago, Justice Susan Denham explained:\(^6\)

There has been accelerating change and development in our societies. The members of the community are educated. Information and communication technologies are driving modern life. Society is transforming and with it the democratic institutions. All institutions are subject to scrutiny. The checks and balances between the people and the institutions of state have been affected by rapid growth and development. In modern society the people and institutions are relating to each other in changing ways. It is of immense importance to society that the independence of the judiciary be protected, whilst at the same time having a modern, accountable judiciary.

Similarly, former Chief District Court Judge Ronald Young observes (our emphasis):\(^7\)

If public confidence in the judiciary was ever based on an ignorance of the judicial system, it can be no longer. We live in an age when it has become the norm to question those in authority. Perhaps what is occurring in New Zealand is a juncture in the natural progression from unquestioned acceptance to confidence based on understanding. Right now there is still a lack of understanding.

If the legitimacy of the judiciary is be maintained, the judiciary must have the confidence of the public. This public confidence can only be maintained with the provision of appropriate information that the judiciary is, not just independent, but effective, efficient, and well administered. Public confidence does not manifest itself in the public agreeing with every individual judicial decision, but in the underlying belief in the legitimacy and integrity of the system. Chief Justice Gleeson explains (our emphasis):\(^8\)

Confidence in the judiciary does not require a belief that all judicial decisions are wise, or all judicial behaviour impeccable, any more than confidence in representative democracy requires a belief that all politicians are enlightened and concerned for the public welfare. What it requires, however, is a satisfaction that the justice system is based upon values of independence, impartiality, integrity, and professionalism, and that, within the limits of ordinary human frailty, the system pursues those values faithfully.

To reiterate, public confidence is the only source of authority for the judiciary. Without that confidence, the ability of the courts to perform their role, resolve disputes and keep the other branches of government in check is seriously compromised.\(^9\) It is therefore imperative that the judiciary provide what is required in order to maintain that confidence. Expectations of the public have developed to where information on the judiciary’s administrative functions is required to maintain public confidence. This should not be resisted, but seen as part of a natural development.

\(^6\) Denham, above n 13 at 31.

\(^7\) Young, above n 11 at 47.

\(^8\) Gleeson, above n 1.

of the relationship between the judiciary and the public. As Justice Keith Mason notes, recent
developments in judicial education, studies of sentencing practices, and annual reports by the courts
would have been unthinkable a generation ago, but are now routine.\textsuperscript{40} The initiatives being
proposed for the performance management of the judiciary will in the future be regarded similarly.

The development of initiatives such as a Judicial Strategy Plan, performance indicators and
formalised peer review mechanisms within the New Zealand District Court bench can only enhance
the administration and delivery of justice overall. While this has benefit in itself, communication of
these initiatives to the public, to the appropriate extent, will provide material on which the public
can satisfy itself that its confidence in the judiciary is not misplaced. Taking the initiative to develop
and disseminate these mechanisms is demonstrative of the explanatory accountability that is now
expected of the judiciary as an institution.

The second half of this paper sets out, at an introductory stage, a proposed set of areas in which the
performance of the judiciary as a whole can be assessed in fulfilment of the judiciary’s
administrative accountability to the public.

\textbf{II. A Minimum Set of Assessment Areas for a Common Law Judiciary}

1. Background and Principles

Ten areas are proposed which might be appropriate to include in a framework for assessing the
performance of the judiciary. They do not necessarily cover comprehensively all aspects of the
judicial function, nor are they intended to. Rather, they reflect our current view that these are
aspects on which the public confidence rests the most. Future iterations of the assessment
framework would have the opportunity to expand and build upon these foundations.

The assessment areas have been selected following a review of the more extensive quality
management systems developed in Europe. Given the different constitutional, institutional and
social context, we do not believe it is easy to adapt a European assessment scheme to a common
law system. An assessment framework must be built in each jurisdiction from the ground up, as the
form and content of the assessment will be influenced by who is conducting it, and what its primary
use and goals are.

