

**Judicial
complaints
reviewer**



The Stamp Office, 10-14 Waterloo Place, Edinburgh EH1 3EG
Email: complaints@judicialcomplaintsreviewer.org.uk Twitter @JudicialScot

Andrew Howlett
Assistant Clerk to the Public Petitions Committee
Scottish Parliament
T3.40
Edinburgh
EH99 1SP

23rd April 2014

Dear Mr Howlett,

Consideration of Petition PE1458

I understand that the Committee is due to consider this petition again shortly. In view of this, and in response to the Cabinet Secretary's letter of 22nd April 2014, this is an opportune time to pull together the reasons why the Judicial Complaints Reviewer believes that a register of interests for the judiciary is essential.

I write not from the viewpoint of the judiciary, who have a vested interest in this issue. I write from the perspective of the Scottish public. I write not on behalf of those who hand down justice, but those who are on the receiving end. It is important that their voice is heard. They have a right to know that justice is being done, an essential component of which is that it is *seen* to be done. A register of interests is a tangible way of showing that justice is being done.

I think it likely that the number of complaints against the judiciary would fall were there to be a published register of interest for judicial office holders. I have received complaints about perceived conflicts of interest that have come to light *after* court proceedings. A register of interests would allow issues to be dealt with at the time, thus averting the need for a complaint. That would be good for the judiciary and for the public.

The position of the judiciary is incredibly powerful. They have the power to take away people's assets, to separate families, to lock people away for years. Some of these people will not have committed a crime. They may be women who want protection from abusing partners, fathers who want access to their children, or people whose home is at stake due to various legal or family wrangles. People going through the court system face stress and anxiety, perhaps financial pressures, and fear about the future. Their perspective is important and must be a consideration in this matter.

Given the position of power held by the judiciary, it is essential not only that they have absolute integrity – but crucially, that they are *seen* to have absolute integrity. Again, a register of interests is a way of

demonstrating that a judicial office holder is impartial and has no vested interest in a case – financially, through family connections, club/society membership or in any other way. Conversely, the refusal to institute a register of interests creates suspicion that in turn undermines judicial credibility. So once more, a register of interests is good for the judiciary and good for the public.

The Cabinet Secretary for Justice states that there are sufficient safeguards already in place, citing the complaints rules as one of these safeguards. As the person appointed by the Cabinet Secretary to review complaints handled under these rules, I can say from experience over nearly three years that the rules are not fit for purpose. I have attached a document I prepared in December 2013, following consultation with members of the public who had made complaints under these rules, to support this assertion.

The Judicial Office's published statistics demonstrate either that judicial conduct is exemplary, and the public vexatious or unable to understand the rules; or they show that the rules are not fit for purpose. I suggest that it is the latter. For the first year in which the Rules were operational (a 13-month period to 31st March 2012), 107 conduct complaints were made to the Judicial Office and 98 were completed during that year. With one exception, all of them were dismissed without investigation. Only one investigation was carried out, following which the complaint was dismissed as "unsubstantiated".

The latest statistics have yet to be published, but year two figures (to March 31st 2013) show that 114 complaints were made (plus the 9 carried over from year 1). Of 116 concluded during the year, only 11 were investigated. Four of the 11 were still underway at year-end, meaning that 7 investigations were completed in Year 2. Of the 7, one was withdrawn; 2 resolved informally; and 4 were reported to the Lord President. Of the 4 reported to the Lord President, 3 were deemed to be without substance, unsubstantiated or vexatious. For the one remaining complaint, an apology was offered by the judicial office holder and the Lord President deemed that no further action was required.

In summary, in the first 25 months of the new complaints regime, the Judicial Office's published statistics show that of 221 complaints there were 12 investigations, one judicial office holder apologised for his or her conduct and no judicial office holders were disciplined.

My experience in this office leads me to the conclusion that the rules are not a sufficient safeguard. But even if they were, particularly when combined with the judicial oath and the Statement of Principles of Judicial Ethics, why not go further in enhancing transparency and accountability?

There are sufficient safeguards in place to prevent members of public boards from acting inappropriately – such as robust audit committees, external scrutiny and regulation, board meetings held in public and a rigorous appointments process. Nevertheless, such members are still required – and rightly so – to complete a publicly accessible register of interests in order to demonstrate transparency and accountability. It is right that public appointees and elected politicians are required to do this, and it is also right that the judiciary should too. Registers of interest are the norm now and the judiciary is out of step with standard practice. This undermines their standing with the public.

For all of the above reasons, it is in the interests both of the judiciary and of the public for there to be a register of interests.

I have been frank about my views in this letter, and I hope that I have not given the impression that I do not have a great deal of respect for the judiciary and the difficult work that they undertake for the greater good of society. Their work is essential, their independence vital. An independent judiciary underpins a civilised society. But with independence goes accountability, and a register of interests is a mechanism for enhancing accountability.

I will be standing down from my role as JCR in the summer, but until that time I am happy to provide further information to the committee if that would be helpful.

Yours sincerely,

Moi Ali
Judicial Complaints Reviewer



FORMAL RESPONSE FROM THE JUDICIAL COMPLAINTS REVIEWER TO THE CONSULTATION ON PROPOSED REVISED RULES:

COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014

INTRODUCTION

I welcome the opportunity to respond to this consultation on the (current 2011) Rules and the proposed (2014) Rules. It would have been helpful to have been involved at an earlier stage, in order to influence the Rules which are now being consulted upon. When the Rules in England and Wales were reviewed, the working group involved my counterpart there, the Ombudsman. I believe that such involvement at that early stage would have been beneficial, to help formulate these proposals rather than merely respond to them.

I support the Lord President's decision to delay the review of the Rules, as the longer experience of operating under the existing Rules has allowed for a more considered response. A review in summer 2012 would have been premature.

To inform my response to this consultation I undertook my own mini-consultation in which I wrote to 28 individuals who had made complaints using the 2011 Rules (the letter I sent can be found in the Appendix). I received detailed replies from 17 (over 60%), to whom I am very grateful – and I am expecting an 18th response in the next few days. Some sent me an initial response followed by a more detailed one. Many included other documentation to support their views. All gave careful and considered responses based on their own experiences of the complaints system.

I also invited the SPSO (Scottish Public Service Ombudsman) to respond directly to the consultation, as I was concerned that the formal list of consultees was too judicial-focused and could benefit from the comments of those who have good experience of operating public sector complaints procedures. I also informed the Judicial Office in Northern Ireland of the consultation and I used social media to publicise it.

My response includes representative quotes from those I consulted in order to give a flavour of how the Rules are viewed by people who have actually used them from start right through to review. (All of those who have requested reviews have been members of the public. My service is equally available to the judicial office holder (JOH) who has been the subject of a

complaint.) Some of the quotes I have included are lengthy, but I feel that they serve to present a good flavour of the sentiments that were expressed by those who responded to me. I have also included quotes from an organisation ('Organisation R') which wrote to me after I had begun my own consultation, seeking a review of the handling of their complaint. With their permission I have lifted some sections of their initial letter to me, as their comments are pertinent to this consultation.

