

Judicial Office  
for Scotland

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The Lord President's Official Response to the Consultation on proposed amendments to the Complaints about the Judiciary (Scotland) Rules

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## 1. Background

As head of the Scottish Judiciary, the Lord President is responsible for making and maintaining appropriate arrangements for investigating and determining matters concerning the conduct of judicial office holders. The Judiciary and Courts (Scotland) Act 2008 makes provision for The Lord President to make rules in connection with these matters.

The previous Lord President made the Complaints about the Judiciary (Scotland) Rules in 2011. After two years of administering the Rules, some administrative issues had been noted and it was agreed that a review of the Rules should be undertaken.

The Judicial Office for Scotland (JOS), on behalf of the Lord President ran a consultation for 12 weeks in 2013. The consultation document sought views on several matters relating to proposals for revised Complaints about the Judiciary (Scotland) Rules and included draft rules.

Responses were collated, assessed and analysed. This report sets out a summary of the content of the consultation responses and the action taken in relation to the responses and suggestions received.

## 2. Overview of Response to Consultation

Part one of this report contains headings for the rules and steps in the process which the consultation document addressed. Under each heading, the corresponding consultation question is listed in **bold** text. Responses to the specific questions posed and the action taken in relation to those responses is provided.

Seven questions were posed in the consultation. Many of the points made in response to those questions have resulted in changes to the Rules. Further helpful suggestions arose in the course of the consultation as a result of which other changes have been implemented. Following the narrative on the consultation responses under each heading, the report outlines the changes which have been implemented.

Part two of this report outlines additional suggestions received from respondents along with changes which have been implemented in response.

Respondents were generally supportive of the draft proposals for new rules. All responses and suggestions from respondents have been considered by the Lord President.

The Lord President has approved the new rules. A copy of the new Complaints about the Judiciary (Scotland) Rules 2015 can be found [here](#).

### **3. Publication of Consultation Responses**

The JOS received 5 responses to the consultation including a response from the previous Judicial Complaints Reviewer (JCR), Moi Ali. The JCR undertook her own mini-consultation of those who had raised a complaint under the 2011 Rules and had requested a review of the handling of their complaint. The JCR's response includes the views of those she consulted. Where approval has been granted, responses to the consultation have been published on the Judiciary of Scotland [website](#).

### **4. PART ONE – Responses to Consultation Questions and Action Taken**

#### Making a Complaint

#### **Q1. In your opinion, is the proposed Rule 5 correctly framed?**

4.1 Most respondents support the proposals for amendment of this rule because it clarifies the information which must be contained in a complaint at this early stage in proceedings.

4.2 In relation to the concept of 'validity' in the 2011 Rules, some respondents expressed concerns that the word and its positioning in that rule could potentially be confusing for complainers. In this regard, those respondents welcomed the clarity provided by the draft amendment to this rule.

4.3 Some respondents felt that the rule as now drafted would be of assistance to the JOS in their initial consideration on whether a complaint has been lodged within the time limits set out in the rules.

4.4 It was suggested that the rule would benefit from amendment to clarify that a complaint against a member of the judiciary could be made by an organisation, company or other entity.

4.5 It was suggested that the rule be amended to allow for incomplete complaints (i.e. those where information required by the rules is missing) to be held open for a defined period while the complainer is given the opportunity to provide the missing documentation/information. Further, it was suggested that for those complaints falling into this category, the rule should contain a requirement for the JOS to write to the complainer reminding them of the forthcoming deadline.

4.6 It was suggested that the rule should include a list of the means by which documents can and cannot be sent, or alternatively that the JOS should provide and publish information of what constitutes "acceptable means" as set out in the draft rule.