It is therefore necessary to set out principles which will underpin any judicial performance
assessment framework. These will strike the necessary balance between judicial independence
(both substantively and administratively), and the need for accountability to foster public
confidence. Whilst these principles should apply to the judiciary of all common law jurisdictions, we
have developed them with particular reference to the nature and extent of the District Courts of
New Zealand. The District Courts are the primary court of first instance, and have perhaps the
widest jurisdiction of any first instance court in the world. The Courts’ 133 Judges travel to sit in

\textsuperscript{40} Mason, above n 12 at 132.
separate locations across the length and breadth of the country. Over 95% of criminal proceedings are heard in the District Courts. This includes the capacity for jury trials and jurisdiction over all but the most serious offences. The Courts' civil jurisdiction extends to most matters of contract and tort up to $200,000. The Family Courts, which are division of the District Courts, have primary jurisdiction for most matters of family law under over a dozen pieces of legislation. The Youth Courts similarly have jurisdiction over offending by young persons.

Due to the District Courts' wide jurisdiction, it is the primary, and for many the only point of contact between the public and the formal justice system. The District Courts and District Court Judges are therefore highly influential on the public’s perception of the courts and the wider justice system, while simultaneously facing a workload of considerable size. This heightens the need for efficient organisation and accountability at an institutional level.

1. Measurement of judicial performance must be conducted so as not to impact on judicial independence. Measurement of judicial performance should be developed and undertaken solely by the judiciary. It will be the responsibility of the Head of Bench’s office to define the goals and standards to be reached, and to carry out the assessment.

It is constitutionally inappropriate for the executive to be involved in an assessment framework which may involve setting goals or targets for Judges, or to put itself in a position where it may appear that Judges are accountable to the executive. This would transgress judicial independence. As noted, interference with the independence of the judiciary at an institutional level can impact on the independence, in fact or appearance, of individual Judges when they make decisions in the courtroom.

It is appropriate for the Head of Bench to take responsibility for developing the framework, as they are given responsibility for ensuring the orderly and expeditious discharge of court business and play a primary role in judicial administration. A Head of Bench will also have a robust understanding of the often conflicting values of justice and efficiency, and so be able to set goals and standards which balance these two values. The experience in Europe has generally been a greater degree of success when performance assessment schemes have been developed and implemented by Judges themselves.

2. Measurement of judicial performance should measure the judiciary as a whole, not individual judges. Where it is necessary to aggregate individual judicial performance, the performance of individual Judges should be anonymised. Results will not rank or compare the performance of individual Judges.

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41 Shetreet, above n 19 at 156.

42 Gleeson, above n 4 notes that a characteristic of open justice is inefficiency. Judges could handle far larger volumes of cases if they were not constrained by the need to give publish reasons and requirements of procedural fairness. Too much drive towards efficiency risks compromising these fundamental safeguards.

Because performance assessment is not being proposed for the purpose of salary or career progression, as in some European states, nor for informing voters in situations where Judges are elected by popular vote, as in some areas of the United States\textsuperscript{44}, the need for performance assessment at the level of an individual Judge is not present. The public confidence in individual Judges is maintained by the delivery of reasoned decisions by Judges in open court. These performance measures are designed to maintain the public confidence in the judiciary as an institution, and so must be directed at the institution.

This does not preclude measures designed to improve the performance and skills of individual judges. Peer review is a paradigmatic example. However, due to the need for individual Judges to be independent of each other, this is an area in which some caution must be exercised.

3. \textit{Measurement of judicial performance will not address the reasoning or decision of any Judge in any case.}

This is a direct and obvious consequence of judicial independence. It is unlikely that an assessment scheme would reveal any data or results which would bring a Judge’s reasoning into question. This does not however preclude general initiatives around judicial training and education, which are necessary to preserve public confidence.

4. \textit{Measurement of judicial performance will be used by the Head of Bench to assist in making administrative decisions about the allocation and education of the judicial resource and in negotiations with the executive department responsible for courts. It will not be used for the purpose of sanction, individual performance evaluation or career promotion.}

This is the converse of Principle 2. Inappropriate use of the information gathered can impact upon judicial independence and impartiality. Furthermore, the proposed use of performance measurement is distinct in kind from that used in the public sector, were individual public servants are assessed and are directly accountable to superiors. It is important to clearly delineate the appropriate and inappropriate uses of performance measurement of the judiciary as an institution, to avoid misconception and confusion.

