

COMPLAINTS ABOUT THE JUDICIARY (SCOTLAND) RULES 2017

Made - - - - - *31 January 2017*

Coming into force - - - - - *06 February 2017*

The Lord President of the Court of Session, in exercise of his powers under section 28 of the Judiciary and Courts (Scotland) Act 2008 (asp 6), makes the following Rules.

Citation and commencement

1. These Rules may be cited as the Complaints about the Judiciary (Scotland) Rules 2017 and come into force on 06 February 2017.

Application

2. These Rules apply in relation to complaints about the conduct of the following judicial office holders:—

- (a) judges of the Court of Session;
- (b) re-employed retired judges of the Court of Session;
- (c) the Chairman of the Scottish Land Court;
- (d) temporary judges of the Court of Session;
- (e) sheriffs principal;
- (f) temporary sheriffs principal;
- (g) sheriffs;
- (h) summary sheriffs;
- (i) re-employed retired sheriffs principal, sheriffs and summary sheriffs;
- (j) part-time sheriffs;
- (k) part-time summary sheriffs;
- (l) justices of the peace.

Disciplinary judge

3.—(1) The Lord President is to appoint a judge of the Inner House of the Court of Session (to be known as “the disciplinary judge”) for the purposes of—

- (a) supervising the operation generally of these Rules and reporting to the Lord President about that matter as appropriate; and
- (b) carrying out the other functions specified by these Rules.

(2) Paragraph (3) applies to a complaint made under these Rules—

- (a) alleging misconduct on the part of the disciplinary judge; or
- (b) where the disciplinary judge considers it to be inappropriate for him or her to carry out the functions mentioned in paragraph (1)(b) in relation to the complaint.

(3) The functions mentioned in paragraph (1)(b) are in relation to that complaint to be carried out by another judge of the Inner House of the Court of Session nominated by the Lord President.

Judicial Office

4.—(1) References in these Rules to the Judicial Office are to the Judicial Office for Scotland which supports the Lord President as head of the Scottish judiciary.

Making a complaint

5.—(1) A complaint may be made by submitting a complaint document to the Judicial Office.

(2) A “complaint document” is a document in writing which —

- (a) is legible;
- (b) contains one or more detailed allegations of misconduct on the part of a named or identifiable judicial office holder;
- (c) gives the date or dates of the alleged misconduct; and
- (d) states the name of the person alleging misconduct and details of an address to which correspondence may be sent.

(3) A complaint document is to be accompanied by all documents within the control of the person complaining upon which that person seeks to rely.

(4) For the purposes of this rule—

- (a) a document may be sent by any method which the Judicial Office has indicated to be an acceptable means of sending it;
- (b) if sent by an electronic means indicated by the Judicial Office to be acceptable, a document is to be treated as valid only if it is capable of being used for subsequent reference.

(5) A complaint document will not be accepted where it (or any communication associated with it) indicates that the person complaining does not want the judicial office holder against whom the complaint is made to see a copy of the complaint document or any document accompanying it.

Allegations of criminal conduct

6. Where it appears to the Judicial Office that an allegation is of an act, omission or other conduct which may constitute a criminal offence—

- (a) further consideration of the allegation under these Rules is to be suspended until—
 - (i) the relevant prosecutor indicates that no criminal proceedings are to be taken;
 - (ii) any such proceedings have concluded; or
 - (iii) it becomes clear to the Judicial Office that no such proceedings are to be taken; and
- (b) the Judicial Office is to notify the person complaining to that effect.

Time limit

7.—(1) Subject to this rule, the Judicial Office must dismiss any allegation which founds on anything said to have occurred more than 3 months before the date on which the complaint document was received.

(2) The person complaining may make an application in writing to the Judicial Office for an allegation which founds on something which is said to have occurred more than 3 months before the date on which the complaint document was received to be treated under these Rules as if it had been submitted on time.

(3) An application under paragraph (2) may only be made on the ground that exceptional circumstances exist which justify the granting of the application and the circumstances relied on must be specified in the application.

(4) Where such an application is not made at the time of making the allegation, the Judicial Office is to write to the person notifying him or her of their right to do so and requiring any such application to be received in the Judicial Office by a specified date.

(5) Where such an application has been made, the disciplinary judge is to decide whether the allegation is to be allowed to continue to be considered under these Rules as if it had been submitted on time.

(6) Where an allegation is dismissed under this rule the Judicial Office is to write to the person complaining to that effect.

(7) Where the Judicial Office considers that the allegation falls to be dismissed under rule 8(3), it may decide not to invite representations under paragraph (3) above and proceed directly to deal with the matter under rule 8.

Initial assessment of complaint

8.—(1) This rule applies to an allegation which is not currently suspended under rule 6 and has not been dismissed under rule 7.

(2) The Judicial Office is to carry out an initial assessment of the allegation.

