



# Pacific Judicial Development Programme

## *TOOLKIT FOR BUILDING PROCEDURES TO HANDLE COMPLAINTS ABOUT JUDICIAL CONDUCT*

April 2015





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Toolkits are evolving and changes may be made in future versions. For the latest version of the Toolkits refer to the website - <http://www.fedcourt.gov.au/pjdp/pjdp-toolkits>.

Note: While every effort has been made to produce informative and educative tools, the applicability of these may vary depending on country and regional circumstances.

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## PJDP TOOLKITS

### Introduction

For over a decade, the Pacific Judicial Development Programme (PJDP) has supported a range of judicial and court development activities in partner courts across the Pacific. These activities have focused on regional judicial leadership meetings and networks, capacity-building and training, and pilot projects to address the local needs of courts in Pacific Island Countries (PICs).

### Toolkits

Since mid-2013, PJDP has launched a collection of toolkits for the ongoing development of courts in the region. These toolkits aim to support partner courts to implement their development activities at the local level by providing information and practical guidance on what to do. These toolkits include:

- Judges' Orientation Toolkit
- Annual Court Reporting Toolkit
- Toolkit for Review of Guidance on Judicial Conduct
- National Judicial Development Committee Toolkit
- Family Violence and Youth Justice Project Workshop Toolkit
- Time Goals Toolkit
- Access to Justice Assessment Toolkit
- Trainer's Toolkit: Designing, Delivering and Evaluating Training Programs
- Judicial Decision-making Toolkit
- Enabling Rights & Unrepresented Litigants
- Toolkit for Public Information Projects
- Reducing Backlog and Delay Toolkit
- ***Toolkit for Building Procedures to Handle Complaints about Judicial Officers***

These toolkits are designed to support change by promoting the local use, management, ownership and sustainability of judicial development in PICs across the region. By developing and making available these resources, PJDP aims to build local capacity to enable partner courts to address local needs and reduce reliance on external donor and adviser support.

PJDP is now adding to the collection with this new ***Toolkit for Building Procedures to Handle Complaints about Judicial Conduct***.

### Use and support

These toolkits are available on-line for the use of partner courts at: <http://www.fedcourt.gov.au/pjdp/pjdp-toolkits>. We hope that partner courts will use these toolkits as / when required. Should you need any additional assistance, please contact us at: [pjdp@fedcourt.gov.au](mailto:pjdp@fedcourt.gov.au)

### Your feedback

We also invite partner courts to provide feedback and suggestions for continual improvement.

Dr. Livingston Armytage  
Team Leader,  
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April 2015

## PREFACE

This toolkit builds on PJDP's existing '*Developing codes of judicial conduct toolkit*', which is available at <http://www.fedcourt.gov.au/pjdp/pjdp-toolkits/PJDP-Codes-of-Judicial-Conduct-CoJC-Toolkit.pdf>.

If you are reading this the chances are your jurisdiction is considering the introduction of complaints handling procedures and you are involved in the process. Please remember we don't know who you are or what your experience is. You may well be familiar with some of the concepts explained here. You won't necessarily need everything in the kit and you certainly don't need to have read and absorbed everything before you begin. Start by skimming through and taking an overview; you will then have an idea of which materials will be of use to you and where it will be helpful to read in more depth.

The aim of this toolkit is to help your judiciary to set up an appropriate mechanism for handling complaints about the conduct of judicial officers. It highlights the key issues in complaints handling that you will have to resolve and the principles that will guide you in their resolution. It introduces examples from other jurisdictions and directs you to where you may find more detailed information. The suggested methodology is for the Chief Justice to select a group of judges to develop draft regulations which are then issued in draft form for wider consultation.

The toolkit was piloted in Vanuatu during July 2014. The three judges who comprised the Working Group reported that reading the toolkit before they commenced their work had alerted them to the major issues and prepared them for the development process. An account of the pilot can be found in Section 7. The draft procedures for receiving and handling complaints can be found in the additional documentation together with the accompanying Users' Guide.

The principal concern of a judicial complaints handling procedure is to encourage the highest standards of judicial conduct. By establishing a system for receiving and handling complaints the judiciary demonstrates that it recognises it is accountable to the people it serves.

