

## CONSULTATION ON PROPOSED REVISED RULES: COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014

### Consultation Arrangements

The Judiciary and Courts (Scotland) Act 2008 makes provision for a scheme for dealing with any matters concerning the conduct of a member of the judiciary. Section 2 confers responsibility on the Lord President, as head of the Scottish judiciary for making and maintaining appropriate arrangements for the investigation and determination of any matters concerning the conduct of judicial office holders, and the review of such determinations. Statute provides a framework of powers, leaving the Lord President to determine the detail.

The Lord President made rules for the investigation and determination of any matters concerning the conduct of judicial office holders; Complaints About the Judiciary (Scotland) Rules 2011. They came into force on 28 February 2011. After two years of administering the rules, several administrative issues had been noted and the Lord President directed that a review be undertaken. This paper sets out the terms of the proposals for revised rules. The Lord President is asking for your views and comments on them.

The consultation period on the proposed revised rules is 12 weeks. Views and comments should be submitted by **16 December 2013**:

by e mail to: [judicialofficeforscotland@scotcourts.gov.uk](mailto:judicialofficeforscotland@scotcourts.gov.uk); or

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

Please note comments by e mail would be preferred as this will assist in the analysis process. It would be helpful when responding for comments to be cross referred to the proposed revised rules although you do not need to comment on each rule separately.

If you would like your responses to be treated as confidential please indicate this clearly. Responses from those who reply in confidence will only be included in numerical totals and names and text will not appear in the list of respondents.

Further copies of this paper can be downloaded from <http://www.scotland-judiciary.org.uk/27/0/Consultations-And-Responses>

## CONSULTATION ON PROPOSED REVISED RULES: COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014

### The requirement for revision

1. The Lord President made rules for the investigation and determination of any matters concerning the conduct of judicial office holders: Complaints About the Judiciary (Scotland) Rules 2011. They came into force on 28 February 2011. During the review, a small error was discovered in rule 15 – this was rectified and the amended rules in force from 8 August 2013 are Complaints About the Judiciary (Scotland) Rules 2013<sup>1</sup>. The error was that the 2011 rules referred to ‘the power’ mentioned in section 29(1) of the Judiciary and Courts (Scotland) Act 2008 that the Nominated Judge has recommended and that the Lord President proposes to use. In order to retain the discretion afforded the Lord President by section 29(1) of the 2008 Act ‘a power’ is referred to in rule 15(3)(c) and 15(7) of the 2013 rules which are available at <http://www.scotland-judiciary.org.uk/15/0/Complaints> .

2. After two years of operating the rules, several administrative issues had been noted and the Lord President directed that a review be undertaken. These issues included:

- the lack of a requirement for a date of the alleged misconduct for a complaint document to be valid;
- the sequence in which preliminary actions are taken;
- the difficulty of considering out of time complaints;
- the confusion on the part of complainers as to the meaning of the ground for dismissal at 9(4)b and 10(4)b ‘it is about judicial decision or judicial case management or judicial management of court programming’;
- duplication of effort when on-going proceedings are involved;
- a need for more flexibility at the investigation stage;
- reported scepticism about the automatic conclusion of investigations when a judicial office holder leaves office; and
- the lack of a mechanism to close a complaint if the complainer fails to respond;

---

<sup>1</sup> As this was a very small change made by the Lord President, references to the ‘current rules’ are to the 2011 rules and the 2013 rules.

## CONSULTATION ON PROPOSED REVISED RULES: COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014

3. There have also been a range of matters which, whilst they do not require alterations to the rules, are important as the Judicial Office (JO) and others with a role in investigating and considering complaints learn from experience. These have led to changes in practice, improvements in communication and, in particular, proposed revisions of the guidance leaflet for complainers. The new guidance leaflet will be finalised when the revised rules are issued.

### **The process of the review**

4. A review of the operation of the rules was planned for summer 2012. However, this was delayed to allow for some experience of operating the rules through the entire procedure. A review taking place in summer of 2012 would not have benefited from the Nominated Judges' experience of conducting investigations, or from the suggestions from the Judicial Complaint Reviewer (JCR).

5. Observations were gathered from those who consider, investigate and review complaints about the judiciary in Scotland.

- The JO staff who administer the process and make initial assessments of complaints submitted a range of observations to the review.
- The Sheriffs Principal and Senators who had acted as Nominated Judges in accordance with the rules were asked for their views.
- The Disciplinary Judge offered his observations on the administration of the rules.
- The JCR provided a summary of her observations in her annual report published in January 2013.