5. \textit{Measurement of judicial performance should be based on purely judicial tasks. It should not be skewed by the performance of the court administration, participants in the court process or litigants.}

This principle derives from the proposition that one should only be accountable for that which they are responsible. In New Zealand, it is not the responsibility of the judiciary to provide sufficient courthouses, courtrooms, and court staff to meet demand. The Ministry of Justice has responsibility for the provision of these, and correspondingly must be accountable for it. The judiciary cannot have their performance measured in respect of things which they cannot control. In some instances, neither the judiciary nor the executive have any control over the actions of others involved in the justice process, particularly the parties, counsel and witnesses. The performance of Judges is also

\textsuperscript{44} See American Bar Association resources for measuring judicial performance at http://www.americanbar.org/groups/judicial/conferences/lawyers_conference/resources/judicial_performance_resources.html.
affected by wider changes in society, the legislative environment and government policy that can have an impact on caseloads and public expectations.45

The judiciary and the executive both have an interest in, and make decisions affecting, the efficiency of the justice process. This is complicated by the fact that the judiciary relies on the executive for administrative and infrastructural support. Isolating aspects of the justice process which are purely judicial tasks is thus an undertaking of some complexity.

This focus distinguishes the present project, which is distinctly concerned with performance measures for the judiciary, from systems which incorporate “court performance indicators” and focus on either the court administration specifically, or the court administration and the judges as a combined subject.

6. Measurement of judicial performance should be made available to the public, to an appropriate extent.

This is a direct consequence of the judiciary’s accountability to the public in respect of judicial administrative matters. Public confidence can only be maintained through transparency. It is therefore important that information about the performance of the judiciary be made public. The amount of information appropriate to be released will be tempered by other considerations and values, including the need for the judiciary to stay independent and appear impartial, and the safety and security of individual Judges. Principles 2 and 3 will also limit what information is made public.

7. Measurement of judicial performance will only be conducted using data of a high quality and high degree of accuracy.

Inaccurate data will lead to inaccurate conclusions about performance. Public confidence will be lost if information about the performance of the judiciary is found to be inaccurate or misleading. A difficulty is that as a consequence of not being responsible for the administrative side of the courts, the judiciary does not always have ready access to the necessary information. This is another area in which the judiciary relies on the executive for support.

8. The judicial assessment scheme will be regularly reviewed and updated to ensure that it delivers the necessary information with a high degree of accuracy, while ensuring that these principles of operation are adhered to.

This is necessary to ensure that the assessment scheme develops to meet the changing expectations of accountability over time. One of the primary objections to use of performance measurement in the judicial context is that many judicial functions cannot be quantified, and that quantifiable data will inevitably be given more weight over qualitative data because it appears to be more reliable and certain.46 An inbuilt review mechanism would address these concerns.47


46 See generally Spigelman, above n 12 at 18-19.
2. Proposed Assessment Areas

The discussion at this stage of the development of the assessment framework is focussed on the question of “what should be assessed”. The discussion at this point is not directed at the question of “how will these areas be assessed”. While we are inclined towards a multi-pronged approach that encompasses statistical reports, formalised peer review and audits, the mechanics of how the assessment will take place is an issue to be dealt with at a future time. At present, the question is whether, in principle, the following areas of judicial activity are appropriate for assessment. Whether they can, in practice, be assessed is a distinct and deferred inquiry.48

We consider that all of these areas are in principle appropriate for assessment. This is because every one of these areas is, in some way, related to the efficiency, organisation and professionalism of the judiciary. These are thus the matters in which the public has an interest and on which it must have confidence in the judiciary as an institution. Therefore, these are the administrative matters in respect of which the judiciary is accountable as an institution to the public. This provides the impetus towards transparency and access to information about these practices.

However, we recognise that there may be concerns that assessment of these practices might impact on other values underpinning the judiciary. If, for example, any assessment area inherently impinges on judicial independence, either as an institution or internally between individual Judges, then in principle it would not be appropriate to assess that area of activity. Likewise, assessments in areas which would impinge on the impartiality of Judges, whether in actuality or in appearance, cannot in principle be accepted. The principles set out in the preceding section will inform whether any of these other values would be unacceptably transgressed.

It is vital that a judicial sounding on these areas of assessment be taken, because without sufficient support and “buy in” from the subjects of the assessment, the assessment scheme is more likely to fail.49 However, we are of the opinion that assessment of an area of judicial activity is not

47 These concerns are unlikely to arise due to the effect of the other principles, particularly the exclusion of executive involvement. It is unlikely that a Head of Bench would overemphasise efficiency over justice when they are not subject to the same direct, sacrificial forms of accountability that public servants are. As these performance indicators are not proposed to be used in the pursuit of free market ideals such as competition or remuneration, quantification is more likely to be kept to its appropriate level of influence.