(3) If the Judicial Office considers that the allegation falls into paragraph (4), it is to dismiss the allegation.

(4) An allegation falls into this paragraph if—

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

(5) Where an allegation is dismissed under paragraph (3), the Judicial Office is to provide written reasons to the person complaining to that effect.

(6) Where an allegation is not dismissed under paragraph (3), the Judicial Office is to write to the person complaining to inform them of that fact and of the next step to be taken under these Rules.

Notification to judicial office holder

9.—(1) This rule applies to an allegation whose consideration is not currently suspended under rule 6 and which has not been dismissed under rule 7 or 8.

(2) The Judicial Office is to send to the judicial office holder concerned—

- (a) a document (which may be the complaint document) containing the allegation;
- (b) all information about the allegation which is in or which accompanied the complaint document;
- (c) notification of the next step to be taken under these Rules.

Ongoing proceedings

10.—(1) This rule applies where a judicial office holder has been notified of an allegation under rule 9.

(2) If it appears to the Judicial Office that the allegation relates to judicial proceedings which are not concluded, it is to refer the allegation to the disciplinary judge for advice as to whether it would be appropriate for consideration under these Rules to continue before the judicial proceedings are concluded.

(3) Where the disciplinary judge advises that it would be inappropriate for that to occur—

- (a) further consideration of the allegation must be suspended until the proceedings have concluded; and

- (b) the Judicial Office is to write to the person complaining and to the judicial office holder concerned to that effect.

Consideration by disciplinary judge

11.—(1) This rule applies to an allegation —

- (a) which is not dismissed under rule 8; and
- (b) whose consideration is not currently suspended under rule 10.

(2) The allegation is to be considered by the disciplinary judge in accordance with the following paragraphs.

(3) If the disciplinary judge is of the view that the allegation falls into paragraph (4), he or she is to dismiss it and is to inform the Judicial Office accordingly.

(4) An allegation falls into this paragraph if —

- (a) it does not contain sufficient information to enable a proper understanding of the grounds of the allegation to be achieved;
- (b) it is about a judicial decision;
- (c) it raises a matter which has already been dealt with, whether under these Rules or otherwise, and does not present any material new evidence;
- (d) it raises a matter which falls within the functions of the Judicial Complaints Reviewer;
- (e) it is vexatious;
- (f) it is without substance;
- (g) it is insubstantial, that is to say that even if substantiated, it would not require any disciplinary action to be taken.

(5) 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 issued by the Lord President under section 2(2)(d) of the 2008 Act.

(6) Where an allegation is dismissed under paragraph (3), the Judicial Office is to write to the person complaining and the judicial office holder concerned to that effect.

(7) If the disciplinary judge is of the view that one or more allegations in a complaint fall outside paragraph (4), he or she is to consider whether paragraph (8) applies and is to inform the Judicial Office or, where the judicial office holder concerned is a justice of the peace, the sheriff principal in the sheriffdom in which that justice of the peace carries out his or her functions.

(8) This paragraph applies where the disciplinary judge thinks that the allegation, if substantiated, would raise a possible question of fitness for office.

(9) Where the Judicial Office is informed that paragraph (8) applies—

- (a) it is to inform the Lord President; and
- (b) further consideration under these Rules is suspended until the Lord President indicates whether he or she intends to request the establishment of a tribunal to consider fitness for office of the judicial office holder.

(10) In the event that the Lord President indicates an intention to make such a request—

- (a) consideration under these Rules is to cease; and
- (b) the Judicial Office is to write to the person complaining and to the judicial office holder concerned to that effect.

(11) Where a sheriff principal is informed that paragraph (8) applies, the sheriff principal will consider whether to request that the Lord President appoints a tribunal under section 71 of the Criminal Proceedings etc. (Reform) (Scotland) Act 2007.

(12) In the event that the sheriff principal indicates an intention to make such a request—

- (a) consideration under these Rules is to cease; and

- (b) the Judicial Office is to write to the person complaining and to the judicial office holder concerned to that effect.

Referral to a nominated judge

12.—(1) This rule applies to an allegation—

- (a) which was not dismissed under rule 11; and
- (b) whose consideration did not cease under that rule.

(2) The Judicial Office is to refer the allegation to a judicial office holder nominated by the disciplinary judge.

(3) Subject to paragraph (4), the nominated judge is to be either a judge of the Court of Session or a sheriff principal.

(4) In the case of an allegation falling within paragraph (5), the nominated judge is to be a judge of the Court of Session.

(5) An allegation falls within this paragraph if it is against—

- (a) a judge of the Court of Session;
- (b) a re-employed retired judge of the Court of Session;
- (c) the Chairman of the Scottish Land Court;
- (d) a temporary judge of the Court of Session and concerns the carrying out of a function of that appointment;
- (e) a sheriff principal.