## CONSULTATION ON PROPOSED REVISED RULES: COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014

### Considerations

6. Section 28 of the 2008 Act makes provision for rules, which may make different provision for different cases and may in particular make provision about the:

- circumstances in which an investigation must or may be undertaken,
- making of complaints,
- steps to be taken by a complainant before a complaint is to be investigated,
- conduct of an investigation (including in particular steps to be taken by the office holder under investigation or by a complainant or other person),
- time limits for taking any step and procedures for extending time limits,
- persons by whom an investigation or part of an investigation is to be conducted,
- matters to be determined by the person conducting an investigation (or part of an investigation), the Lord President or any other person,
- making of recommendations by persons conducting investigations (or parts of investigations),
- obtaining of information relating to complaints,
- keeping of records of investigations,
- confidentiality of communications or proceedings,
- publication of information or its provision to any person.

7. The current rules are a useful means of providing for complaints about Scotland's judiciary. There have been 221<sup>2</sup> separate letters of complaint dealt with in accordance with the rules. As with any new process there have been lessons to be learned as well as things that work well.

**CONSULTATION ON PROPOSED REVISED RULES:  
COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014**

Rule 5: making a complaint

8. Rule 5 describes what is required for a complaint to be considered 'validly made'. The language of complaints being valid or not has caused some confusion for complainers; who have thought that comment was being made on the seriousness or legitimacy of their complaint. It is hoped that clearer guidance and the offer of a template complaint document will alleviate this problem.

9. There have been issues observed about the information required for a complaint to be validly made. Describing the alleged misconduct; identifying the judicial office holder complained about and giving the complainer's name and address would still seem to be the minimum requirements of making a complaint.

10. However, Rule 5 does not currently require that, in order for a complaint to be validly made, date(s) must be given for the alleged misconduct. This meant that it was not always clear when a complaint document comes in whether or not it was within the time limit prescribed by rule 6.

11. In addition, Rule 5 currently includes a requirement to provide a telephone number. It was argued that failure to provide this should not be a reason for a complaint not being validly made, thereby delaying its consideration. Most communication with complainers is via email or letter.

12. We would like to make it clear through guidance that a complaint must set out all the details required and that complainers should provide specific details about the alleged misconduct. The guidance will explain that simply stating that, for example, a judicial office holder was 'rude' is not detailed enough. In this example the complainant should say what the judge said or did to cause the complainant to believe that the judge was behaving inappropriately and a description of the context: when and where this happened; what happened beforehand; and what happened afterward.

## CONSULTATION ON PROPOSED REVISED RULES: COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014

### Current rule 6: time limit

13. There were several issues observed in connection with the current Rule 6. This rule provides a time limit for complaints to be made. It also provides a mechanism by which complainers may make a case for their complaint to be considered out of time in exceptional circumstances.

14. The current rules provide that the time limit within which a complaint must be made is 3 months from the date of the alleged misconduct. Where a complainer provides a case for exceptional circumstances, this must be passed to the Disciplinary Judge for consideration. This adds a layer of administration which is potentially unnecessary. In addition, JO often have to refer cases to the Disciplinary Judge where it is clear that, in any event, the complaint would fall to be dismissed under current rule 9 (initial assessment of complaint). A hypothetical example is given in illustration:

A complaint was made and was dismissed after assessment by the Judicial Office. Nine months later the same complaint is submitted, with an additional complaint that the rules were not followed in handling it first time round. Such a complaint would fall to be dismissed as being (1) a matter already dealt with<sup>3</sup> and (2) a matter for the JCR<sup>4</sup>. However, the rules as currently written mean that the JO would must ask the complainer for a case for exceptional circumstances as the complaint is out of time, and if received, submit that case to the Disciplinary Judge.

15. Options were considered to alleviate this problem: to extend the time limit to one year, but without any opportunity for extension; or to allow all complaints whether or not within the time limit to be initially assessed by the JO.

---

<sup>3</sup> Rule 9(4)c

<sup>4</sup> Rule 9(4)d

**CONSULTATION ON PROPOSED REVISED RULES:  
COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014**

16. Extending the time limit to one year with no opportunity for extension has the administrative advantage of an absolute limit which would still have allowed the vast majority of the complaints submitted to date to be assessed. However, the introduction of such a limit could be seen as a retrograde step. For example, the complaints handling system in England and Wales **introduced** a similar 3 month time limit and mechanism for extension in 2011.<sup>5</sup> In addition, investigations of allegations about events that happened up to twelve months before the complaint was made may be hampered by a lack of reliable recollection or contemporaneous records of the events.

17. The rules as currently drafted provide that initial assessment by the JO is conducted after the judicial office holder complained of is notified of the complaint. The JO assesses whether the complaint falls into one of four categories<sup>6</sup>:

- it does not contain sufficient information to enable a proper understanding of the allegation to be achieved;
- it is about a judicial decision or judicial case management or judicial management of court programming;
- it raises a matter which has already been dealt with (whether under these Rules or otherwise), and does not present any material new evidence;
- it raises a matter which falls within the functions of the Judicial Complaints Reviewer.

