

Annex 1 f

BARRISTER

26 August 2022

By email:

Mauri Madam Chairperson

Allegations to be investigated by the Independent Tribunal established by Te Beretitenti He Taneti Maamau

1. Thank you very much for making time available last night. During that session you asked a number of questions on behalf of the Tribunal and I undertook to make further inquiries and respond to you in writing. The purpose of this letter is to respond to your questions.
2. The first set of questions relating to the Chief Justice seeking leave to go back to New Zealand and the work that he undertook whilst in New Zealand.
3. First, I respond to the issue of the Chief Justice seeking leave to go back to New Zealand. This was covered in some detail in my letter of 3 August 2022. The point that I emphasised during the hearing yesterday was that the Chief Justice was in regular contact with Secretary Kaaro in November to ensure that the Ministry were happy with the prospect of his going back to New Zealand to spend time with his family at Christmas. There was no issue on the part of the Ministry as to his ability to take leave in these circumstances, even though the Chief Justice was still in the first year of his appointment.
4. The second issue related to the amount of time that he was on leave. I explained that he spent time in quarantine in both Australia and New Zealand and then Christmas in Wellington with his family and that immediately after the New Year began, he was working remotely as he endeavoured to get back to Kiribati. I am in possession of a number of emails relating to the work undertaken by him. Amongst many other matters, the emails show in particular:
 - a. 16 December 2021 – discussion with the Chief Registrar about holding remote hearings as a result of Fiji Airways cancelling all January flights.
 - b. 31 December 2021 – consideration of IT assistant interview results.
 - c. 4 January 2022 – consideration of a senior counsel appointment regulation.
 - d. 7 January 2022 – the Chief Justice attended the swearing in of the Chief Magistrate.

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- e. 20 January 2022 – there was an ongoing discussion with the Chief Registrar who wanted to take steps to close the magistracy in protest at the Government not signing single magistrates' warrants.
 - f. 24 January 2022 – there was a discussion with Judiciary officials about holding remote hearings during lockdown.
 - g. 25 January 2022 – Senior Management Team meetings begin with the Chief Justice in attendance and continue through February.
 - h. 8 February 2022 – the Chief Justice began reviewing various components of the annual report.
 - i. 11 February 2022 – this was the formal opening of the legal year presided over by the Chief Justice and he also gave a speech. This was all done virtually.
 - j. 11-17 February 2022 – work was undertaken to scan files and prepare for hearings.
 - k. 17 February 2022 and thereafter – remote hearings began.
 - l. 2 March 2022 – the Chief Justice presided over a special sitting for the late Senior Magistrate Katikori Moatau.
5. There are regular emails involving the Chief Justice receiving scanned files and submissions for hearings as well as the other work set out in earlier letters.
6. Accordingly, the submission on behalf of the Chief Justice is, notwithstanding, he was physically in Wellington, New Zealand he was fully engaged with the work of Chief Justice from the very beginning of January 2022.
7. The third issue that was raised involved flights to Kiribati. Thank you for asking me that question. As a result of making inquiries, I can respond as follows:
- a. The first option was a flight on 10 January 2022 from Fiji. The Chief Justice was told about the requirement to quarantine in Fiji for 10 days on 30 December 2021. This would have required the Chief Justice to leave for Fiji immediately. There were simply no flights at that time from New Zealand to Fiji. I would also observe that it was the 10 January 2022 flight to Tarawa which brought Covid to Kiribati.
 - b. Another option was a flight on 12 February 2022. This was from Brisbane. However, at that time there were limited flights to Brisbane from New Zealand. There was a flight from Auckland to Brisbane on 9 February 2022 but again, that left insufficient time to comply with the 10-day quarantine requirement in Brisbane and confirmation that the Chief Justice was on the flight had not been received by 2 February 2022 which was 10 days before the flight.
 - c. On 10 March 2022, the Chief Justice received an email saying that he (and Lambourne J) had been "de-authorised" to be on a flight from Brisbane to Tarawa on 12 March 2022.
 - d. I am also in possession of an email dated 21 March from the New Zealand Defence Force which raised the possibility of the NZDF taking the Chief Justice to Kiribati in May.

Unfortunately, however, the Chief Justice then received an email on 5 April which advised that the NZDF was not able to take him on that flight.