The power to discipline judges is usually reserved to the state upon representations by the elected parliament but for reasons set out in this toolkit, it is for the judiciary to establish and manage the procedures for handling complaints and it is for your judiciary to formulate procedures for receiving and handling them. The procedures you put in place will depend on the resources available to you.

Do not be surprised if you encounter difficulty in resolving some issues. It is only comparatively recently that judiciaries have begun to introduce procedures for receiving and determining complaints against judges. The degree to which matters should be confidential is difficult, there are very good reasons to safeguard the reputation of the judiciary and therefore a very understandable reluctance to wash judicial 'dirty linen' in public.

It should be noted that conduct, in the context of complaints handling procedures, is not generally concerned with corruption or criminal wrongdoing by judges. Such allegations must be referred to the police or other anti-corruption agency for investigation. Where a judge is convicted of criminal wrongdoing, the conviction may well merit action by the disciplinary authority.

Finally, judicial misconduct is rare and it is very, very rare for a judicial officer to be removed from office for misbehaviour.

**NOTE:** Throughout this toolkit the word judge is used in its widest possible sense to include all judicial officers. Thus judges, magistrates, land court magistrates are all included, whether or not they are lay or law trained, and whether or not they are formally accorded the title 'judge'.

## TABLE OF CONTENTS

Abbreviations .....	iv
1 Introduction .....	1
2 What characterises an effective complaints procedure? .....	2
2.1 Objectives .....	2
2.2 Characteristics .....	2
2.3 Watch points .....	2
3 The elements of a 'typical' complaints procedure .....	3
4 Putting complaints procedures in context .....	4
4.1 Do complaints procedures threaten judicial independence? .....	4
4.1.1 Judicial independence and immunity from suit .....	4
4.1.2 Degrees of misconduct - from minor failure to disciplinary matter .....	4
4.1.3 The duty of the judiciary to ensure it merits the respect and confidence of the public .....	4
4.1.4 A protection for judicial independence - preserving the separation of powers .....	5
4.2 Who is the disciplinary Authority? .....	5
4.3 Confidentiality .....	6
4.4 Three guiding principles for complaints handling procedures .....	7
5 Creating your complaints procedure .....	8
5.1 Mapping the structure of your complaints authority .....	8
5.2 Who should receive complaints and manage the complaints procedures? .....	11
5.3 Receiving complaints .....	11
5.4 Initial examination - compliance with formalities - substance .....	12
5.5 Progressing complaints – considering the merits .....	12
5.6 Minor misconduct .....	13
5.7 Allegation merits an investigation .....	13
5.8 Clearly serious and requiring disciplinary action .....	13
5.9 Disciplinary action .....	14
6 Notes for guidance .....	15
6.1 Informing the subject of the complaint - when should the judge be told? .....	15
6.2 finality v fairness .....	15
7 The Vanuatu experience - A Case Study .....	17
7.1 The Pilot .....	17
7.1.1 Can you have a complaints procedure in the absence of guidance on conduct? .....	17
7.1.2 The matter which caused most difficulty .....	18
7.2 Introducing the procedures .....	18
7.3 The documents produced .....	19
7.3.1 The procedures step-by-step .....	19
7.3.2 Summary of time limits .....	20
7.3.3 Draft letter to Law Society, Public Prosecutor, Public Solicitor, etc. ....	21
7.4 Feedback from the Working Group .....	21
7.5 Follow up visit .....	22

Additional Documentation - <http://www.fedcourt.gov.au/pjdp/pjdp-toolkits/Complaints-Handling-Toolkit-AD.pdf>

Annex 1: Complaints Handling Procedures Manual .....

## ABBREVIATIONS

- JCIO - Judicial Conduct Investigations Office
- JIG - Judicial Integrity Group
- JSC - Judicial Services Commission
- MFAT - New Zealand Ministry of Foreign Affairs and Trade
- MSC - Managing Services Contractor - Federal Court of Australia
- PIC - Pacific Island Country
- PJDP - Pacific Judicial Development Programme ('Programme')

## 1 INTRODUCTION

Judges are expected to be independent and impartial, to treat those appearing in court as equal before the law and to work with both diligence and competence. They are expected to act with integrity and propriety both in and out of court.