48 There is, admittedly, some crossover between these inquiries, which is reflected in the form of the assessment areas. Each of the areas proposed is framed as a tangible activity rather than an intangible concept. We do not propose to assess or measure abstract concepts such as “impartiality” or “independence”, directly. The practical difficulty and degree of subjectivity implicit in any attempt to measure such concepts is so great as to be an objection in principle, because it is highly unlikely that results could have the necessary objective pedigree to be used by the public for the purpose of maintaining the public confidence.

inappropriate in principle merely because the release of information would lead to a loss of public confidence. It is the essence of accountability that activities which are not being performed efficiently, professionally or to the expected standard are exposed. If the judiciary is not performing well, then the judiciary must accept the loss of confidence that will result. This will provide incentive for improving performance, and for increasing the degree and quality of administrative and infrastructural support provided to the judiciary by the executive.

1. Timeliness of decisions

This relates primarily to the timeliness of delivery of judgments, but would also include efficient dispatch of work that Judges do in Chambers\(^50\) and other tasks. Save for the absence of corruption, the efficiency of the justice process is perhaps the most important matter for the public. However, there are many different parties and persons involved throughout the course of the justice process. The area for assessment must focus specifically on matters which are particularly within the control of the judiciary.\(^51\) A Judge cannot be held responsible, and thus accountable, for delays caused when a witness fails to appear, or when probation has not prepared pre-sentence reports, or when the Department of Corrections fails to deliver a defendant held in custody to the court on time.

The portion of the justice process which a Judge has the most control over, and which the Judge is specifically responsible for, is the delivery of final decisions. It is the responsibility of the Judge to assess the evidence, consider the arguments of counsel, come to a reasoned decision, and deliver that decision in written or oral form. This is the basis on which individual Judges are accountable to the public. It is imperative that such decisions be delivered in a timely manner. A lengthy delay damages the credibility of the Judge and the justice system as a whole. The parties are essentially left in limbo pending a final decision. This causes frustration, which increases the risk of the decision not being accepted as final and the institution not being seen as legitimate. Furthermore, from a purely practical standpoint there is increased risk of error in reasoning when the decision making process is temporally distant from the hearing.

In recent submissions to the Law Commission, members of the public and the legal profession expressed consistent dissatisfaction with the time taken for the delivery of judgments reserved by the judge for further consideration, and called for some accountability to be imposed. The Law Commission was of the opinion that any statutory time limit on the delivery of judgments would be inconsistent with judicial independence. However, there was a genuine public interest in the delivery of decisions within acceptable timeframes, and in transparency as to what decisions were outstanding. The Law Commission recommended a list of outstanding reserve judgments in all courts be published on the Courts of New Zealand website.\(^52\) Without expressing a view on this recommendation, we believe that these calls from the public demonstrate a lack of public confidence in this area. This is therefore an area where performance assessment is appropriate in principle, and much needed.

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\(^{50}\) Commonly known as “box work”.

\(^{51}\) See principle 5 above.

Obviously, the delivery of decisions in a timely manner will be affected by external influences. The two most prominent are the workloads of individual Judges, and the degree of technological and administrative support that Judges have when making their decisions. Delivery of a decision will be delayed if a Judge is not allocated judgment writing time due to the need to sit in court, or if they are sitting in a remote location with a slow intranet connection. Such external influences can be accounted for in the mechanics of the assessment; they do not affect the legitimacy, in principle, of this area being subject to assessment.

2. Statutory timeframes

This is closely related to general timeliness of decisions, but has a slightly different emphasis. In some instances, Judges must make decisions within timeframes specified in legislation. Examples include: applications for compulsory treatment orders under the Mental Health (Compulsory Assessment and Treatment) Act 1992, where a Judge must make an examination and determination within 14 days of the application under s 18(2), though this can be extended for up to 1 month under s 15(2); compulsory care orders under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, which also have a 14 day timeframe for determination under s 41(1); and applications for return of a child abducted to New Zealand under s 105 of the Care of Children Act 2004, which under s 107 must be given priority and with an aim to be determined within six weeks.