I accept that those who sought independent review are, of course, people who were dissatisfied with the process and may not therefore necessarily be representative of everyone who used the complaints Rules.

I will ensure that everyone who replied to my consultation receives a copy of this response and that it is published on my website.

I am broadly supportive of the proposed amendments, which will provide more clarity, but they do not go far enough. The Rules could be significantly strengthened to make them fairer and more user-friendly. The recommendations contained in this report set out further enhancements for consideration.

- Part 1 of this response contains general comments by way of a backdrop.
- Part 2 moves on to address the Rules in roughly numerical order.

I hope that you find these observations and recommendations helpful and that they will influence the final version of the Rules. If I can be of any further assistance, I am more than happy to offer any help and support that I can.

Moi Ali
Judicial Complaints Reviewer
Monday 2nd December 2013

PART 1: General Comments

Valuing complaints

The revision of the complaints Rules provides a marvellous opportunity to create a new, more usable set of Rules that will help dismiss some of the negative perceptions the public have of the current complaints process. Unfortunately, the draft Rules have missed the opportunity to do just that. I hope that as a result of feedback received as part of this consultation process, the final Rules will set out a complaints process that is fair, proportionate, transparent and easy to understand.

One of my principal concerns relates to the style and tone of the Rules, and the way in which they have been constructed, giving the impression that they have been devised to deter people from complaining, to find reasons to reject a complaint at the earliest opportunity, and to over-protect the judiciary. This point is made repeatedly in the responses I received:

Mr C: "The approach taken in the rules is to put a series of hurdles in the way of a complainant. If your complaint isn't dismissed at first stage it goes to the next stage - and if it's not dismissed then it goes to the next stage etc. The presumption therefore appears to be that complaints won't have merit and I would question whether this is fair and appropriate."

Organisation R: "This was the first complaint against the Judiciary made by this organisation. The decision to complain was not taken lightly...I do believe the current Rules are constructed in an unhelpful and restricted manner that serves to deter complaints rather than try and engage with users of the Court. In raising these issues it is my hope that the Judicial Complaints process can be improved. This has been a frustrating and disappointing experience for my staff."

*Mrs Q: "In summary, you have asked me to comment on my experience of the Rules – **they are not working**, because they are stacked against the people they allegedly seek to serve. They are however, doing a grand job of serving and protecting the judges who are the subjects of the public's complaints. The statistics on the current Rules clearly demonstrate that they urgently require a complete, radical change of ethos. The minor tweaking at the edges of the current Rules as outlined in the Lord President's proposals is not nearly enough. Complaints about the judiciary need to be investigated and judged by a transparently independent authority, such as yourself [the JCR] if the public is to have any confidence in them."*

Mr G: No amount of tinkering with the Rules will make a difference until the mind set within the Judicial Office changes... There should be a zero tolerance approach to cronyism, corruption, collusion etc - that is not currently the case. The judiciary should be setting the standard for others to follow. In that regard they should be making it as easy as possible to make complaints. Thereafter dealing with the evidence supporting the complaints efficiently, thoroughly and honestly and responding without fear or favour. This will enhance the reputation of the judiciary. The Rules appear to be a line of defence that are used to dismiss complaints. They are overly prescriptive and unnecessary in their present form."

Mr A: "In our justice system where, for example, judgements can hinge on interpretation of language used, where nuance can be very relevant, then I very much doubt if [our] experience in complaining against [name]... has anything to do with the Lord President's rules..

I hope you can sense my sense of deep injustice in this matter. In the absence of any acknowledgment of concern by the Lord President and the Judicial Office over this matter, in the absence of any change, there will always be the suspicion that both were protecting "their own". I fear rule changes will not be enough, but rather a change in culture at the Judicial Office."

Mrs O and Ms P: "The problems we have encountered trying to get these issues addressed has been very stressful and upsetting and we do not have any confidence in the procedures in place at the moment to listen to our complaint and rectify this for us or other members of the public facing the same ordeal."

Mr N: "...they really want to make changes to the handling of complaints in my own "EYES" it will make no scrap of difference as the complaints will only be considered 1 week only to be automatically dismissed and rejected three weeks later."

Most organisations recognise the value of complaints and welcome them. Addressing legitimate complaints and putting into practice any learning from them can help an organisation improve what it does and how it does it. Such an approach builds public credibility and respect. The intention of the Rules as drafted cannot be to reject as many complaints as possible, yet that is the impression that is created by both the existing and the proposed Rules.

The complaints statistics add weight to the public's feelings that their complaint will never progress through the system:

Mrs Q: "I had requested from the Judicial Office statistics in respect of the decisions on complaints about the judiciary under the 2011 Rules and received confirmation that during the period 28th February 2011 to 31st March 2012, 98 complaints were received, all of which were dismissed under one provision or another, only one reaching the stage of referral to a nominated judge for investigation, and this also subsequently dismissed as unsubstantiated. This 100% dismissal rate did not bolster my confidence in the Rules. I later requested the statistics for the following year, 1st April 2012 to 31st March 2013 and received the information showing that 116 complaints had been received during the period. Of these, 3 were withdrawn by the complainer, 2 were deemed to fall within your [the JCR's] own remit, 1 was investigated by the nominated judge and subsequently withdrawn by the complainant under Rule 17(4) and 2 were investigated by the nominated judge and subsequently resolved to the satisfaction of the complainer, leaving 108 complaints, all of which, again, were dismissed, save one, where the complainer's version of events was not challenged by the Judicial Office holder concerned, who offered an apology, and so the Lord President deemed that no further action should be taken against him. These combined statistics clearly demonstrate the near-impossibility of complainers achieving justice in a system where judges are judged by fellow judges."

The judiciary's public standing would be enhanced by a complaints system that genuinely welcomed complaints; that made it easy for complaints to be lodged; and that implemented learning from complaints. Even complaints that are not upheld can lead to lessons being learned. I have certainly found this to be the case in my reviews: even where I find that the Rules have not been breached, there may be constructive feedback to help improve the complaints process for others.

Inevitably any complaints system will attract some so-called 'vexatious' complaints, but that is not a good reason for constructing a complaints process that appears to regard all complaints as potentially frivolous and places obstacles in the way of legitimate complaints. Should a complaint be thrown out simply because it was made by email and therefore did not contain a postal address? Should a complaint be rejected because the complainer forgot to include the date of the alleged judicial misconduct? Clearly key information must form part of a complaint, but dismissing a complaint before first creating an opportunity for missing information to be provided does not give complainers the impression that their complaint is welcomed.

The Scottish Public Service Ombudsman (SPSO) *Guidance on a Model Complaints Handling Procedure* document says:

“Service providers that value complaints will take advantage of the opportunities that result from them. There are obvious lessons to be learned where service failures are identified and remedial action can be taken to ensure that similar mistakes are avoided in the future. However, close monitoring of service user complaints and feedback can highlight opportunities for operational improvements even where the service was initially delivered properly.”