## Action Taken

4.7 Draft Rule 5 has been amended to clarify the wording regarding the requirement for address details to be provided.

4.8 The rule has been amended to clearly set out the criteria and requirements of a valid complaint. The Lord President is in agreement with the concerns expressed by some respondents that the word 'validly' could be confusing for complainers. The intention of the redrafted rule is that a complaint is termed as 'valid' when the complaint document received by the JOS contains all the relevant information required by the Rules. The redrafting clarifies any potential misunderstanding that may arise at this early point of the complaint procedure. No consideration is being given at this stage to the actual substance of the complaint itself only whether it is made in the correct format.

4.9 The redrafted rule will be of assistance to the staff of the JOS in their initial consideration about whether a complaint has been lodged within the time limits provided by the Rules. A pro-forma complaint document has been prepared for the benefit of complainers and is included in the revised Official Guidance which is available on the Judiciary of Scotland website [here](#).

4.10 In relation to the suggestion that the rule be amended to clarify that a complaint against a member of the judiciary could be made by an organisation, company or other entity, the Lord President is of the opinion that no such rule requirement is necessary. There is no provision in the Rules to exclude any category of complainer. Thus it can rightly be interpreted by any potential complainer that no such exclusion exists. The Official Guidance document has been revised to clarify this point for the benefit of complainers.

4.11 Consideration has been given to the suggestion that the rule be amended to allow for incomplete complaints (i.e. those where information required under the Rules is missing) to be held open for a defined period while the complainer is given the opportunity to provide missing documentation/information. The rules have not been amended to make provision to this effect. To do so would be contrary to the desirability to simplify and streamline the process for dealing with complaints since it would add an unnecessary layer of procedure. This is considered to be impractical on an administrative level and likely to create inefficiencies and delays within the complaints system. The revised Rules along with Official Guidance and the new pro-forma complaint form provide sufficient clarity on how to bring a complaint under the Rules.

4.12 It would not be practicable or proportionate to include a list of the means by which documents can and cannot be sent. In an environment of constantly evolving and advancing I.T and communications, it would be a cumbersome approach to amend the Rules on each occasion that advancements in communication methods led to changes in "acceptable means". However, information to this effect is incorporated in the Official Guidance for the benefit of users of the complaints process.

## Time Limit

### **Q2. 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?**

4.13 Most respondents who answered this question agreed with retaining the three month time limit for making a complaint under the Rules. There was a suggestion that consideration be given to extending the current three month time limit as well as a facility to further extend where reasonable to do so.

4.14 It was also suggested that the time limit should appear in the Rules as a 'stand-alone' provision as it was considered that this would be clearer for complainers.

4.15 It was suggested that there was a need to clarify the situation regarding the consideration of complaints of on-going alleged misconduct where not all of the events complained about fall within the time limits.

4.16 It was suggested that the Rules ought to be amended so that complaints which are both out of time and contain insufficient information are put on hold for a specified time. This would be pending the provision of further specific details and a case for exceptional circumstances from the complainer.

### **Action Taken**

4.17 The provision of a specific 'stand-alone' rule on time limits for the lodging of a complaint is appropriate. It is anticipated that this amendment will benefit the functioning of the complaints process by creating clarity for complainers as well as streamlining the administration of complaints for staff of the JOS.

4.18 The new 'stand-alone' rule will facilitate the lodging of a complaint which alleges a 'course of conduct' (where not all the allegations in that complaint fall within the time limit).

4.19 The Lord President has not made provision in the rules so that complaints that are both out of time and contain insufficient information are put on hold (as described in part 4.16). To do so would, in our opinion, be contrary to the desirability to simplify and streamline the process for dealing with complaints. The Lord President has however revised the Rules in relation to cases seeking to proceed under the Rule on exceptional circumstances. The revision provides that the discretion on the decision about whether an allegation is allowed to proceed in such cases is a matter for the Disciplinary Judge (DJ) and not the JOS as previously drafted. There is however an exception where the JOS considers that the allegation would fall to be dismissed under rule 8(3). In that case the JOS may proceed to dismiss the complaint without consideration of a time extension being required.