(6) Where at any stage of consideration under these Rules the nominated judge thinks that an allegation may be capable of resolution to the satisfaction of the person complaining and the judicial office holder concerned without further investigation, he or she may communicate with them both with a view to securing that outcome.

(7) Where that outcome is achieved, the nominated judge is to write to the Judicial Office to that effect and consideration of the allegation under these Rules is to cease.

Investigation and report

13.—(1) This rule applies to an allegation referred to a nominated judge which has on initial consideration been incapable of resolution under rule 12(6).

(2) The nominated judge is to investigate the allegation and produce a report determining—

- (a) the facts of the matter;
- (b) whether the allegation is substantiated (or substantiated in part); and if so, to recommend whether the Lord President should exercise a power mentioned in section 29(1) of the 2008 Act or take other action.

(3) The report must—

- (a) be in writing;
- (b) contain reasons for its conclusions;
- (c) be submitted to the Judicial Office.

(4) In deciding whether an allegation is to any extent substantiated and in making any recommendation in consequence the nominated 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.

Procedure and conduct of investigation

14.—(1) For the purposes of the investigation the nominated judge may—

- (a) make such inquiries regarding the allegation as he or she considers appropriate;

- (b) obtain and consider any documents which appear to be relevant;
 - (c) interview any persons he or she considers appropriate.
- (2) The nominated judge is to—
- (a) give an interviewee reasonable notice of the date and time of the interview;
 - (b) permit an interviewee to be accompanied by a person of his or her choosing for the purpose of—
 - (i) providing moral support;
 - (ii) helping to manage papers;
 - (iii) taking notes;
 - (iv) offering advice.
- (3) The nominated judge may arrange for any interview to be recorded by equipment which records sound digitally on an appropriate storage medium.
- (4) The judicial office holder concerned is to comply with a request from the nominated judge that he or she be interviewed.
- (5) The procedure and conduct of an investigation is such (consistent with respect for the principles of fairness and natural justice) as the nominated judge thinks fit; but—
- (a) the judicial office holder concerned is to be afforded the opportunity to submit a written response to the allegation;
 - (b) the person complaining and the judicial office holder are each to be afforded the opportunity to submit written comments on any information obtained by the nominated judge which he or she has not previously seen;
 - (c) so far as the determination of questions of fact is concerned—
 - (i) the investigation is to be conducted with the aim of ascertaining the truth;
 - (ii) findings of fact are to be made on the balance of probabilities;
 - (d) so far as possible, the investigation is to be conducted without disclosure to third parties of the identity of the person complaining or the judicial office holder concerned.
- (6) Before the investigation starts the nominated judge is to prepare and issue to the person complaining and the judicial office holder concerned a statement of the procedure he or she has decided on.
- (7) Where, after the investigation starts, the nominated judge wishes to depart from that procedure in a material way, he or she must inform the person complaining and the judicial office holder concerned in writing before proceeding.
- (8) The nominated judge is to make a note of the substance of all communications in the course of the investigation which are material to it and is to create and maintain a file containing—
- (a) those notes;
 - (b) all documents relevant to the investigation; and
 - (c) all recordings of interviews carried out in the course of the investigation.
- (9) For the purpose of these Rules, notes taken by the nominated judge under paragraph (3) are deemed to be an accurate record of any interview where the interviewee has signed a copy of the notes to that effect.
- (10) After submitting a report under rule 13, the nominated judge is to send the file to the Judicial Office.

Review by disciplinary judge

- 15.—**(1) This rule applies where the Judicial Office has received a report under rule 13.
- (2) The report is to be put before the disciplinary judge, together with the nominated judge's file.

- (3) The disciplinary judge is to review the determinations in the report.
- (4) Having reviewed the determinations, the disciplinary judge may require the nominated judge to reconsider any of them.
- (5) Such a requirement is to be in writing and a copy is to be sent to the Judicial Office.
- (6) For the purposes of reconsidering a determination, the nominated judge may—
 - (a) make such further inquiries regarding the allegation as he or she considers appropriate;
 - (b) obtain and consider any further documents which appear to be relevant;
 - (c) interview (or re-interview) such persons as he or she considers appropriate.
- (7) Rules 14(2), (3) and (9) apply to an interview under paragraph (6)(c) as they apply to an interview conducted under rule 14(1)(c).
- (8) The nominated judge is to make a note of the substance of all communications in the course of reconsideration of a determination which are material to it and is to update the nominated judge's file with—
 - (a) those notes;
 - (b) all additional documents relevant to the reconsideration;
 - (c) all recordings of interviews carried out in the course of the reconsideration.
- (9) Having carried out all reconsiderations required by the disciplinary judge, the nominated judge is to resubmit the report and the file.
- (10) In relation to any determination which the nominated judge was required to reconsider the report is to contain statements of—
 - (a) what the nominated judge did in reconsidering the determination;
 - (b) what the outcome of the reconsideration was.