JCR Recommendation: Revise the style and language of the Rules so that the tone demonstrates that complaints are valued and that the judiciary wishes to learn from conduct complaints – including those that are not upheld.

Existing Rule 9 in particular (initial assessment – proposed rule 8) reinforces the impression that the purpose of the Rules is to reject complaints rather than encourage them. It says at 9.4.a. (proposed 8.4.a) that a complaint is to be dismissed if “it does not contain sufficient information to enable a proper understanding of the allegation to be achieved”. A simple change to this rule – to hold such complaints open for a pre-determined period and to invite the complainer to supply further information – would create the more positive impression that complaints are welcomed. Members of the public are expected to be familiar with the lengthy, legalistic and complex Rules and to know in advance what information you require. This is unrealistic. At least give them an opportunity to understand what you need, and time to supply it, before dismissal.

Mr A: “And what prompted my approach to you, as the Reviewer, was more the attitude (or is it arrogance?) coming from the Judicial Office where valid points were completely ignored or dismissed.”

JCR Recommendation: Revise the Rules to allow for complaints containing insufficient information (current Rule 9.4.a) to be held open for a defined period while the complainer is invited to supply further details

Was the old system better?

A small number of my consultees have responded that the old (pre-Rules) complaints system was better:

Ms H: "I would like to point out that the present Rules considering complaints against Judges and Sheriffs; and brought in by the former Lord President Hamilton, don't deal with a complainers complaint about conduct on the Bench."

Ms H then goes on to detail the case of a Sheriff removed from office for reasons of misconduct to illustrate the effectiveness of the system of investigation for alleged judicial misconduct that was in place before these Rules. This view is echoed by Mr E:

Mr E: "Before the judicial office was set up, such complaints got dealt with. In my view the old rules which apply [those prior to 2011] should be used."

Mr E then goes on to give an example.

Mr F: "Firstly, I would say that the Judicial Office for Scotland should be abolished. Since Lord President Hamilton set up this office and rules to deal with complaints against judges and sheriffs etc, the rules that have always [previously] applied have been ignored." [He then cites the same case as Ms H.]

I am not familiar with the system that was in place prior to the Rules, but notwithstanding the legislative requirement in the Act to have complaints rules, Rules are necessary to ensure that complaints are handled consistently, transparently and fairly. Having rules *per se* does not ensure this, but having the right rules can go a long way to guaranteeing a fair and proportionate process for complainer and complained against alike.

Accessible language

The purpose of these Rules is unclear. Have they been produced as a set of instructions for the Judicial Office/investigators to follow, or as a procedure for members of the public to adhere to when making a complaint or challenging the handling of their complaint? The two are not mutually exclusive.

If the Rules are expected to serve both purposes, they need to be written in plain English rather than legalese. I am involved with the Postal Redress complaints scheme, the Rules for which have been written in plain English and awarded the Plain English Campaign's 'Crystal Mark' for clarity. I would recommend that the Complaints About the Judiciary Rules undergo a similar process. It is not costly and results in much clearer, more accessible documents.

Arguably the guidance leaflet, which is written using clear language, is the document for public use. However, members of the public have found that the leaflet contains insufficient detail to enable them to challenge whether or not the Rules have been followed. When they refer to the Rules to mount their challenge, many struggle to understand them. Plain English Rules would solve this problem and make it easier for anyone to understand and challenge the process.

It is little wonder that people cannot understand what the Rules mean. In places they require cross-referencing to an Act of Parliament. For example, existing/proposed Rule 10.5 says:

“In forming his or her view as to whether paragraph (4)(f) or (g) applies, the disciplinary judge is to take due account of the extent to which the conduct concerned complies with any guidance relating to the conduct of judicial office holders issued by the Lord President under section 2(2)(d) of the 2008 Act which is relevant.”

Straightforward, clear language would aid everyone’s understanding. The Plain English Campaign says:

“In 1936, Fred Rodell, a professor of law at Yale University, argued that there ‘are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground.’

Legal documents usually set out our rights and responsibilities. If we cannot understand the documents, we cannot exercise our rights and we cannot take responsibility.

It is possible to use plain English in legal documents. It does not mean sacrificing accuracy for clarity. The excuse that legal writing has to be complex to avoid misinterpretations does not stand up.”

On my website I ask complainers seeking a review to tell me which Rule has been breached and why they believe that a breach has occurred, but I have not yet received a letter asking me to review the complaint with reference to the breached Rule(s) – no doubt because no one could understand the Rules sufficiently. If a review request falls within my remit, I will always accept it regardless of whether the complainer has been able to explain the nature of the breach because I take the view that if the Rules are so difficult to navigate, members of the public cannot be expected to find a route through them and it is my job – on their behalf – to check the handling against the Rules to either provide them with reassurance, or to refer a case to the Lord President if there has been a breach. However, I would hope that plain English Rules would lead to a reduction in the number of review requests I receive, as individuals would be able to carry out their own checks against the Rules.

If a future JCR requires details of alleged Rule breaches before accepting a review request, it makes the need for clear Rules all the more important so that members of the public can exercise their review rights.

During reviews there can be occasions when it is unclear which Rule was applied, when and why. That is not helped by the fact that I do not receive complete complaints files and sometimes have to resort to guesswork to understand which Rule was applied. Arguably, more detailed letters from the Judicial Office citing which Rule is being used would address this, but so too would a clearer set of Rules.

Organisation R: As a Public Body we were often confused as to which stage matters were and the use and meaning of language.

JCR Recommendation: Rewrite the Rules in plain English and get them Crystal-mark accredited (or equivalent).

Deadlines/response times

The only target timescales for complaints handling are set out in the guidance and relate to responding to correspondence. Timescales should form part of the Rules so that complainers have clear expectations about how quickly they can expect to receive acknowledgements, responses and outcomes at various key stages in the process. The benefit of incorporating timescales into the Rules is that the JCR can then make adverse findings against the Judicial Office and/or the disciplinary and nominated judges, which will in turn act as an incentive to observe deadlines.

Organisation R: The Complaints about the Judiciary (Scotland) Rules 2011 (The Rules) stipulate any complaint can consider conduct within a three month period from receipt of the complaint. The Rules are silent regarding responses to complaints themselves. As a public body that is accountable to the Scottish Public Services Ombudsman I find it strange that such accountability is lacking within the Rules. Clearly a complaint that takes 15 months to conclude is neither in the interest of the complainer or to whom the complaint refers to...If complaints are perceived as important then this would be reflected by them gaining priority over competing pressures. Timescales are obviously an element of fairness as undue delay is inherently unfair.”

Mr C: “Also, if the complainant is to be subject to a time limit why should the other steps not also be subject to a time limit. Other complaint procedures make provision for a complaint to be determined within a prescribed timescale. Why should that not be the case here?”