## Allegations of Criminal Conduct

### **Q.3 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)?**

4.20 Rule 6 - Half of the respondents who answered this question, agreed with the proposals regarding criminal proceedings as well as suggesting that a complaint falling into this category should be suspended without discretion.

4.21 There were some responses suggesting that that the draft rule was unclear about the point at which the JOS is to write to a complainer and that the Judicial Office Holder (JOH) should also be written to at this point.

4.22 There was also a suggestion that the Rules should specify what steps JOS staff should take to report any allegations of a potentially criminal nature contained in a complaint falling into this category and thereafter that staff check with the relevant authorities whether such allegations result in criminal proceedings.

### **Action Taken**

4.23 The Lord President has revised this rule so that any complaint containing an allegation of criminal conduct under these Rules will be suspended until a decision or conclusion of any criminal proceedings.

4.24 The Lord President is clear on the purpose and statutory authority enabling the making of these rules (Section 28 Judiciary & Courts (Scotland) Act 2008). The Rules are provided to regulate procedure for complaints against the judiciary and are not designed as a mechanism to regulate JOS policy, nor does the statutory provision for their making, give authority to do so. The Lord President has therefore not made any amendment to the Rules to require JOS staff to report allegations contained in a complaint to other authorities. This would be wholly inappropriate and out with the Lord President's statutory powers under the 2008 Act to compel a civil servant to take such a course of action.

4.25 Official Guidance has been updated to ensure clarity on this matter for the benefit of complainers.

4.26 In relation to a suggestion that the Rules be amended to provide that the JOS write to the JOH as well as the complainer at this point in proceedings, the Lord President considers this suggestion to be impractical. This would create administrative inefficiencies within the complaints system. There is no added benefit to the complaints procedure by making an additional administrative requirement in the processing of a complaint which would automatically be suspended at this stage. The revised Rules along with the revised Official Guidance are sufficient and fit for purpose.

## **Notification of Judicial Office Holder**

4.27 The consultation responses contained no comments in relation to draft Rule 7 (Rule 9 under the new published Rules). However, some of the general comments made by respondents are applicable to this section of the draft and are discussed here.

4.28 It was suggested that the rules be reversed in order that a complaint can be assessed and thereafter the JOH be informed either, that a complaint has been received and will be considered, or that a complaint has been received and will be dismissed. It is suggested that that this change would remove the possibility of unnecessary worry for JOHs where complaints are dismissed as well as removing a layer of bureaucracy and streamlining the complaints process.

4.29 Other comments suggested that the JOH should only be informed of a complaint when it has been transmitted to the disciplinary judge (DJ).

## **Action Taken**

4.30 The Lord President supports the suggested revisions and has amended the Rules to make provision for initial assessment by JOS staff of a complaint which has not been suspended under the rule relating to an allegation of criminal conduct or dismissed under the rule on time limits.

4.31 Intimation (including a document containing the allegation and information on next steps) to the JOH will now only happen if a complaint is to be considered by the disciplinary judge under rule 10 or 11.

4.32 Revising the Rules to this effect is likely to streamline the complaints process and create efficiencies for the benefit of complainers.

## Initial Assessment

**Q4. 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?**

4.33 Consultation responses and actions on proposals regarding appropriate time limits are outlined previously under the section titled "Time Limit".

## Interpretation of 'Judicial Decision'

**Q.5 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)?**

4.34 All respondents who answered this question agreed with the need for clarification in the wording of the rules in this specific matter. It was suggested by respondents that the words, 'judicial case management or judicial management of court programming', should be removed from the draft provisions and replaced with

a definition of the wording 'judicial decision' in the interpretation section. Those responding all submitted that there was a requirement for clarity and simplicity in this matter to make it easier for the general public to understand what CANNOT be complained about under the Rules. It was also suggested that examples to illustrate the matter should be provided.