18. It makes sense for any complaint that falls into these categories to be dismissed as such rather than going through the process of requesting a case that exceptional circumstances exist to consider a complaint. This is particularly undesirable if the complaint is not understandable, has been dealt with before or is a matter for the JCR.

---

<sup>5</sup> See The Judicial Discipline (Prescribed Procedures) Regulations 2013 at <http://origin-www.legislation.gov.uk/uksi/2013/1674/made>  
<sup>6</sup> Rule 9(4)

## CONSULTATION ON PROPOSED REVISED RULES: COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014

19. Even in the case of complaints about judicial decisions, it may be fairer to the complainer and the judicial office holder if it is made plain that complaints about judicial decisions cannot be considered further under the rules. This means that the complainer can be advised that the complaints process is not an alternative to appeal or other judicial remedy.

20. An amendment is proposed to allow initial assessment of complaints that are out of time, in order that a case for exceptional circumstances is not requested from the complainer for complaints which fall to be dismissed at initial assessment. This is at rule 8 in the revised rules.

### Current rule 7: allegations of criminal conduct

21. Whilst there has been no experience of using this rule, it was observed that criminal proceedings take precedence over consideration under the rules. Further, criminal proceedings may be underway with regard to events which happened more than three months prior to the complaint being made. It is proposed that this rule is considered at the very outset so that consideration can be given to this important issue first, whether or not the complaint is within the time limit. This is achieved by the time limit being included in rule 8 in the revised rules.

### Current rule 8: notification of the judicial office holder

22. A difficulty was observed and flagged up by the JCR concerning the point at which notification was being made to judicial office holders. There were cases where if it was plain to the JO that the complaint must be dismissed that it would be artificial and a waste of resources to send out a letter of notification to the judicial office holder and then the very next day send out a copy of the dismissal letter. By including the consideration of the time limit in the revised rule 8, notification to the judicial office holder will be made of all complaints including those which are out of time. In practice, this may be done at the same time that a complaint is acknowledged.

**CONSULTATION ON PROPOSED REVISED RULES:  
COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014**

Current rule 9: initial assessment

23. It is proposed that the initial consideration by the JO would occur for all complaints irrespective of whether they are out of time. The reasoning for this is discussed in the current rule 6 section.
24. There is some confusion on the part of complainers about what the term ‘judicial decision’ in rule 9(4)(b) means. It is proposed that this will be explained in guidance and a short definition given in the rules themselves. It was also suggested that the implied separation of ‘judicial decision’ from ‘judicial case management’ or ‘judicial case programming’ contributes to this confusion and ‘judicial decision’ should be the lone term used in rule 9(4)b and 10(4)b.
25. A definition is given separately in the revised rule 20 explaining that this includes ‘any decision taken by a judicial office holder in the course of his or her official duties including: a judgement in a case; a decision as to the conduct of proceedings; a decision as to case management; and, a decision in relation to court programming’.
26. The guidance will then be used to explain the independence of judicial decisions. In essence, that constitutional independence of the judiciary means that decisions made by a judicial office holder during the course of proceedings are made without the interference of ministers, officials or other judicial office holders (unless they are considering the matter whilst sitting in their judicial capacity, for example, in an appeal hearing).
27. Guidance would also explain the scope of the definition of judicial decisions. This could allow complainers to understand that judicial decisions include, but are not limited to: the way in which proceedings are managed; disclosure of documents; which evidence should be heard; and the judgment or sentence given.

**CONSULTATION ON PROPOSED REVISED RULES:  
COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014**

Current rule 9(6) on-going proceedings

28. The current rule 9(6) provides that when a complaint is not dismissed by the JO at initial assessment, and there are on-going proceedings, the Disciplinary Judge will consider whether consideration under the rules should be suspended awaiting conclusion of those proceedings.

29. The consideration of whether to suspend consideration of the complaint until on-going proceedings are concluded is for the Disciplinary Judge. In addition, with the proposed change to allow initial assessment whether or not a complaint was out of time; it is clearer to have the consideration of whether to wait for on-going proceedings to be concluded separately from initial assessment in the rules. It will be easier to administer and for complainers to follow if these considerations are separated as proposed in the revised rule 9.

Referral to the Nominated Judge

30. The current rule 11(6) provides for the possibility of resolution of complaints without further consideration only at the outset of an investigation. It has been observed that only as the facts surrounding the allegation come to light would the Nominated Judge become aware of a possible resolution. The revised rule 11(6) would allow for that resolution to be pursued.

Procedure and conduct of investigation

31. The current rules provide that any interviews undertaken by the Nominated Judge must be digitally recorded. This was found by Nominated Judges to be overly onerous. It could also lead to uncomfortable circumstances for interviewees when the only digital recording equipment was available in a court setting or when formal interviews were conducted when a properly documented telephone conversation would have been more appropriate. The revised rule 13(3) allows for contemporaneous notes of interviews as a more practical measure.