JCR Recommendation: Include both fixed and target timescales within the Rules for various stages of the process (for example, how quickly complaints will be acknowledged or how soon after an investigation a complainer will be informed of the outcome).

‘Investigations’ and ‘complaints’

Just two weeks into my role as JCR I wrote to the Judicial Office raising a query about the interpretation of the word ‘investigation’ in the context of the scope of my powers under section 30 of the Judiciary and Courts (Scotland) Act 2008 to review the handling of an ‘investigation’ and to report thereon. I requested clarification about the Lord President’s interpretation of the word investigation in relation to my powers as the Judicial Complaints Reviewer. My concern was that the legislation allowed only investigations, and not complaints, to be reviewed.

Your predecessor’s officials helpfully replied: “I am happy to confirm that the Lord President, without being able to bind his successor, does not believe that a narrow interpretation should be put on the word ‘investigation’ contained in the 2008 Act. His view is that it is intended that you be able to consider the handling of any complaint about the conduct of judicial office holders sent to the Judicial Office and not just those that reach the stage of a formal investigation. The issue arose because of the wording of the Rules and the way the Rules refer to an investigation. I can confirm that it was not the intention in writing the rules to have the effect of significantly reducing access to the Judicial Complaints Reviewer, which a narrow interpretation of the word investigation would undoubtedly do. It may be sensible

when we come to consider any necessary amendments to the Rules later in the year that we try to put this issue beyond doubt.”

There has been a change of Lord President since that was written and it would seem an opportune moment to clarify the situation in the Rules, specifying that the JCR has jurisdiction to consider a complaint from the point at which it was received by the Judicial Office for Scotland.

JCR Recommendation: Clarify in the Rules that the handling of an ‘investigation’ commences at the point at which the complaint is received by the Judicial Office and is not restricted to complaints that progress to formal investigation under the Rules.

Powers of the JCR

The JCR’s powers are detailed in the Act, not the Rules, and are a matter for our legislators. However, you may find it useful to have an insight into the views of complainers on this subject:

Mr G: “The office of the Judicial Complaints Reviewer should be given the power to intervene in any complaint as he/she sees fit - if they [the judiciary] have nothing to hide they have nothing to fear from such an arrangement.”

Mr B: “I would also suggest that if there is an adverse finding by yourself [the JCR] while investigating a complaint then the Judiciary must abide by any recommendations you make...I see no point in an investigator with no teeth to follow through or make decisions which the court can just ignore. In this day and age I think a person looking at complaints and how the complainer was dealt with must be able to consider the original complaint and this is one change I would push for. It is not satisfactory for an investigator not to be able to consider the actual original complaints. Lets face it how can you consider if the courts have dealt with a complaint properly without considering that complaint ?”

Mr J: “The judiciary is a public body funded by tax payers and as such should not be self-governing as there is no independence and does not ensure that justice is seen to be done. My understanding is that in England and Wales the Judicial Reviewer can request that action is taken e.g. a reinvestigation of a case. This should also be the case in Scotland to maintain integrity and ensure justice is done and seen to be done.”

Ms K: “I am sure you can appreciate that this is a difficult letter to write due to the emotions involved in my current situation...Through no fault of my own, I find myself having to attend court on a regular basis to try to protect my young daughter. Never at any time did I expect to be treated in the way I was by the judicial system.

*It is my understanding that although you [the JCR] were dealing with my complaint you have no authority in the matters you investigate. I could not help but feel disappointed in your response and wondered if all complaints about the judicial system are **futile**???*

Perhaps in your deliberations with the Lord President you could remind him that you are the voice of the people like me who are trying to protect their child and in doing

so are not only having their concerns ignored but being reprimanded for voicing them!!!

This letter is not directed as a criticism of you Ms Ali, more a suggestion that the Lord President takes stock of the role you hold and acts accordingly.”

Mrs O and Ms P: “As we have previously stated, we totally appreciate your efforts in taking forward our complaint so far as you could and do understand the restrictions for you too... As we have said before, it would great if your investigation brought a positive outcome ensuring that these people were held accountable for their actions...”

Mr A: “Perhaps there is a need for a rule here. One which simply states that the Lord President should make all correspondence available to the Reviewer, regardless of the circumstances.”

PART 2: The Proposals

In this section I have addressed the proposed amendments and any omissions, following roughly a numerical order.

Existing & Proposed Rule 4.2

The purpose of this rule is unclear. Is it to ensure that sufficiently senior staff deal with complaints?

JCR Recommendation: Rephrase rule 4.2 so that its purpose is clear – or remove the Rule if it serves no purpose

Existing & Proposed Rule 5

“Validly made” complaints

I welcome the proposed dropping of the term “validly made” for the reasons you have outlined in the consultation documentation.

Proposed Rule 5.2.c: Timing of alleged misconduct:

I have previously raised the issue of the need for dates to be provided and I welcome the fact that this has been addressed in the proposed rules. In one case I reviewed, the complainer sought an extension to the time limit but did not provide a date of the alleged misconduct. The Disciplinary Judge speculated on the date rather than asking for it. Requiring a date will ensure that this does not happen again.

In another review I undertook, no date was supplied. How can complaints be checked to ensure they are ‘in time’ if no date is required? The current Rules are silent on what happens in these circumstances. The proposed requirement to provide a date resolves this.

Existing Rule 5.2.c (Proposed Rule 5.2.d): Name and address requirements

I welcome the proposal to no longer require a telephone number. This is currently a requirement of the Rules, but Judicial Office staff helpfully take a pragmatic approach and accept complaints without one.

I have raised previously my concerns about Rule 5.2.c requiring dismissal of all complaints not bearing a postal address (and telephone number). There is no provision in the proposed Rules to hold a complaint open for a period while contact information is sought.

Many people are switching from post to email. When complaining by email, complainers sometimes inadvertently omit to include their postal address. This leads to their complaint being dismissed. One complainer was told: “It is the view of the Judicial Office that you have failed to comply with one of these requirements, namely you have failed to provide your address and telephone number. Your complaint is, therefore, not validly made and cannot be

considered at this time.” It would have been more positive had the Judicial Office simply asked for contact details so that they could consider the complaint. I would like to see complaints put on hold pending the supply of contact details rather than dismissed.

JCR Recommendation: Amend Rules to allow for complaints lacking a postal address (existing Rule 5.2.c/proposed Rule 5.2.d) to be held open for a defined period¹ while the complainer is invited to provide a postal address

Notwithstanding the comments above, I remain concerned that this Rule has a potentially adverse impact on homeless people, who may not have a fixed postal address. I previously suggested that an Equality Impact Assessment be conducted to ensure that no group is unnecessarily adversely affected by this requirement. It is unclear whether that has been carried out. I am pleased that the JO has taken a pragmatic approach to the Rules when dealing with complaints from homeless people. However, I would prefer to see some kind of safeguard included in the Rules to ensure that their needs will always be taken into account.

