EXPLANATORY MEMORANDUM TO

THE JUDICIAL DISCIPLINE (PRESCRIBED PROCEDURES) REGULATIONS 2013

2013 No. 1674

1. This explanatory memorandum has been prepared by the Ministry of Justice and is laid before Parliament by Command of Her Majesty.

2. Purpose of the instrument

2.1 This instrument replaces the Judicial Discipline (Prescribed Procedure) Regulations 2006 (as amended). The new regulations will deliver a more streamlined process for dealing with complaints about judicial conduct.

3. Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None

4. Legislative Context

4.1 This instrument is made following a review of the current regulations and rules governing judicial discipline. The review was undertaken at the request of the Lord Chancellor and the Lord Chief Justice with the aim of developing a more streamlined and efficient process for dealing with complaints about judicial conduct.

5. Territorial Extent and Application

5.1 This instrument applies to all of the United Kingdom.

6. European Convention on Human Rights

6.1 As the instrument is subject to negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

- What is being done and why

7.1 The Lord Chancellor and the Lord Chief Justice of England and Wales are responsible for judicial discipline under the Constitutional Reform Act 2005 in England and Wales. The Lord President together with the Lord Chancellor is responsible for judicial discipline in relation to specified judicial office holders who exercise their functions wholly or mainly in Scotland; and the Lord Chief Justice in Northern Ireland and the Lord Chancellor are responsible for judicial discipline in

relation to specified judicial office holders who exercise their functions wholly or mainly in Northern Ireland. The Judicial Discipline (Prescribed Procedures) Regulations 2006 (as amended) provide for one procedure to be followed regardless of whether the allegation of misconduct is serious or relatively minor.

7.2 The Office for Judicial Complaints (OJC) was established on 3rd April 2006, to administer complaints about judicial conduct and to provide advice and assistance to the Lord Chancellor and Lord Chief Justice[1] in the performance of their joint responsibility for judicial discipline.

7.3 Under the current procedures different disciplinary processes exist for courts based judiciary, tribunal judges and magistrates. Complaints about courts judiciary are considered in the first instance by the OJC; for tribunals the relevant Tribunal President considers the complaint, and for magistrates a complaint is referred to the appropriate Advisory Committee. The office holder concerned is invited to comment upon the allegations of misconduct as part of the investigation process. The complaint may be dismissed by the OJC, Tribunal President or Advisory Committee if they consider the complaint raises no issue of personal misconduct requiring disciplinary sanction. However, if following an investigation by these bodies there is a recommendation for a disciplinary sanction, the matter is referred, via the OJC, to the Lord Chancellor and the Lord Chief Justice for an interim decision. The office holder concerned then has the opportunity to make further representations and may ask for the matter to be referred to a review body panel. The panel is comprised of two judicial members and two lay members and following a review of the matter, the review body panel prepares a report with a recommendation which the Lord Chancellor and the Lord Chief Justice will consider before reaching their decision. The office holder then has a further opportunity to make representations before a final decision is made by the Lord Chief Justice and the Lord Chancellor. Where no request for a review body is made within the requisite time frame, the OJC writes to the office holder concerned to confirm the sanction.

Number of Complaints

7.4 The OJC received 2,154 complaints in the year ending March 13 (this figure does not include complaints received at tribunal and magistrate level) this is an increase of 33%, compared to the 1,615 complaints received during the previous year. Despite the increase in the number of complaints received, only 55 cases required disciplinary sanction (this figure includes disciplinary sanctions issued to tribunal judges and magistrates).

Reasons for the Review

7.5 General concerns had been raised by both complainants and judges about the time taken to conclude some complaints under the current processes. With the merger of

[1] Where reference is made the to the Lord Chief Justice this should be read: in relation to an office holder who exercises functions wholly or mainly in Scotland as a reference to the Lord President of the Court of Session; in relation to an office holder who exercises functions wholly or mainly in Northern Ireland as reference to the Lord Chief Justice for Northern Ireland; otherwise as a reference to the Lord Chief Justice for England and Wales.

the courts and tribunals service the Lord Chancellor and the Lord Chief Justice of England and Wales, felt that the time was right for the current regulations and rules governing judicial discipline to be reviewed. The aim of the review was therefore to streamline the process to provide an effective and efficient system for dealing with complaints about judicial conduct. The review was not driven by the need to cut costs but the terms of reference required that any new process must be managed within existing resources. As such, it was agreed that the initial investigation process would continue to be undertaken by the OJC, Tribunal President, and Advisory Committee, as appropriate, but as far as possible the processes for dealing with conduct complaints should be aligned. There are 3,600 members of the full and part time judiciary, approximately 29,000 Magistrates and 7,000 Tribunal members, all of whom are subject to the disciplinary regulations.