- e. I repeat what I said at our virtual hearing last night, namely that the Chief Justice was anxious to return to Kiribati as soon as possible but the pandemic, and complications associated with the pandemic, meant that travel was virtually impossible.
8. The third issue is the Code of Conduct issue.
9. You referred me to clause 2.5 of the Code of Conduct which provides that if the Chief Justice feels or thinks his decision would be affected, or appear to be affected, he should not sit and hear a case. Rather, he should withdraw and let another judicial officer hear the case (this is a paraphrase of clause 2.5).
10. There are two responses to that by the Chief Justice:
 - a. He did not believe that his decision would be affected or appear to be affected. Moreover, there was no other judicial officer who could hear the case. The Commissioner could not hear the case because emails reveal that he was involved in decisions cutting off Justice Lambourne's pay on the basis that his purported contract had expired.
 - b. I also refer to what I said during the course of our virtual session. That is, the way in which recusal applications are dealt with are for the party seeking recusal to make a formal application citing the reasons for the application so that the judicial officer can respond to them. It can then be heard in open Court and a reasoned decision given. Any party who is unhappy with that decision has a right of appeal. Because of the importance of the administration of justice and the independence of the judiciary, recusal applications should never be dealt with informally but on the basis outlined by me. As I mentioned to you, there was an instance in New Zealand recently where a Judge approached recusal in an informal way and that gave rise to a lot of problems. That occurred when I was Attorney-General of New Zealand.
11. The fourth issue is with respect to the Chief Justice authorising the continuation of Lambourne J's salary. As I said last night, this was done on the basis of the principle that one party to a case must not disadvantage the other party to a case before the issue to be resolved has been determined. In this case, it appears from emails that the Chief Registrar came to the Chief Justice on 13 August 2022 to seek his advice on whether or not to continue Lambourne J's pay. On the basis of this principle, they agreed that a memorandum from the Chief Justice to the Chief Registrar would be sufficient. The content of that memorandum was then twice confirmed in Court, first on the basis of an urgent application by Lambourne J's lawyer in the presence of the government's lawyer who made no submissions; and second on the basis of submissions from both lawyers.
12. The final issue relates to the article. It was commissioned in July 2021 and reviewed by a senior New Zealand judge and a former appellate judge in the United States. As I emphasised at the hearing last night, it is important to note that the article began life as a general article focusing on general principles relating to the Rule of Law and there was specific reference to some of the constitutional issues that have recently arisen in Samoa. The Chief Justice also talked

about the Rule of Law in New Zealand. There is a relatively short part of the article which deals with some of the issues which arose in Kiribati in April and May when the amendment bill that attracted the attention of the Commonwealth Magistrates and Judges Association was before Parliament. It is important to emphasise, however, that *the article did not reveal any private discussions*. The issues the Chief Justice canvassed were in the public domain. Indeed, they had been debated in the Parliament.

13. As I mentioned to you last night in response to a question from the Chairperson, you asked me about the final paragraphs where the Chief Justice referred to his sitting in Onotoa and also Beru. It also said he was to go to Kiritimatl Island.
14. It is submitted that those paragraphs are inoffensive and do not raise anything that could be construed as negative. These additional paragraphs were added by the Chief Justice at the request of the publisher for personal experiences and do not relate in any way to the Lambourne matter.
15. I hope this clarifies matters. I wish also to make the following points:
 - a. It is unfortunate that no mention has been made of all the good work the Chief Justice has done for Kiribati for nearly a year before he was suspended. The Lambourne matter was merely one of scores of other cases and matters of administration before the Chief Justice about which no complaints were made.
 - b. It is unfortunate that the government waited to use these allegations to justify its suspension of the Chief Justice on the day he was scheduled to hear Lambourne J's challenge to his suspension;
 - c. If the government had complied with s 3 of the High Court Judges (Salaries and Allowances) Act, there would have been another judge available to hear the Lambourne matters.
 - d. Even if the tribunal rejects the evidence and my submissions, at the end of the day it still must decide whether the allegations are sufficient to warrant removing the Chief Justice from office.
16. I am very happy to answer any further questions that you may have.
17. Thank you once again for giving me the opportunity to address you last night.

Yours sincerely,