JCR Recommendation: Include a safeguard so that complaints can be accepted from homeless people with no postal address (existing Rule 5.2.c/proposed Rule 5.2.d)

I am concerned that requiring complaints to be made in writing is potentially discriminatory. Roughly 23% of the general Scottish public have low literacy skills (and it is estimated that the figure for prisoners in Scotland is 80%). Additionally there are citizens for whom English is not their first language. Equality impact assessing the Rules could be beneficial in highlighting any issues and enabling support provisions to be incorporated into the Rules.

JCR Recommendation: Include a provision that allows complaints to be accepted from those who cannot provide them in writing (current/proposed Rule 5.2)

Existing Rule 5.2.c (Proposed Rule 5.2.d): Restricting complaints to individuals

One consultee asked:

Mr C: “Why is the right to complain restricted to a person? This is in the primary legislation and there may be an interpretation provision somewhere which widens the definition. Otherwise why can’t other legal entities such as companies or partnerships complain?”

One of the first reviews I conducted was on behalf of an organisation and I have recently received another from a different organisation, so it is clear that complaints from other entities can be considered. It is only fair that organisations have the same rights to make a complaint about judicial conduct as individuals. In light of the above comment, I recommend that this be clarified in the Rules.

JCR Recommendation: Clarify the position in relation to complaints from organisations, companies and other entities so that it is clear that such complaints can be accepted under the Rules

¹ Where I have recommended that complaints be put on hold for a specified time, I strongly recommend that timescales are specified in the Rules rather than being left to staff to determine. This will enable consistency.

Rule 5.3 (existing and proposed): Documentation

I am supportive of the proposal to issue guidance explaining what information is required to make a complaint, including the need for specific details about alleged misconduct. Complainers will find such guidance helpful.

The Rules state that “A complaint document is to be accompanied by all documents within the control of the person complaining upon which the person seeks to rely in making the allegation.” People may have a large number of documents or be unsure as to precisely what may be required. It would seem unreasonable to dismiss an incomplete complaint without providing an opportunity for the supply of any missing documentation.

JCR Recommendation: Amend Rules to allow for incomplete complaints (existing & proposed Rule 5.3) to be held open for a defined period while the complainer is invited to supply missing documentation

Rule 5.4.a (existing and proposed): Documentation

This Rule states: “a document may be sent by any method which the Judicial Office has indicated to be an acceptable means of sending it”. There are limited ways of sending a document (post, email, fax, courier or by hand) and it might be more helpful if the Rules specified acceptable means (and perhaps unacceptable means, if there are any) – or explained where such a list can be found.

JCR Recommendation: Include in Rule 5.4.a (existing & proposed) a list of the means by which documents can and cannot be sent, or provide details of where the Judicial Office has published details of what constitute “acceptable means.”

Rule 5.4.b: Documentation

I do not understand what existing & proposed Rule 5.4.b. means.

Rule 5: Reminders

I have suggested above that complaints could be put on hold for a defined period to enable further information to be provided. In Northern Ireland I understand that as the deadline approaches, a reminder is sent to complainers to provide the additional information in order to avoid their case being closed. I would welcome this more proactive and engaged case management system in Scotland.

JCR Recommendation: Where complaints are put on hold pending further information, I recommend that the Rules require the JO to write to the complainer reminding them of the impending deadline and alerting them to the fact that that their case will be closed if the information is not received

Rule 5 (existing and proposed) and proposed Rule 8 (existing Rule 9): Appeals/review/escalation

There are numerous opportunities for the Judicial Office to dismiss a complaint (principally Rules 5 and 8/9). There is no provision in the Rules for a dismissal to be appealed (other than by requesting a review by the JCR). I have found cases during my reviews where complaints were dismissed that in my view should not have been. Arguably I can pick up such cases and feed them back through the system. However, I have no powers to require that a complaint be looked at again. Furthermore, not everyone whose complaint is dismissed requests a review.

As I have said in the past, some kind of appeal mechanism would enable challenges to be heard and handled in a consistent way.

Mr C: "The JO is given power to dismiss a complaint. What if it makes a mistake? I would suggest there should be provision for this to be reviewed by someone e.g. The disciplinary judge."

In case JCR0012, the complainer wrote to the JO asking for reconsideration of their decision. Neither Rules nor guidance set out an internal complaints 'escalation' or appeal process. I raised this with the JO, as it would be helpful for complainers to know what the procedure is in such circumstances. In some cases, complaints are reviewed by a more senior member of staff at the Judicial Office. In one case, there was a referral to the DJ. Is this appeal mechanism a formal part of the process, open to everyone, or an *ad hoc* response? It is fairer to have a consistent policy, set out in the Rules and published guidance.

The Judicial Office told me previously: "You have suggested that we set out a policy for internal review of complaints by a more senior member of staff. The Judicial Office will of course correct any administrative error in dealing with complaints if a complainer writes to us about it. However, we take care not to deal with matters which are for your office and would not want complainers to think that they must go through another stage before writing to you." I agree that complainers should not have to go through an additional hurdle before asking me for a review; I am merely suggesting that where complainers ask the Judicial Office to escalate their complaint internally, this be done on a consistent basis.

JCR Recommendation: Incorporate an appropriate provision in the Rules to allow for Judicial Office decisions to be appealed, escalated internally for review or other action as appropriate, so that all such requests are dealt with consistently

Existing Rule 6/Proposed Rule 8: Time limits

I agree with your proposed amendment to allow initial assessment of out-of-time complaints. There is no point in raising the hopes of complainers, and asking them to go to the trouble of making a case for exceptional circumstances, if it is known that their complaint will be dismissed thereafter. Your proposal is fairer to the complainer and has a subsidiary benefit of removing an unnecessary layer of bureaucracy for staff.

I do not understand why you considered only two time limits options, namely: extending the limit to one year, with no extensions; or keeping the time limit as is, but allowing initial assessment to be made before a case for exceptional circumstances is requested.

I agree that a time limit with no opportunity of extension – even if that time limit is a longer one – is a retrograde step. There can be many factors outwith the control of the complainer that can result in a complaint being made after the deadline, and it would seem unreasonable to make no provision for the circumstances to be considered before dismissing the complaint on time grounds alone.

Was consideration given to the obvious option of extending the current three-month time limit *and* continuing to allow extensions in exceptional circumstances?

Mr B: "I would like to see all time bars lifted with complaints against judges totally, and if they must remain then the time must run from the time you know you have a complaint."

Mrs L: "There must be no time limits for complaints against judges or the judiciary, cases must be raised at any time."

Mr C: "I have some reservations about the 3 month time limit. This seems very short compared to other complaint procedures where 12 months is more normal. Such a short period may also be difficult to operate in practice where the conduct complained of is not one-off in nature and some alleged misconduct occurs either side of the 3-month dividing line. What happens then?"

Mr J: "...there appeared to be nothing wrong with his [the Sheriff's] memory yet the excuse given for the three month time limit was that it would be difficult to have a clear recollection of events. The time limit is unreasonable and should be removed in order to stop travesties of justice and ensure that justice is done and seen to be done."