### **Action Taken**

4.35 The Lord President has revised the Rules to remove the wording '*judicial case management or judicial management of court programming*' where it appears in individual rules. The words '*judicial decision*' has now been included in the interpretation in part 21 of the Rules. In addition, Official Guidance has been revised to include some examples of what constitutes a judicial decision. It is anticipated that these revisions will provide clarity on the issue and will consequently be beneficial to users of the complaints process.

### On-going Proceedings

#### **Q6. Should there be a separate rule for 'on-going proceedings', as in the proposed revised Rules at Rule 9?**

4.36 Four of the five respondents who answered this question agreed with the proposal that there should be a separate rule for on-going proceedings after initial assessment by JOS.

4.37 One respondent suggested that the DJ may wish to consult the sheriff principal for a view before giving advice under this rule.

### **Action Taken**

4.38 Rule 10 of the new Rules makes provision for seeking advice from the DJ and for informing the complainer and JOH of any suspension in proceedings in the circumstances outlined in the rule.

4.39 Official Guidance has been revised to assist complainers and clearly sets out the practical effect upon a complaint which is suspended at this stage of the Rules.

4.40 Internal staff guidance has been reviewed to ensure clarity about the JOS responsibilities at this stage. The requirement to write to the complainer and JOH where a complaint is suspended under this rule is included.

4.41 The Lord President does not consider it appropriate that the Rules incorporate a requirement that the DJ consult with a Sheriff Principal for a view before giving advice. That is not to say that the DJ may choose to do so of his/her own accord should circumstances arise.

## Withdrawal and Deemed Withdrawal of Complaint

**Q7. Proposed revised Rule 17(2) provides that if the 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’?**

4.42 Respondents gave varying suggestions for what they considered to be a reasonable period, for example; 14 days, 28 days plus, a period to vary with the circumstances and one respondent disagreed with the proposal.

4.43 It was suggested that it should be a matter for the DJ or Nominated Judge (NJ), whether a complaint ought to be withdrawn. That the draft wording of the rule should be amended from “will be deemed” to “may be deemed”, giving a level of discretion within this stage of the procedure.

4.44 It was suggested that a complaint ought to be treated as withdrawn only after a reminder or ‘ultimatum’ letter has been sent to the complainer. This being after the expiry of the relevant period.

4.45 The respondent who disagreed with the proposal suggested that complaints should not be dropped since there could be varying circumstances that could mean a complainer ceases contact.

### **Action Taken**

4.46 The Lord President has deemed that 28 days is a reasonable period of time to allow a complainer sufficient opportunity to respond. Provision has therefore been made within the Rules (see rule 18(2)).

4.47 It is also considered appropriate that the rule affords a level of discretion as to whether a complaint should subsequently be withdrawn. Accordingly, the heading of the rule has been revised to delete the wording “*and deemed withdrawal*”; the draft rule has been revised to delete the wording “*will be deemed*” and “*will be treated*” to “*may*” on each occasion where it appears in the draft.

4.48 The final determination on whether a complaint is withdrawn under this rule will be made by either the DJ or NJ in each case, according to the relevant stage the case has reached under the complaints process.

4.49 Internal staff guidance has been revised to clarify the procedure that officials will follow, which includes a letter being issued to a complainer prior to withdrawing a complaint and affording them with the opportunity to respond within 28 days.

## Ceasing to Hold Judicial Office

**Q7. 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?**

4.50 Most respondents indicated that they have no objection to complaints being considered following a JOH leaving office, provided that clarification is given for the circumstances in which the Lord President could proceed. However, respondents highlighted that such a provision may not be competent under the terms of section 29 of the 2008 Act and raised the question of whether a JOH could be compelled to co-operate with an investigation in such circumstances.

### **Action Taken**

4.51 The Lord President is of the view that a complaint against an individual who no longer holds judicial office is incompetent under these Rules. Furthermore the Lord President has no authority to take any action under section 29 of the 2008 Act.