7.6 The Lord Chief Justice of England and Wales and the Lord Chancellor therefore asked the OJC to undertake a review of the rules and regulations governing judicial discipline with a view to developing a more streamlined and effective process. In July 2011 a working group chaired by Lord Justice Toulson (as he then was) was formed of representatives from of a cross section of the judiciary, together with representatives for the public perspective, and officials from the Ministry of Justice.
The working group formulated twenty one recommendations for improvement to the procedure for dealing with complaints. In particular, the Working Group recommended the introduction of different procedures according to the nature of the alleged misconduct to facilitate a more streamlined process.

Key Changes Resulting from the Recommendations

7.7 i) Under the current system there is one set of regulations with separate sets of supporting rules for tribunal judges, and magistrates. The process for dealing with complaints about the courts judiciary is contained within the regulations themselves. The working group considered the possibility of having one set of regulations and rules for all judicial offices, however, it became clear throughout the discussions that although the broad process for conducting disciplinary investigations would be the same for all judicial office holders under the new proposals, the steps taken within the process would continue to be carried out by different bodies depending on the judicial area. The group therefore considered that one overarching set of regulations should be established, with separate rules for courts judiciary, tribunal judges and magistrates. This is reflected in regulations 6 and 7 of the instrument.

ii)The working group considered that the Office for Judicial Complaints should be re-named to better reflect the fact that it considers complaints about judicial conduct. It therefore recommended that the officials supporting the Lord Chancellor and the Lord Chief Justice with their joint responsibility for judicial discipline should be known collectively as the Judicial Conduct Investigations Office. This is reflected in regulation 4 (2) of the instrument.

iii) The OJC plays an important role in ensuring a consistency of approach to disciplinary matters and in providing advice in relation to processes and procedures.

Whilst the current supporting guidance to the tribunals and the magistrates rules highlight the advisory role that the OJC has in relation to judicial complaints, the working group considered that the regulations should clearly define the OJC's responsibilities. This responsibility is set out in regulation 4(4) and 4(5) of the instrument.

iv) The working group recommended the introduction of different procedures according to the nature of the alleged misconduct to facilitate a more streamlined process, particularly for less serious issues of misconduct. This recommendation was amended slightly as a result of feedback from the consultation process. Therefore, following an investigation, where a recommendation for disciplinary sanction is recommended:

a) below removal or suspension from office - the judicial office holder will receive a copy of the report of the findings and recommendation for sanction, and have an opportunity to comment upon the report before it is sent to the Lord Chancellor and the Lord Chief Justice for final decision. There will be no automatic right to a hearing but a request may be made at this stage and considered by the Lord Chancellor and the Lord Chief Justice. There will be no interim decision and no review body stage. The decision of the Lord Chancellor and Lord Chief Justice will be final.

b) removal or suspension from office - there will be an automatic right to request that the matter be considered by a disciplinary panel before the recommendation is sent to the Lord Chancellor and the Lord Chief Justice for consideration; this will not be subject to a merit test.

The disciplinary panel will be formed along the lines of the existing review body panel (as referred to in paragraph 7.3 above). It will consider the matter and prepare its report before it is referred to the Lord Chancellor and the Lord Chief Justice for consideration. There will be no interim decision and no review body stage. The decision of the Lord Chancellor and the Lord Chief Justice will be final.

v) The detailed processes for handling complaints are set in the rules made by the Lord Chief Justice with the agreement of the Lord Chancellor under regulation 7 of this instrument. Regulation 11, of the instrument sets out the details of how the disciplinary panel should be formed. Where no recommendation for removal is made but the Lord Chancellor and the Lord Chief Justice consider it appropriate to remove the office holder concerned, the Lord Chief Justice and Lord Chancellor must refer the matter to a disciplinary panel for consideration before a final decision is made. This is reflected in regulation 14 of the instrument.

vi) The current regulations preclude the investigation into the conduct of any office holder who no longer holds office. In practice this means that if the office holder resigns during the course of an investigation the process stops and there is no formal finding of misconduct registered by the Lord Chancellor and the Lord Chief Justice. The only exception to this is when the resignation is made towards

the end of the process and the Lord Chancellor and Lord Chief Justice have written to the office holder indicating that they are minded to remove him or her from office. In these circumstances a press notice is issued detailing the circumstances of the resignation.