Report to the Lord President

- 16.**—(1) Paragraph (2) applies where the Judicial Office has—
- (a) received a report under rule 13 and the disciplinary judge has indicated that he or she does not require the nominated judge to review any determination under rule 15; or
 - (b) received a report under rule 15(9).
- (2) The Judicial Office is to put the report before the Lord President.
- (3) Paragraph (4) applies where—
- (a) the report finds the allegation to be substantiated (or substantiated in part); and
 - (b) the report recommends that the Lord President should exercise a power mentioned in section 29(1) of the 2008 Act.
- (4) The Lord President is to write to the judicial office holder who is the subject of the report inviting him or her to make written representations.
- (5) The Lord President's letter must contain or be accompanied by such information, which may include the report, as he or she considers to be appropriate for the purpose of giving the judicial office holder a fair opportunity to make any representations.
- (6) The judicial office holder who is the subject of the report may make any representations by such date as is specified in the invitation made under paragraph (4).
- (7) The Lord President is to consider any representations before deciding whether to exercise a power mentioned in section 29(1) of the 2008 Act.

Notification of outcome, etc.

- 17.**—(1) This rule applies where—
- (a) the Lord President has received a report under rule 16(2); and

(b) the Lord President has taken all action (if any) which he or she proposes to take in relation to the allegation.

(2) The Judicial Office is to write to the person complaining to inform the person of—

(a) the outcome of the investigation of the allegation; and

(b) of any action taken by the Lord President in consequence.

(3) 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).

(4) Except where the Lord President has already done so in under rule 16, he or she is to write to the judicial office holder who is the subject of the report to inform him or her of the matters mentioned in paragraphs (2)(a) and (b).

(5) After paragraphs (2) and (4) have been complied with the Lord President may 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 appropriate.

Withdrawal of complaint

18.—(1) A person complaining may, by writing to the Judicial Office to that effect, withdraw an allegation at any time before the Lord President has received a report about it under rule 16(2).

(2) Where a person complaining fails to respond to correspondence from the Judicial Office or the nominated judge within 28 days, the complaint may be deemed to have been withdrawn and may be treated in accordance with this rule.

(3) Where an allegation is withdrawn before it is referred to a nominated judge under rule 12, the disciplinary judge is to consider whether further procedure under these Rules is appropriate.

(4) If the disciplinary judge determines further procedure is appropriate, the allegation is to continue to be considered under these Rules as if it had not been withdrawn.

(5) Where an allegation is withdrawn after it is referred to a nominated judge under rule 12, the nominated judge is to consider whether further investigation the allegation is appropriate.

(6) If the nominated judge determines further investigation is appropriate, the allegation is to continue to be investigated under these Rules as if it had not been withdrawn.

(7) Where an allegation is continuing under these Rules by virtue of paragraph (4) or (6), any requirement in the Rules or in the statement of the procedure decided on under rule 14(6) to communicate a matter to or to seek comments from the person complaining ceases to apply.

Consideration of matters in absence of a complaint

19.—(1) Paragraph (2) applies where no complaint is made under these Rules but the disciplinary judge receives information from any source which suggests to him or her that consideration under these Rules of a possible allegation of misconduct is appropriate.

(2) The allegation is to be considered under these Rules (with the necessary modifications reflecting the absence of a person complaining) as if—

(a) a complaint containing it had been made under rule 5; and

(b) rule 7 did not apply.

Ceasing to hold judicial office

20. Where a judicial office holder against whom an allegation under these Rules had been made ceases to hold any of the judicial offices listed in rule 2(1) or dies, consideration of the allegation under these Rules is to cease.

Interpretation

21. In these Rules—

“the 2008 Act” means the Judiciary and Courts (Scotland) Act 2008;

“judicial office holder concerned” means the judicial office holder against whom the allegation is made;

“Lord President” means the Lord President of the Court of Session;

“re-employed retired judge” means a person acting as a judge of the Court of Session or the High Court of Justiciary by virtue of section 20E(1) Judiciary and Courts (Scotland) Act 2008;

“re-employed retired sheriff principal, sheriff or summary sheriff” means a person acting as a sheriff or summary sheriff by virtue of section 12(1) of the Courts Reform (Scotland) Act 2014;

“judicial decision” includes: a judgment in a case; a decision in relation to the conduct of proceedings; a decision in relation to case management; and, a decision in relation to court programming.

Revocation and Saving

22.—(1) The Complaints about the Judiciary (Scotland) Rules 2016 are revoked.

(2) Those Rules as they applied immediately before 06 February 2017 continue to have effect for the purpose of any complaint made but not determined, dismissed or withdrawn prior to that date.

CJM Sutherland
Lord President of the Court of Session

Edinburgh
30 January 2017