## **5. PART TWO – Additional suggestions received in Consultation responses and Action Taken**

### Complainers

5.1 It was suggested that the Rules should restrict who could bring about a conduct complaint in relation to a member of the judiciary. The view taken by the respondent was that complaints should be “*confined to those who might be thought of as being "on the receiving end" of the judicial misconduct alleged but not include mere bystanders/observers.*”

### **Action Taken**

5.2 The Lord President does not consider this proposition to be valid in the context of the purpose of the Rules and the procedures they set out. The purpose of the Rules is to provide a framework for the administration of complaints about judicial misconduct, whatever form that misconduct may take. In this respect, no inference should be drawn from these Rules to suggest that only parties to individual court proceedings are capable of making a complaint about the conduct of a JOH. Therefore to make any such provision in the Rules would be contrary to the inherent purpose of the Rules themselves and as such is inappropriate.

### Referral to the Nominated Judge

5.3 It was suggested that informal resolution should be an option at any stage after a complaint is passed to the NJ.

5.4 It was suggested that draft Rule 12 be revised to provide for resolution of the complaint to the mutual satisfaction of the complainer and JOH.

5.5 It was suggested that there may also be benefit in building in the ability to take other action under the Rules in cases that do not amount to misconduct, i.e. where a training need is identified.

## **Action Taken**

5.6 Rule 12 has been revised to ensure that where the NJ feels that a complaint is deemed capable of resolution to the satisfaction of the complainer, that may sought to be achieved at any stage of the investigation process.

5.7 The suggestion that this rule should be reworded to express that the matter may be resolved to the mutual satisfaction of the complainer and JOH was not deemed practical. Such a provision would not be viable or workable in the context of a complaints process.

5.8 The suggestion that a matter identified during the course of a complaint which was not necessarily misconduct but identified a training need should be taken forward under the complaints process was not deemed practical for inclusion in these Rules. Training needs require to be addressed with the assistance and guidance of the Judicial Institute.

### Procedure and Conduct of Investigation

5.9 It was observed that provision may be needed in Rule 14 for any contemporaneous notes taken by the NJ during the course of the complaints process to be accepted as accurate or in some way deemed to be accepted.

## **Action Taken**

5.10 The Lord President has considered the suggestion and is of the view that whilst this issue could be termed as 'good practice' for investigations, it will benefit the streamlining of the complaints process to a greater degree if incorporated into the Rules. A revision to the Rules has been made to the effect that notes taken by the NJ under these Rules are deemed to be an accurate record of any interview where the interviewee has signed a copy of the notes.

### The Roles in Handling a Complaint

5.11 One respondent questioned the nature of the complaints process and the administration of the process by the JOS, suggesting that the person who is going to hear a complaint and make a decision should be independent, impartial and should not be from the same institution.

## **Action Taken**

5.12 In order for the Lord President to fulfil his responsibilities under the 2008 Act, the procedures (and revised Rules and Official Guidance) and administration of the complaints process by JOS is the appropriate manner for dealing with complaints against the judiciary. Furthermore, the Scottish Government has appointed a [Judicial Complaints Reviewer](#) (JCR). Complainers can obtain an impartial and free service if they are unhappy with the way their complaint about the conduct of a member of the judiciary has been handled by the Judicial Office for Scotland. Members of the Scottish judiciary who have been the subject of a complaint may also seek a review of the handling of that complaint.

## Evidence

5.13 A respondent made a suggestion about evidence to support a complaint and recommended that each court room should have a voice recorder and video recorder so that everything can be heard and watched later should a complaint be lodged.

### **Action Taken**

5.14 This is an operational matter for the Scottish Courts and Tribunals Service and accordingly the JOS is not in a position to take this matter forward.

## Appeals

5.15 It was suggested that there should be provision in the Rules to allow for JOS decisions to be appealed, escalated internally for review or other action as appropriate, so that all such requests are dealt with consistently.