Timeframes for giving decision are only rarely set out in legislation. When they are, it is because delay in delivering a decision would have a detrimental effect either on the ability to determine the application, or on the health or safety of the person who is the subject of the application. It is therefore of vital importance that these areas be closely monitored to ensure that the timeframes are complied with. Systemic failure to adhere to these timeframes could have a significant detrimental effect on public confidence in the judiciary. It is also in this context that any inadequacy in the support provided to the judiciary by the executive, or excessive workloads for Judges, would be most exposed.

3. Punctuality

In a busy list court, a delayed start can result in delay for all matters heard that day. It is of vital importance that all court fixtures start on time. Therefore, it is imperative that Judges be in court on time, having done the necessary preparation for the day. This is an aspect of the professionalism of the judiciary on which public confidence rests. It is therefore appropriate that the punctuality of Judges in court should be assessed and reported. Given that a Judge cannot be disciplined for lack of punctuality in the way that an employee can, due to restrictions on removal and independence, transparency of these matters is the only method by which Judges can be held accountable.

This will not, of course, guarantee that court sessions will start on time. Other parties involved, such as counsel, witnesses, or probation may not be on time. External factors such as workloads may also affect the degree of preparation that Judges can accomplish prior to a hearing. These issues however go to the mechanics of the assessment, not whether it is appropriate in principle. Development of appropriate measurements and data collection will need to be cognisant of these other factors outside the Judges’ control.
4. Giving of reasons

Giving of reasons for decisions is one of the fundamental methods by which the judiciary is held accountable to the public in respect of decisions made in court. At an institutional level, the judiciary should be trained so that reasons for decisions in court are more than merely perfunctory. Assuming that some form of oversight and assessment can be developed which does not impinge on judicial independence, such assessment would go towards maintaining the public confidence that Judges are in fact performing their constitutional responsibilities with a high degree of professionalism and skill.

Admittedly, this is a difficult area to assess given the need to protect judicial independence. However, in principle a mere check that reasons are being given does not violate judicial independence, so long as the reasoning in particular cases is not evaluated or questioned. An inquiry as to whether reasons were given is a legitimate area of assessment, whereas inquiry into whether those reasons were adequate violates judicial independence. Delivery of reasons is not so much an issue for the final decisions which ultimately determine cases, as they are required as a matter of course. Delivery of reasons is however less consistent in preliminary matters. Bail decisions are of particular concern, especially in light of recent media attention and publicity about the degree of offending, particularly violent offending that is committed while on bail.53 Where reasons are available, the public can assess the Judge’s reasoning for itself. This is explanatory accountability in action. If the judiciary is seen to take measures to ensure that such reasons are delivered, this will go to maintaining public confidence in the judiciary at an institutional level.

5. Training

Judging is a specific task that requires a specific skill set. In common law jurisdictions, judging is not a career path that is specifically trained for, as in Europe. Judges are typically senior and distinguished legal practitioners with a background in litigation. While they may have experience in the courtroom, the role of the Judge is very different from that of counsel. Judges therefore need to be trained in how to be a Judge. This includes practical matters such as crafting judgments and managing a courtroom; legal matters regarding the law and procedure they must administer, including the need to keep abreast of the law as it changes; and ethical considerations about what a Judge may and may not do, and the need to maintain independence and impartiality. Training may be administered in various ways, such as through individual mentors or programmes run by specifically funded education institutions, such as the Institute of Judicial Studies in New Zealand.

Judicial training is necessary to ensure that each individual Judge performs their role professionally, impartially, efficiently and with a high degree of skill. Public confidence rests on the Judge being able to do so. At an institutional level, the judiciary must therefore promote judicial training and education from which Judges can learn and maintain the necessary skills. It is in respect of the

53 The murder of teenager Christie Marceau by an offender when released on bail has been the primary impetus for this, including a public campaign labelled “Christies Law” which aims to amend the Bail Act 2000 with more strenuous requirements for being granted bail. For background, see Anna Leask “Christie’s parents’ bail law campaign” The New Zealand Herald (online ed, Auckland, 18 February 2012); Isaac Davison “58,000 sign ‘Christie’s law’ bail petition” The New Zealand Herald (online ed, Auckland, 29 May 2012).
provision and uptake of this training that the judiciary as an institution is accountable to the public.\textsuperscript{54} In the medical profession, doctors must participate in ongoing education in order to gain their practicing certificate. This ensures that those practicing medicine are competent to do so. Although Judges do not have a practice certificate, the public would expect no less competence of those charged with looking after their fundamental rights than they would of those charged with looking after their health. Assessment and information on what training Judges receive, and the numbers of Judges taking advantage of the various educational courses offered, would go a long way towards the maintaining the public’s confidence in the judiciary as a professional and highly skilled institution.\textsuperscript{55}