Under the new rules there will be no 'minded to remove' letter from the Lord Chancellor and the Lord Chief Justice. The working group recognised however, that there will be certain serious cases of misconduct, where it is felt that in the interests of public confidence in the judiciary, the Lord Chancellor and the Lord Chief Justice would wish to make a statement in relation to a misconduct investigation. This is particularly important where a judge chooses to retire as it is possible an application may be made by that judge to return to the bench to sit part-time as a deputy.

The working group therefore considered that should an office holder resign or retire after receipt of a report recommending removal has been prepared by the Nominated Judge, Tribunal President or Advisory Committee, the Lord Chief Justice and Lord Chancellor should be invited to consider whether a finding of misconduct should be made and a press statement issued indicating that the office holder would have been removed had they not resigned or retired. This is reflected in regulation 23 of the instrument.

vii) The remaining recommendations relating to the process for handling conduct complaints were accepted and are reflected in the rules made under this instrument. This includes a summary process for dealing with complaints that would likely result in removal from office, such as a criminal conviction for dishonesty. Full details of the working group's recommendations and the subsequent evaluation can be found at www.judicialcomplaints.gov.uk

Consultation

7.8 In formulating the recommendations the working group reported regularly to the Judges' Council[2] and the recommendations were published for the statutory 12 week consultation period by the Office for Judicial Complaints from February to May 2012. There has been little public interest with only four members of the public responding to the consultation. However responses were received from each of the associations representing the different office holders, magistrates Advisory Committees, individual judges, and officials involved with the judicial complaints process. The full recommendations consultation document, and subsequent evaluation may be found on the OJC website at www.judicialcomplaints.gov.uk

[2] The Judges' Council is a body broadly representative of the judiciary as whole, which will inform and advise the Lord Chief Justice of England and Wales on matters as requested from time to time.

- Consolidation

7.9 The instrument will replace the existing regulations governing judicial discipline and will be available to judicial office holders and members of the public via the Office for Judicial Complaint's website.

8. Consultation outcome

8.1 There has been ongoing consultation throughout the development of the recommendations, as the working group was comprised of representatives from the range of judicial offices, representatives for the public and officials. A public consultation ran from 29 February to 23 May 2012.

8.2 Forty two organisations or individuals responded to the public consultation. The majority of responses were on behalf of the judiciary with only four responses from members of the public.

8.3 An evaluation of the consultation was published in September 2012 with details of how the recommendations would be amended as a result of the comments received. Two main areas were amended as a result of the feedback received from the consultation:

i) where a disciplinary sanction is recommended the judicial office holder will receive a copy of the report and recommendation before it is sent to the Lord Chancellor and the Lord Chief Justice for consideration.

ii) where there is a recommendation for removal or suspension from office, the right to a disciplinary panel will not be subject to a merit test.

8.4 The working group members and the Judicial Appointment and Conduct Ombudsman have been consulted in the drafting the new rules and regulations. The Lord Chief Justice for England and Wales, the Lord President of the Court of Session and the Lord Chief Justice for Northern Ireland were also consulted during the drafting period and have indicated they are content with the proposed new Regulations.

9. Guidance

9.1 The OJC provides advice and guidance to the public and judicial office holders through its website and leaflets which will be amended to reflect the changes brought about by this instrument.

10. Impact

10.1 There is no impact on private business or the voluntary sector as this instrument relates only to the administration of judicial complaints.

10.2 The impact on the public sector is limited to the Office for Judicial Complaints, judges, and magistrates' Advisory Committees, all of whom have been fully

engaged with the development of the proposed new rules and regulations. The instrument will provide for more efficient administration of the disciplinary process.

10.3 An Impact Assessment has not been prepared for this instrument.

11. Regulating small business

11.1 The legislation does not apply to small business.

12. Monitoring & review

12.1 The instrument will enable the complaints process to operate more efficiently and effectively. The operation of the new regulations and rules will be subject to an internal review after 12 months and the legislation may be amended accordingly.

13. Contact

Judy Anckorn at the Office for Judicial Complaints Tel: 020 3334 0145 or email: inbox@ojc.gsi.gov.uk can answer any queries regarding the instrument.