### **Action Taken**

5.16 The new Rules, Official Guidance and internal staff guidance provide a robust framework for handling of complaints against the judiciary. A complainer is able to take their case to the JCR should they be unhappy with the handling of their complaint. A further appeal process is not desirable in the Rules as this would be contrary to the summary nature of the process and undermine the statutory authority and responsibility of the Lord President under the 2008 Act for dealing with matters of judicial conduct and discipline. Provision to review the handling of complaints against JOHs exists under the statutory powers of the JCR and no further legislative provision is necessary.

## Consideration by Disciplinary Judge

5.17 It was suggested that written reasons should be provided to complainers when their complaint is dismissed and that the Rules should reflect such a requirement.

### **Action Taken**

5.18 Any letter notifying a complainer that their complaint is being dismissed will state the rule under which the complaint is dismissed and the reason for dismissal.

## Fitness for Office

5.19 It was suggested that the draft rules appeared to contain no provision for informing the JOH or the complainer that an allegation is being considered by the Lord President as a possible fitness for office issue. Nor for providing reasons to the two parties if it is decided that it was not a fitness for office issue and it was suggested that the Rules be revised to this effect.

## **Action Taken**

5.20 Rules 11(8) to (10) make appropriate provision for the matters raised.

### Investigation Reports

5.21 It was suggested that the Lord President should be able to take action even when the NJ recommends no action. The intention of the draft rule was queried in that the rule provides that the Lord President may exercise a disciplinary power only when the NJ has so recommended. It was pointed out that the 2013 amendment to the Rules allowed the Lord President to exercise a power which was not the power recommended by the NJ but raised the question of what the effect is if the NJ has recommended no power be exercised? It was suggested that having received a report from the NJ holding a complaint substantiated (in whole or in part), it may be appropriate that the Lord President be empowered to impose a disciplinary sanction if he thinks fit even if there has been no such recommendation by the NJ.

5.22 It was suggested that the Rules should compel the Lord President to share the investigation report with the JOH in cases where the LP proposes to take disciplinary action, so that the JOH has a fair opportunity to make representations.

5.23 It was suggested that the Rules should compel the Lord President, in the case of upheld complaints, to share the investigation report with the complainer and in complaints which are not upheld, a summary of the report could be provided.

## **Action Taken**

5.24 Section 29(1) of the Courts and Judiciary (Scotland) Act specifies the powers the Lord President can exercise when there has been an investigation into a complaint and the person carrying out the investigation recommends he takes action. There is no statutory authority under the Act for the Lord President to take action when the person carrying out the investigation has not recommended he exercise a power. However, this does not restrict what the Lord President may do informally, for other purposes or where any advice or warning is not given to a particular JOH.

5.25 Rule 16(5) makes appropriate provision for disclosure by the Lord President of all pertinent matters relating to the nature of a complaint allegation against a JOH. The discretion the Lord President has in this rule, regarding the sharing of the Investigation report (in whole or part), is appropriate.

### Application of the Rules

5.26 It was suggested by one respondent that the Rules should make clear to complainers how to complain about the Lord President and that they should set out a process for the JOS to assess such complaints and pass them to the Scottish Government. In relation to this it was also suggested that draft Rule 2(a) be amended 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.

## **Action Taken**

5.27 The suggestion that the Rules should contain provisions for complaints against the Lord President is wholly inappropriate. These Rules are made by the Lord President in order to assist him in discharging his responsibilities under Section 2(e) of the 2008 Act.

## **Miscellaneous Amendments**

### Interpretation

5.28 The Rules have been amended to include the interpretation of '*re-employed retired judge*' which was omitted in error from the draft.

5.29 Interpretation of the wording '*judicial decision*' has been amended and simplified.

### Revocation and Saving

5.30 The Rules have been revised to include a new subsection to provide for any on-going cases which are subject to the 2011 and 2013 Rules.

## Consultation Questions

1. In your opinion, is the proposed rule 5 correctly framed?
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)?
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?
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)?
5. Should there be a separate rule for 'on-going proceedings', as in the proposed revised rules at Rule 9?
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'?
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?