JCR Recommendation: Consider extending the time limit of three months, while maintaining the facility to extend this further where reasonable to do so.

In the case of JCR0012, the issue of ongoing judicial conduct was raised. The complainer wrote about a series of alleged misconduct actions spanning a long period of time. His reasonable view was that so long as the last of those actions was within the timeframe, the rest should be considered as part of that ongoing pattern of behaviour. The Rules – old and new – see it differently. They require that each time there is any alleged misconduct, it should be complained about within a three-month period. This complainer would have been required to make a series of complaints during the course of his court case.

Mr J: "The rules do not cover a pattern of behaviour over a period of time. In my case and complaints, I raised what I considered to be numerous serious issues that occurred over a period of time yet I was advised that the time limit was imposed from the date of each incident. The rules should therefore, include a clause to ensure that pattern of behaviour over a period of time is considered as one issue with no time limit."

It is reasonable that one-off incidents should be complained about in a timely fashion, but there may be an argument for a different approach where there is ongoing concerning behaviour. It might be that a potential complainer is concerned about an aspect of judicial conduct but lets it pass as a one-off. It then happens again, but the three-month deadline following the first incident has passed. The two incidents taken alone may seem insignificant, but taken together, they could show a concerning pattern. Or perhaps someone is involved

in an ongoing court case and is afraid to report alleged misconduct for fear of adversely influencing the outcome of the court case. Some may prefer to wait until after legal proceedings have concluded before filing a complaint.

In the past I have discussed this with the Judicial Office. They explained that where there is an ongoing pattern of concerning behaviour which is complained about when only one of the incidents remains 'in time', they would consider that 'in time' incident in the context of the previous 'out of time' pattern. In circumstances where a complainer puts off complaining until after legal proceedings have been concluded, this would be considered under exceptional circumstances. This practice seems reasonable, but enshrining such practice within the Rules – or, as a minimum, in the revised guidance – would provide more confidence that it will be applied.

I disagree that complaints that are both out of time and contain insufficient information should be dismissed at this point. A complaint should be put on hold for a specified time while the complainer is given the opportunity to provide further specific details and to put their case forward for exceptional circumstances.

JCR Recommendation: Clarify in the Rules (and in guidance) the situation regarding the consideration of ongoing alleged misconduct where not all of the events fall within the time limits.

JCR Recommendation: Amend the Rules so that complaints that are both out of time and contain insufficient information are put on hold for a specified time pending the provision of further specific details and a case for exceptional circumstances from the complainer.

Existing Rule 7/Proposed Rule 6: Allegations of criminal conduct

It is unclear whether there is a requirement on the Judicial Office to report such allegations to the relevant authority. As the wording stands, a member of the public may report, let's say, a sheriff for hitting his young child in the supermarket the previous day. This "may constitute a criminal offence" but the Rules require that staff suspend consideration until "the relevant prosecutor indicates that no criminal proceedings are to be taken". How is the relevant prosecutor to know of the allegations unless they are reported to the police? A complainer may not indicate whether such allegations have been reported to the police. Even if they have been reported, they may still be under investigation and not as yet conveyed to the prosecutor. What happens where no report has yet reached the prosecutor?

JCR Recommendation: Clarify proposed Rule 6 to specify what steps Judicial Office staff should take to report allegations of a potentially criminal nature and to check with the relevant authorities as to whether such allegations are to result in criminal proceedings

Existing Rule 8/Proposed Rule 7: Notification of JOH

I wonder whether it might be better to reverse the order of proposed Rules 7 and 8 so that the JOH is notified of the complaint *after* it has undergone initial assessment; otherwise there is a risk that they are informed one day of a complaint and the next day of its dismissal. By reversing the order, a complaint can be assessed and the JOH then informed either that

a complaint has been received and will be considered, or that a complaint has been received and will be dismissed. It removes possibly unnecessary worry for JOHs where complaints are dismissed, removes a layer of bureaucracy, and streamlines the process.

JCR Recommendation: Consider reversing proposed Rule 7 and 8 for the reasons outlined above

Existing Rule 9/Proposed Rule 8: Initial assessment

Existing Rule 9.5 and 9.7b/Proposed Rule 8.6

I have raised my concerns in the past about complainers not being given proper reasons for decisions. I therefore welcome the addition of the words “written reasons” in proposed new Rule 8.6 and believe that this will go a long way to helping complainers to understand why their complaint has been dismissed, or indeed to challenge the decision if the reasons provided are not robust.

Existing Rule 9.4.a/Proposed Rule 8.4.a and Existing & Proposed Rule 10.4.a

This Rule dismisses allegations which contain insufficient information to allow a proper understanding of the allegation to be achieved. I would like to see an opportunity for the complainer to supply sufficient information within a defined timescale before their allegation is dismissed.

JCR Recommendation: Amend Rules to allow for insufficiently detailed complaints (existing Rule 9.4.a/proposed Rule 8.4.a and existing/proposed Rules 10.4.a) to be held open for a defined period while the complainer is invited to supply sufficient information

Existing Rule 9.4.b/Proposed Rule 8.4.b: “Judicial decisions” and definitions

I welcome the proposal to define the term “judicial decision”, which is not understood, particularly when it is linked with the terms “judicial case management” and “judicial case programming”. The definition provided in the revised Rules is not sufficiently clear and examples would be helpful to illustrate what is meant.

The Rules rightly disallow complaints that concern judicial decisions. However, issues have been raised about the definition of a judicial decision, the ethical factors that may affect judicial decision, and the fact that not all judicial decisions can be appealed against, leaving so-called “vexatious litigants” with nowhere else to go even when they believe that the judicial decision was influenced by bias.

Mr C: “The definition of judicial decision includes matters that cannot be appealed e.g. decisions about court programming. If such decisions are outwith the complaints procedure and cannot be appealed under judicial process what recourse does someone have if they think an error has been made?”

Mr D: “I was very disappointed by what I regard as persistent misapplications of the Rules by the Judicial Office in response to my complaints. The misapplications were in falsely holding that my complaints were about decisions when in fact my

complaints were about alleged unethical conduct. This approach by the Judicial Office would only be a logical position if there were no ethical issues involved in the making of the decisions in question, as a fair reading of the Statement of Principles of Judicial Ethics for the Scottish Judiciary would confirm.

In order to prevent such misapplications of the Rules in future I propose that Rule 9(4)(b) should be amended to the following:

“it is about a judicial decision or judicial case management or judicial management of court programming in respect of which no allegation of unethical conduct has been presented;”

Existing and Proposed Rule 10(6)

I have raised this matter previously following reviews in which I have found that no reasons have been provided for decisions to dismiss complaints at this stage. For example, in the case of JCR0042 I was critical of the fact that the complainer was told that her complaint was being dismissed but given no indication of why, other than the reference to the Rules. I raised this with the JO, who explained that they would pass my feedback to the Disciplinary Judge and ask him to consider doing so in the future.