In 2002 the Judicial Integrity Group (JIG) identified and explained those values in the *Bangalore Principles* which have gained virtually universal acceptance and been endorsed by the United Nations<sup>1</sup>. JIG<sup>2</sup> is now an established body, working to strengthen judicial integrity. JIG has encouraged jurisdictions to develop their own guidance on judicial conduct reflecting the Bangalore Principles. PJDP has recently supported four Pacific jurisdictions<sup>3</sup> to develop such guidance and a PJDP toolkit has been produced for use by any jurisdiction wishing to review its current guidance or develop new guidance on conduct. Most Pacific jurisdictions now have guidance on conduct for their judges which reflects these principles.

### *The Bangalore Principles*

*“a universally acceptable statement of judicial standards which, consistent with the principle of judicial independence, would be capable of being respected and ultimately enforced at the national level by the judiciary, without the intervention of either the executive or legislative branches of government.”*

The vision of the Judicial Integrity Group as later described by one of its founder members, Dr Nihal Jayawickrama at the Conference on Ethics for the Prevention of Corruption in Turkey. Ankara 2009

Guidance on judicial conduct is an important aid to judges, particularly those with less experience, and non-law trained judges. It is also a valuable guide to inform the public of the judicial role and what standards of behaviour those involved with the courts can expect of judges. The judiciary makes decisions which affect peoples' lives and it is important that the public have confidence in the integrity of the individuals making those decisions; by publishing guidance on judicial conduct a judiciary acknowledges that the community it serves has the right to expect certain standards of professionalism from its judges.

BUT, inevitably the question arises as to how to deal with an allegation that a judge's behaviour has fallen short of the expected standard.

The aim of this toolkit is to help your judiciary to set up an appropriate mechanism for handling complaints about the conduct of judges.

<sup>1</sup> The United Nations Social and Economic Council, by resolution 2006/ 23.

<sup>2</sup> [www.judicialintegritygroup.org](http://www.judicialintegritygroup.org)

<sup>3</sup> Niue, Tuvalu, Kiribati, - 2011. Samoa - 2013.

## 2 WHAT CHARACTERISES AN EFFECTIVE COMPLAINTS PROCEDURE?

The Pacific jurisdictions which constitute PJDP vary enormously in size and complexity. Some have significant numbers of law trained judges whilst others depend almost entirely on non-law trained local judges or magistrates. The resources available to the different judiciaries are likewise varied. These very practical considerations are likely to affect what is appropriate in any jurisdiction and what it can do with the personnel and resources available. It is therefore appropriate that we look at the generic features of effective complaints handling procedures before looking in more detail at the stages in the procedure.

### 2.1 OBJECTIVES

The objective of a complaints handling procedure is to receive and determine complaints regarding judicial behaviour and thereby to:

- promote high standards of judicial conduct;
- enhance the public's confidence in the judiciary; and
- increase understanding of the judicial process and the judicial role.

### 2.2 CHARACTERISTICS

An effective complaints handling procedure clearly sets out the procedures for receiving and determining an allegation that an individual judge's conduct fell short of the appropriate professional standard, and

- the procedures and the complaints authority are recognised as being transparent, objective and fair.
- the complaints authority must be seen to be independent from the judge who is the subject of the complaint, and
- complaints are dealt with promptly, and
- multiplicity of litigation is avoided. i.e. the complaints handling procedure does not duplicate or offer an alternative to an appeal or the right to review, and
- the procedures are simple, clear and proportionate (i.e. can be adjusted according to the seriousness of alleged misconduct), and
- because the aim is to correct improper behaviour in judges a complaints handling procedure does not provide a 'remedy' or redress for the complainant, and
- where it is proven that a judge's conduct fell short of the appropriate professional standard the outcome or sanction imposed is proportionate to the seriousness of the misconduct, and
- decisions are clearly explained and published, and
- determinations are generally final.