6. Rostering decisions

The rostering and assignment of Judges is the responsibility of the Chief District Court Judge under s 9 of the District Courts Act 1947. This encompasses a wide range of decisions, which include: the places in which Judges will sit; the lengths of time during the day for which they will sit in court; the jurisdiction in which they will sit, be it general criminal, jury, civil, family, youth or specialist courts\textsuperscript{56}; the division of time between sitting in court and working in Chambers to determine matters on the papers, write judgments, prepare for upcoming hearings and a multitude of other miscellaneous tasks; the amount of time devoted to judicial training; the amount of time Judges with administrative responsibilities may devote to those responsibilities; and the amount of time Judges may be out of the roster for other activities, such as speaking at conferences or sitting on the Parole Board.

Each of these decisions has an impact on the efficiency of the justice process, and by extension the public’s access to justice. Because the Chief District Court Judge is responsible for these decisions, and the judiciary has a corresponding collective responsibility, accountability in respect of rostering decisions is appropriate. Public confidence in the judiciary as an institution depends on satisfaction that there are sufficient numbers of Judges deployed where demand for them is most needed. It also depends on satisfaction that the appropriate balance between time in court and time out of court has been achieved, and that an excessive amount of judicial time is not devoted to other activities. It is also in the public interest to know, if Judges could not be deployed to hear scheduled cases, whether this was due to unsatisfactory rostering practices, or satisfactory rostering practices hampered by a deficiency in the number of judges or a lack of infrastructural and administrative

\textsuperscript{54} This has been explicitly recognised by the Judiciary of England and Wales, above n 22 at 4; Gleeson, above n 1; Young, above n 11 at 44-45.

\textsuperscript{55} If information on training and education provides an incentive for a higher degree of uptake, or development of more training and education programmes, then the resultant increase in the skill level of the judiciary will likely have benefits for the efficiency of the justice process, which will in turn maintain public confidence in the judiciary.

\textsuperscript{56} This is limited by the warrants that each Judge has. Only specifically warranted Judges may hear jury trials or sit in the Family Courts or Youth Courts. See s 28C, District Courts Act 1947; s 5, Family Courts Act 1980; s 435, Children, Young Persons, and Their Families Act 1989.
support. Providing information on the deployment strategy for the judicial resource, and assessments of the effectiveness of this strategy, will satisfy this need for accountability.

7. Appeals and Judicial Review

Appeals are one of the methods of ensuring accountability for individual judicial decisions. The ability for a higher court to review the decision below provides a check on the quality and correctness of decisions, and goes to maintaining the public’s confidence in the overall integrity of the system. The appeal process is recognition of the inevitable fact that Judges will get things wrong, because they are human.\(^\text{57}\) It is also necessary due to the doctrine of binding precedent. Sometimes the right outcome can only be attained on appeal by a court able to overturn its previous decision. At other times, new arguments or circumstances may be put forth on appeal that will change the outcome of a case. The appeal process therefore maximises the ability of the justice process to treat litigants in a fair and just fashion.

However, due to the time and cost involved in appeals, both to the litigants and to the taxpayer, disputes should be resolved wherever possible at the first instance. A high quality first instance decision that is legally and procedurally sound has a higher chance of being accepted by both parties. A high number of successful appeals could be taken to indicate that decisions at first instance are not of the quality they should be. Given the scope for judicial error, the fact that there may be various legitimate interpretations of a set of facts or law, and the restrictive nature of precedent on lower courts, there will be an acceptable level of successful appeals. Anything above that may indicate a need for education and training, for example if a high number of appeals are successful on the basis that a District Court Judge acted out of their jurisdiction. A high number of successful appeals may also indicate that workload pressures or lack of support for the judiciary are impacting on the quality of justice being delivered.

It is therefore legitimate and necessary to monitor and assess of the level of successful appeals from the District Courts. Public confidence depends on a high quality of justice being delivered at all levels of the court hierarchy, so it is appropriate that the judiciary be accountable for the juridical quality of decisions. Judicial independence would not be offended so long as appeal numbers are considered in the aggregate, and the reasoning of any particular decision is not assessed or questioned.