Mr C: “Should this not require the disciplinary judge to provide reasons for dismissal? Rule 8 requires the JO to give reasons and it seems difficult to justify why a member of the judiciary should not be subject to a similar requirement.”

JCR Recommendation: In the interests of natural justice, written reasons should be provided to complainers when their complaint is dismissed under Rule 10(6) and the Rules should reflect such a requirement.

Existing and Proposed Rule 10.8 and 10.9: Fitness for Office

There appears to be no provision here for informing the JOH or the complainer that the allegation is being considered by the LP as a possible fitness for office issue, nor of providing reasons to the two parties if it is decided that it was not a fitness for office issue.

JCR Recommendation: Amend Rules 10.8/10.9 so that both parties are informed when a complaint allegation is being considered as a fitness for office matter, and given written reasons if it is decided that the matter was not of that magnitude.

Existing and Proposed Rule 11.6

I agree with the suggestion that informal resolution should be an option at any stage after a complaint is passed to the Nominated Judge. If such an option is acceptable to the complainer, and spares them the time and stress of participating in a wider investigation, then it seems a sensible proposal.

There may also be benefit in building in the ability to refer matters that do not amount to misconduct onwards to be handled pastorally – as happens in England and Wales. One case I referred to you was about a woman who felt that the judge had not taken her needs as a disabled woman with complex medical needs into account. If it was found after investigation that the alleged conduct was not misconduct but a training matter, then it would be appropriate that pastoral advice and training be given to the judge rather than the case closed and no action taken. The latter course of action would leave the judge likely to repeat any shortcomings when presiding over other cases involving people with disabilities. The Rules do not accommodate the giving of pastoral advice.

JCR Recommendation: Consider incorporating a pathway within the Rules that allows for the provision of pastoral advice in cases where a JOH has not been found guilty of misconduct, but is in need of advice and guidance.

Existing and Proposed Rule 14: Review by Disciplinary Judge

I am unsure of the purpose of the DJ reviewing the NJ's determinations and having the authority to require the NJ to reconsider any of them and to resubmit his or her report. It could be seen that such a provision allows the DJ to exert influence over the NJ to change his or her findings. Until I understand why this provision is included, I cannot comment. In any event, there is a need for the Rules to make clear the purpose of such a power.

JCR Recommendation: Clarify the intent behind Rule 14, which gives the disciplinary judge the power to require the nominated judge to reconsider their decisions.

As the Rules (16) do not require that a copy of the report must be given to the complainer or the JOH (although this *may* happen in the case of the JOH – see below), there is a lack of transparency. A complainer is told the final outcome, but will be unaware of the content of any investigation reports, any changes made to the original determination or the reason for them. It is the same with JOHs, unless they are sent the report under Rule 15.5. This is very concerning, as the complaints process should be fair and transparent.

Existing and Proposed Rule 15: Investigation reports

Rule 15 relates to situations where a complaint has been investigated and a report produced, and the Lord President proposes to take disciplinary action. The LP can, but is not required to, share a copy of the report with the judicial office holder (JOH) who is the subject of the report. It is difficult to see how a JOH could have a fair opportunity to make representations without having seen the report. While I acknowledge that the Rules require the LP to provide “such information ... as he or she considers appropriate”, which could include the report, it seems fair and proportionate, and in the interests of natural justice, that the report **always** be provided.

Mr C: “I think as a matter of principle the investigation report should be disclosed. I can’t think of a good reason why it should not. If the argument is the report includes policy advice to the LP on any sanction this part could be separated out. Otherwise the process appears closed.”

JCR Recommendation: Amend Rule 15 to require the Lord President to share the investigation report with the JOH who is the subject of the report, in cases where the LP proposes to take disciplinary action, so that the JOH has a fair opportunity to make representations.

Existing and Proposed Rule 16: Notification of Outcome

I reviewed a case a few months ago in which a complaint was investigated (JCR00026) but the final report was not shared with the complainer. All they received by way of explanation was this:

“a) the underlying facts of the complaint as framed have not been established; b) there has been no misconduct on the part of the sheriff; c) the behaviour of the sheriff, on the occasion in question, was entirely commensurate with proper and practical judicial conduct; and d) having regard to the nature of the allegation, on the balance of probabilities, the complaint is vexatious.”

This is far from transparent, as only the outcome is conveyed but no indication as to the reasons for it. Had the complainer been provided with the report, he would have had the necessary information to satisfy himself that his complaint had been thoroughly investigated, and would have understood the reasons for the conclusion. It may be that where certain complaints are not upheld, there may be good reasons for not issuing the whole report to the complainer – but there is no reason why a summary of the report could not be provided in such cases.

Organisation R: It would appear that inherent within the Rules is a lack of transparency. Complainers do not get access to information, including the reports of The Investigatory and Disciplinary Judge.

The Rules say that the “Judicial Office’s letter is to contain or be accompanied by such information as the Lord President considers to be appropriate for the purpose of giving the person complaining a fair understanding of the matters mentioned in paragraphs (2)(a) and (b).” Put simply, the Rules require that the outcome and any action is relayed, but there is no requirement to provide any reasons. Surely it is necessary to provide complainers with an

explanation of how that outcome was reached? Natural justice and transparency demand that sufficient reasons and information be provided.

The SPSO's guidance on a model complaints handling procedure assumes that complainers will receive a full explanation of how any conclusions were reached. *“At the end of the investigation, the service provider's decision may be formally communicated to the service user face-to-face or in writing. Responses should be based on the facts established by the investigation and a full explanation should be given about how those facts were used to inform the conclusions reached.”*

Under the Rules, even in the case of complaints that are upheld, there is no requirement to share the report with the complainer.

JCR Recommendation: Amend Rule 16 to require the Lord President to share the investigation report with the complainer in all cases where the complaint is upheld.

JCR Recommendation: Amend Rule 16 to require the Lord President to share the full report, or as a minimum a summary of it (if there are good reasons for not sharing the complete report) in cases where the complaint is not upheld.

Existing and Proposed Rule 16(5): Disclosure

I am concerned that the provisions contained in existing/proposed Rule 16.5 are too wide. The Lord President is allowed to “publish or disclose to any person such information concerning the whole matter (including the identity of the person complaining or the judicial office holder who is the subject of the report or both) as he or she considers to be appropriate.” In this way, the identity of a complainer who has been wronged may be revealed, thus potentially deterring future legitimate complaints from others; equally, the identity of a JOH who has been found to be innocent of wrongdoing may also be disclosed.

There will be occasions when it is appropriate, subject to data protection legislation, to disclose details of upheld complaints to, for example, the Judicial Appointments Board.

Furthermore, there are strong arguments for publishing – as a minimum – anonymised cases where misconduct has been found. In England and Wales the names of JOHs who have been found guilty of misconduct are also published, reflecting the Lord Chancellor and Lord Chief Justice's view that such publication improves “transparency and openness of the complaints system”². This is also the case across the UK, including Scotland, for other professionals such as doctors and dentists. It is a more transparent way of handling misconduct and builds public trust and confidence in the complaints system.