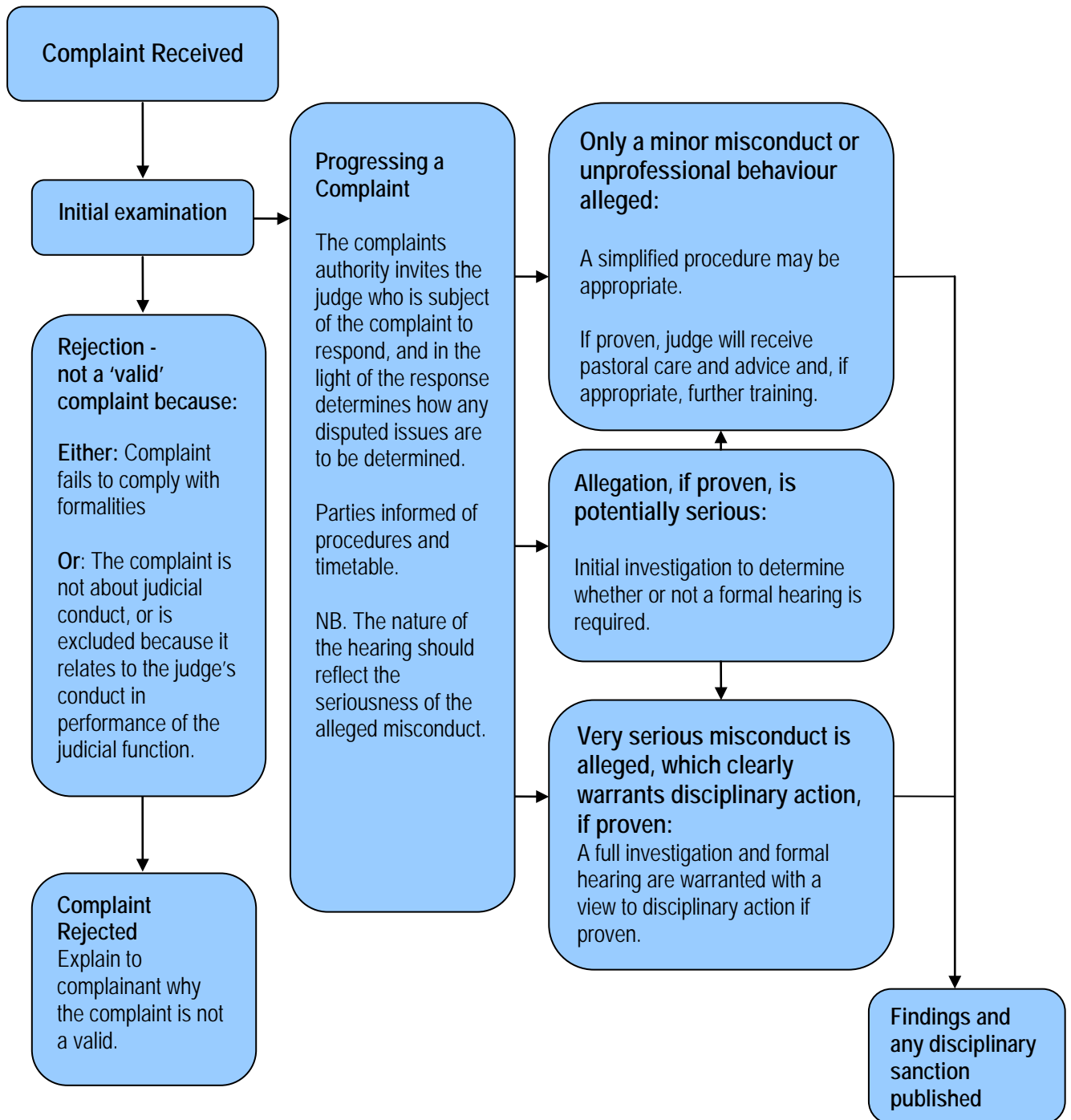
In addition, it should be noted that no charge is made for the registration of a complaint. This reflects the fact that the focus is on internal quality assurance; the complainant cannot gain any remedy or compensation as the result of making a complaint.

### 2.3 WATCH POINTS

- Judicial independence is respected and safeguarded.
- The procedures must be designed so as to dovetail with the law relating to the discipline and removal from office of judges.
- Judges are neither intimidated nor overburdened by the process but are informed and accorded a hearing and due process.
- Unfounded or vexatious complaints should be quickly identified and dismissed.