This area could be expanded to include incidents where judgments are recalled by the same court due to some error. Assessment and monitoring of the numbers of these decisions would serve the same purpose as assessment of successful appeals.

8. Workloads

Judges will be perceived by the public to be highly professional and ethical if they are seen to be working diligently. Information and assessment of workloads that Judges deal with will enhance

\(^{57}\) Justice Helen Winkelmann, Chief High Court Judge of New Zealand “Fronting Up” (dinner address to the Australian and New Zealand College of Notaries, 23 November 2012) at [31].
public confidence that justice is being delivered in an efficient manner. Where it is not, this can be identified so steps can be taken to resolve any deficiency.

Development of performance assessment in this area would also be an opportunity to reconceptualise what is considered judicial work. The traditional measure of the time that Judges sit in court is no longer appropriate, given the amount of time that Judges must spend out of the courtroom to prepare for, and make a decision following a hearing. It is critical that assessment of workloads account for all the work that Judges do outside of court, in Chambers, as well as time spent in essential administrative functions, education and training. This would also provide an opportunity to educate the public on the types of tasks that Judges do.

It may be that assessment of judicial workloads will reveal that Judges are overburdened, or are not getting through their workload. This may have the effect of putting other assessments of performance in perspective. A loss in public confidence due to deficiencies in timeliness of decisions and training might be offset if accompanied by assessments that the judiciary is overburdened. If the public sees the judiciary performing as best as possible in the circumstances, the integrity of the judiciary as an institution is preserved. Accountability for the deficiencies will pass to those responsible for providing the judiciary with the necessary resources and infrastructure in order to perform their function.

9. Communication to the public

This area involves, to put it bluntly, accountability for being accountable. Judges and the judiciary as an institution are only accountable to the public in an explanatory manner. It is imperative that the judiciary therefore take initiatives to put information about their decisions, both judicial and administrative, into the public arena. Only then can the public assess whether its confidence in the judiciary is well placed. Assessment in this area would therefore evaluate the methods by which the judiciary communicate to the public. Such methods include online access to judicial decisions, publication of annual reports, information websites, and though somewhat self-fulfilling, assessment of judicial performance.

10. Complaints

In New Zealand, complaints by the public against Judges are submitted to the Judicial Conduct Commissioner in accordance with the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004.58 This is one of the few formal methods of accountability between the judiciary and the public, albeit it in an explanatory sense consistent with judicial independence.

The complaints invariably relate to a particular Judge in a particular case. The substance of those complaints is therefore not pertinent to a set of performance measures directed at the judiciary as an institution. However, overall numbers of complaints, and the portion of those complaints which were upheld, may be taken as a general indicator of public confidence in the judiciary. This is most pertinent for the District Courts where, as a first instance court, there is the most interaction between Judges and the public. While dissatisfied litigants are an inherent part of an adversarial

58 See above n 17 for an overview of the process.
justice process, increased numbers of complaints over time is indicative of a public less willing to accept judicial decisions as final. Increased numbers of complaints where the Judicial Conduct Commissioner considers there to be reason for further inquiry could indicate some concern about the professionalism of the judiciary, which is one underpinning of public confidence. This could require a response in the form of judiciary-wide education and training initiatives.

III. Concluding Remarks

We have endeavoured to set out a framework of first principles for why the judiciary as an institution must be, and be seen to be, a dynamic, efficient and professional institution. Public confidence in the judiciary relies on transparency as to those matters for which the judiciary is responsible, and therefore accountable. To this end, we have proposed areas of judicial activity which should be subject to performance assessment, and principles about the goals, appropriate use and limits of performance assessment in the judicial context. We believe that these are the primary areas of importance when it comes to public trust and confidence in the judiciary, but which do not impinge on the sanctity of judicial independence.

We see the Asia Pacific Courts Conference as a key opportunity to discuss the direction that we are taking, to gain feedback and to learn from similar experiences in other jurisdictions. At the Conference, we wish to discuss and seek guidance on the proposed areas of assessment. To this end, we pose the following questions and would welcome your thoughts:

- Do you agree that accountability to maintain public confidence should be the touchstone for the development of judicial performance assessment?
- Do you see the principles proposed as effectively balancing the need for accountability with the need to maintain judicial independence?
- Do you agree that each of the ten areas of judicial activity proposed is, in principle, appropriate for some form of performance assessment?
- Are there any obvious omissions from the areas proposed for performance assessment which you think should be included?