**CONSULTATION ON PROPOSED REVISED RULES:  
COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014**

Conclusion of complaint consideration or investigation

32. Under the present rules, it might be possible for a complaint to remain in 'limbo' for an indefinite period. The complainer might not participate in the process of considering the complaint, either by not providing information to the JO or not engaging with the process of investigation. There is no explicit mechanism to bring the consideration or investigation to a close. The proposed solution to this is to insert a subsection into the revised rule 17 providing for 'deemed withdrawal' of a complaint if a complainer fails to respond to correspondence from the JO or the Nominated Judge within a given period.

33. Consideration or investigation of any complaint about a judicial office holder must end if the said judicial office holder no longer holds office. This could be through resignation or retirement. This was observed by the JCR to be a possible source of doubt in the eyes of the public as to the potency of the complaints process

34. Similar to the provision for an investigation to continue to conclusion if the complainer withdraws the complaint, it is suggested that in serious cases, if an investigation is underway or a report has been submitted at the point of a judicial office holder no longer holding office, then the Lord President could consider whether a determination should still be reached and recorded. This is included in the revised rule 19

## CONSULTATION ON PROPOSED REVISED RULES: COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014

### Summary of the key points

35. The proposed revisions aim to improve the practical administration of the rules and the clarity for both complainers and judicial office holders who are the subject of complaint. The objective of a suitable and appropriate mechanism to consider complaints made about the personal conduct of judicial office holders remains paramount.

### Initial assessment

36. The proposed revised rules include the consideration of the time limit *alongside* the initial assessment of the complaint by the JO. This has the intended effect of simplifying the initial stages of consideration. In addition, even if outside the 3 month time limit:

- all considerations of complaints may be suspended if it appears to the JO that the allegation is of an act or omission which may be a criminal offence; and
- all judicial office holders will be notified of complaints about them

### Investigation process

37. The proposed revised rules would allow for the Nominated Judge to pursue resolution of the complaint to the satisfaction of the complainer at any time during his or her investigation. In addition, a revision allows for a more flexible approach to documenting interviews.

### Conclusion of consideration or investigation

38. The proposed revised rules allow for a clear conclusion to the consideration of a complaint if the complainer has stopped participating in the consideration or investigation of his or her complaint. In addition, a revision allows for the Lord President to decide to continue an investigation to conclusion even if the subject of the complaint is no longer a judicial office holder.

**CONSULTATION ON PROPOSED REVISED RULES:  
COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014**

**Consultation Questions**

1. In your opinion, is the proposed rule 5 correctly framed?

	YES
	NO
Please give reasons for your answer	

2. Do you agree with the new position of the rules in relation to criminal proceedings and notification of the judicial office holder (proposed revised Rules 6 and 7)?

	YES
	NO
Please give reasons for your answer	

3. Do you agree with the form of the proposed revised rule 8, which now incorporates the time limit alongside the initial assessment by the Judicial Office?

	YES
	NO
Please give reasons for your answer	

4. Should the words 'judicial case management or judicial management of court programming' be removed as in revised rules 8(4)(b) and 10(4)(b) and a definition of 'judicial decision' including those two types of decision be inserted into the interpretation section (at section 20)?

	YES
	NO
Please give reasons for your answer	

**CONSULTATION ON PROPOSED REVISED RULES:  
COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014**

5. Should there be a separate rule for 'on-going proceedings', as in the proposed revised rules at Rule 9?

	YES
	NO
Please give reasons for your answer	

6. Proposed revised rule 17 (2) provides that if person complaining fails to respond 'within a reasonable period' the complaint is deemed to be withdrawn. What in your view would be a 'reasonable period'?

Please give reasons for your answer	
-------------------------------------	--

6. Should there be provision that a serious complaint which has reached investigation at the point a judicial office holder has left office may proceed to determination?

	YES
	NO
Please give reasons for your answer	

**CONSULTATION ON PROPOSED REVISED RULES:  
COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014**

**ANNEX 1**

**RESPONDENT INFORMATION FORM**

**Please Note** this form must be returned with your response to ensure that we handle your response appropriately

If you hold judicial office, please specify:	
--	--

Title (Mr, Ms, Sheriff etc.)	
Surname	
Forename	
Postal Address	
Phone Number on which we may contact you.	
Email address at which we may contact you.	

**Confidentiality**

**If you would like your responses to be treated as confidential please indicate this clearly. Responses from those who reply in confidence will only be included in numerical totals and names and text will not appear in the list of respondents.**

**CONSULTATION ON PROPOSED REVISED RULES:  
COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2014**

Please return the completed respondent information form and your response to the consultation by **16 December 2013**

by e mail to: [judicialofficeforscotland@scotcourts.gov.uk](mailto:judicialofficeforscotland@scotcourts.gov.uk); or

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