### 3 THE ELEMENTS OF A 'TYPICAL' COMPLAINTS PROCEDURE



## 4 PUTTING COMPLAINTS PROCEDURES IN CONTEXT

Jurisdictions which have set up complaints handling procedures report that a large proportion of the complaints they receive are misfounded in that they are based either on an assertion that the judge made the wrong decision, or that the judge was wrong in the way he or she managed the case or the hearing. The complainants' understanding of the judicial role and the administration of justice will be improved by a careful explanation of why their complaint cannot be entertained. Whilst he or she may not like the decision it is important that each complainant is reassured that they have been treated fairly. Where the complaints handling body reports publicly on its work, its report will serve to educate court users and to encourage more realistic expectations.

### 4.1 DO COMPLAINTS PROCEDURES THREATEN JUDICIAL INDEPENDENCE?

The independence of both the judiciary as an institution and each judge as an individual is fundamental to the rule of law and the administration of justice. Judges are used to being accorded great respect and are not used to having the way they perform their job examined or called into question; they may therefore be disquieted or even affronted by the prospect of the introduction of procedures which appear to invite complaints about their conduct. It is not unusual for those who do not immediately welcome the new transparency to suggest that the introduction of procedures for receiving and determining complaints threatens judicial independence.

#### 4.1.1 Judicial independence and immunity from suit

To protect and ensure judicial independence judges are generally given security of tenure and are given immunity from any liability with respect to the exercise of their judicial duties. A judicial decision can only be challenged in accordance with the specific rights of appeal or review given by law. Judicial immunity from suit is however limited to actions done in the execution of the judicial function; judges remain subject to the law in respect of their non-judicial activities and private lives.

#### 4.1.2 Degrees of misconduct - from minor failure to disciplinary matter

The terms upon which most judges are appointed provide that a judge may be removed from office for incapacity or misbehaviour. In this context misbehaviour has to be some kind of misconduct so serious as to render the judge unfit to hold judicial office. Conduct that is sufficiently serious to give rise to disciplinary sanctions must be distinguished from a lesser failure to observe professional standards<sup>4</sup>. All judges should of course aim to exemplify best practice and to comply with guidance on conduct, but no judge is likely to be perfect. When judges do fall short, most failures will not be sufficiently serious to justify disciplinary proceedings; some minor slips may not merit any action at all or may be best addressed through pastoral advice and, where appropriate, additional training.

#### 4.1.3 The duty of the judiciary to ensure it merits the respect and confidence of the public

A complaints procedure allows an individual to call into question a judge's behaviour when it allegedly falls below the expected standard even though it may not be 'so serious' as to warrant disciplinary action.

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<sup>4</sup> Delay in issuing decisions is a common cause of complaints; in England decisions show that such conduct may result in the judges receiving 'formal advice'. In Canada when a judge who admitted delay in publishing her decision, apologised and explained personal circumstances which had caused the delay, no further action was deemed necessary; the Judicial Council also took into account an excellent prior record. Removal from office is very rare but in England in 2014 a Recorder and Fee paid judge Miss Constance Briscoe was removed from office following her conviction for perverting the course of justice. Records show that judges sometimes choose to retire when faced with an investigation; the investigation then ceases as the judge no longer holds office.

By making individual judges accountable for such misconduct we do not challenge their independence, rather we make sure that they live up to their part of the bargain and act with integrity.

*"No one doubts that judges are expected to behave according to certain standards both in and out of court. Are these mere expectations of voluntary decency to be exercised on a personal level, or are they expectations that a certain standard of conduct needs to be observed by a particular professional group in the interests of itself and the community? As this is a fundamental question, it is necessary to make some elementary observations. We form a particular group in the community. We comprise a select part of an honourable profession. We are entrusted, day after day, with the exercise of considerable power. Its exercise has dramatic effects upon the lives and fortunes of those who come before us. Citizens cannot be sure that they or their fortunes will not some day depend upon our judgment. They will not wish such power to be reposed in anyone whose honesty, ability or personal standards are questionable. It is necessary for the continuity of the system of law as we know it, that there be standards of conduct, both in and out of court, which are designed to maintain confidence in those expectations"<sup>5</sup>*

#### 4.1.4 A protection for judicial independence - preserving the separation of powers

Rather than challenging judicial independence the adoption of complaints procedures may protect it by preempting any interference by either the legislature or the executive.