Rule 16's wording is too wide and unspecific as currently drafted. Despite the breadth of disclosure actions that this Rule allows, it cannot be used to inform me of the outcomes of cases which I have referred to the LP following a case review.

Mr C: “This gives the LP power to disclose personal information. I would query whether this complies with data protection requirements. As I understand it this is not a judicial process so is it not subject to over-riding DPA requirements.”

² Office for Judicial Complaints annual report 2012/13

JCR Recommendation: Amend Rule 16.5 to specify circumstances in which names of complainers, JOHs who have been the subject of complaints, or investigation reports may be published or otherwise disclosed, to ensure compliance with necessary legislation and appropriate confidentiality.

JCR Recommendation: Consider incorporating a Rule that allows the publication of the details of upheld cases, including possibly the name of the JOH (but not the complainer).

Existing and Proposed Rule 18: Absence of a complaint

I wonder if there is a typographical mistake in proposed Rule 18.2.b as I assume that the judicial office holder would be informed that there was to be an investigation, even in the absence of a complaint.

Existing and Proposed Rule 19

I welcome the suggestion that complaints under investigation at the point at which a JOH resigns or retires could still be concluded, although the suggestion is at odds with what I was told previously when I raised these concerns. I was informed that the Rules merely reflect the legislation, which does not allow the investigation of complaints against those no longer holding judicial office. Is the proposal a ‘work-around’ solution to the restrictions imposed by the legislation, or was I misinformed?

Mr J: “In my case, the Sheriff retired but is still presiding over cases in the Sheriff Court... Regarding Page 11 - Pt. 33 of the Consultation Paper, Investigations should not end because the office holder resigns or retires as this does not allow for justice to be done where there is incompetence or mistakes have been made. Judicial Office Holders should be held accountable for their actions regardless of whether they have retired or resigned.”

The proposed Rule states “except where the Lord President decides otherwise”, consideration will cease. It would be helpful if the Rules gave an indication of what circumstances might lead the LP to decide otherwise. The Rules consultation document suggests that “serious cases” would be considered.

JCR Recommendation: Amend Rule 19 – or the guidance – to clarify the circumstances in which the Lord President might continue to investigate complaints against JOHs who have retired or resigned.

Complaints about the Lord President

The Judiciary and Courts (Scotland) Act 2008, at Section 35, allows for consideration of matters concerning *fitness for office* of the Lord President. However, as you know, there is no procedure for members of the public to make conduct complaints about matters that are not of a removal-from-office magnitude and it is also not clear from published guidance what the existing process is for the public to raise complaints that *are* of that magnitude.

You are aware that I took senior counsel’s opinion on this matter, which said: “*These Rules are stated to apply “in relation to complaints about the conduct of the following judicial office*

holders”, which list includes “judges of the Court of Session” (rule 2(1)(a)). This last term is not defined by the Rules (see rule 20), but would normally include the Lord President of the Court of Session. However, it is clear from the terms of the Rules, when read as a whole, that as made they cannot operate in respect of complaints about the judicial conduct of the Lord President. The Act and the Rules proceed on the basis that the Lord President is in charge of the system, as head of the judiciary in Scotland. The Rules do not contain any procedure for the handling of a complaint that relates to the Lord President himself: see e.g. rules 12(2)(b) and 15(2)...”

JCR Recommendation: Amend proposed Rule 2(a) to define what is meant under the Rules by “judges of the Court of Session” i.e. that it does not include the Lord President.

Counsel’s advice went on: “... The Judicial Office for Scotland has issued guidance (last revised in August 2011) entitled “Complaints about Judicial Conduct: Guidance Leaflet”. Like the webpage on the Judiciary of Scotland website entitled “Complaints”, this leaflet does not suggest that complaints may not be made in relation to the conduct of the Lord President, and it does not in terms address the difficulties posed by the investigation and determination of such complaints under the Rules to which it refers. Like the Judiciary Scotland website, the Scottish Government webpages direct complaints against individual judicial office holders to be made to the Judicial Office for Scotland.”

JCR Recommendation: Amend proposed Rules so that it is clear to complainers how complaints about the Lord President may be made. Also provide further information in the guidance and on the website about this.

The opinion continued: “removal from office.complaints may in principle be received by the Judicial Office in relation to the Lord President, and would be passed on to the Scottish Government where appropriate, for consideration as to whether the First Minister should exercise his powers under section 35... If the Rules were to make specific provision for the receipt, handling and onward transmission of such complaints, then on the present wording of the Act the Judicial Complaints Reviewer would have some role in reviewing the handling of the complaint by the Judicial Office up to the point of transfer to the Scottish Government.”

JCR Recommendation: Amend proposed Rules to allow for complaints about the conduct of the Lord President to be received, assessed and passed on to Scottish Government for further consideration.

APPENDIX

The following letter, personalised to each recipient, was issued in October 2013.



The Stamp Office, 10-14 Waterloo Place, Edinburgh EH1 3EG
Email: complaints@judicialcomplaintsreviewer.org.uk

[address]

[date]

[salutation]

YOUR VIEWS WANTED: Proposed Changes to the Complaints Rules

I am writing to you, and everyone else who has asked me to conduct a review of how the Judicial Office handled their complaint, because I would like to hear your thoughts.

Your original complaint was handled by the Judicial Office according to a procedure called the Rules (Complaints About the Judiciary (Scotland) Rules 2011), which were drawn up by the Lord President. He is currently consulting on changes to these Rules. I have been invited to respond to his consultation. Rather than simply put forward my own views, I would like to hear from people who have actually made a complaint under these Rules – people like you.

I am completely independent from the Judicial Office, the Lord President and Government. I am genuinely interested in hearing from you and in representing the views of others when I formally respond to this consultation.

You can send me your views by post or email on your experiences of making a complaint. I will personally read every response sent in. I need to hear from you no later than **30th November** to allow time for me to consider the responses.

Alternatively, you may wish to see the Lord President's consultation yourself. This is available online at the following address:

[http://www.scotland-judiciary.org.uk/27/1133/Consultation-on-proposed-amendments-to-the-Complaints-About-the-Judiciary-\(Scotland\)-Rules](http://www.scotland-judiciary.org.uk/27/1133/Consultation-on-proposed-amendments-to-the-Complaints-About-the-Judiciary-(Scotland)-Rules)

If you wish to see it but cannot get online, you can get a copy direct from the Judicial Office for Scotland, as they are running the consultation (address below). If you wish to send your comments direct to the Judicial Office rather than to me, views and comments should be submitted by **16 December 2013** by email to: judicialofficeforscotland@scotcourts.gov.uk; or in writing to:

Complaints Rules Consultation, Judicial Office for Scotland, -3/R12, Parliament House, Parliament Square, Edinburgh, EH1 1RQ

Thank you in advance for your help and I look forward to hearing your views.

Yours sincerely,

Moi Ali
Judicial Complaints Reviewer