*"If the judiciary fails or neglects to assume responsibility for ensuring that its members maintain the high standards of judicial conduct expected of them, public opinion and political expediency may lead the other two branches of government to intervene. When that happens, the principle of judicial independence upon which the judiciary is founded and by which it is sustained, is likely to be undermined to some degree, perhaps seriously."<sup>6</sup>*

In 2010 JIG identified the instigation of mechanisms for handling complaints of unethical conduct as a responsibility of the judiciary.

*"The judiciary should consider establishing a credible, independent judicial ethics review committee to receive, inquire into, resolve and determine complaints of unethical conduct of members of the judiciary where no provision exists for the reference of such complaints to a court."*

Measures for the effective implementation of The Bangalore Principles of Judicial Conduct  
JIG - Lusaka - 2010

## 4.2 WHO IS THE DISCIPLINARY AUTHORITY?

The provisions you draft will have to take into account, and be consistent with, the provisions in your constitution and other legislation relating to the appointment, tenure and removal from office of judges.

Judges are usually given security of tenure until retirement age. In most jurisdictions the law provides that a judge can only be removed from office for proven incapacity or misbehaviour. The law relating to removal from office will also specify who can exercise this power (i.e. the disciplinary authority). Very often that is the State at the request of Parliament.

<sup>5</sup> Thomas - Judicial Ethics in Australia, 2<sup>nd</sup> edition (1997)

<sup>6</sup> Commentary on the Bangalore Principles 2007 at Page 28

By way of example in Australia judges of the Federal Court are appointed by the Governor-General by commission and *"shall not be removed except by the Governor-General, on an address from both Houses of the Parliament in the same session, praying for his or her removal on the ground of proved misbehaviour or incapacity"*<sup>7</sup>.

Misbehaviour must be very serious if it is to warrant removal from office. Most often the behaviour which forms the subject of a complaint will be at most unprofessional or inappropriate and will fall far below the threshold where removal from office might be considered. In such cases the Chief Justice will have power as head of the judiciary to advise the judge in question.

In structuring your procedures it is very important to bear in mind that before any disciplinary action can result from a complaint the matter will have, at some stage, to be referred for consideration by whomever the law identifies as the disciplinary authority. Some complaints systems provide for the authority in charge of the complaints process to transfer the matter to the disciplinary authority as soon as it becomes clear that there may have been serious misconduct e.g. New Zealand. Others provide that the complaints authority should conduct an inquiry and make a recommendation to the disciplinary authority e.g. Canada.

In the examples given below in 5.1, it can be seen that the New Zealand Judicial Conduct Commissioner acts as a preliminary filter. If he identifies a potential disciplinary matter he must refer it to the Attorney General with a recommendation that a conduct panel be convened. In Canada the Judicial Council conducts the investigation and inquiry and makes a recommendation to Parliament regarding disciplinary action. In England the Lord Chancellor and Lord Chief Justice are responsible for the entire complaints process and have disciplinary power over judges.

Whilst the hand-over to the disciplinary authority is very significant as regards constitutional principle and the independence of the judiciary it is unlikely to be of great concern to the complainant, whose interest will be in whether or not the judge is found to have misconducted him or herself and in whether any sanction is to be imposed.

### 4.3 CONFIDENTIALITY

You will have to consider the extent to which complaints are to be confidential. In many jurisdictions everything other than formal disciplinary proceedings is treated as confidential<sup>8</sup>, but in some jurisdictions<sup>9</sup> disciplinary hearings are held routinely in public. In the interest of transparency cases which result in the imposition of disciplinary sanctions should be reported and the judge named. However it is probably not appropriate to name the judge where the complaint is dismissed for want of substance or where the matter is sufficiently minor to be dealt with pastorally or through additional training. Most jurisdictions report such matters generically identifying the nature of the complaint and the overall numbers of judges who received re-training or pastoral advice. It is important that anyone involved in handling complaints understands that the existence and nature of any complaint should be kept confidential unless the rules otherwise state.

Both Canadian Judicial Council and the Judicial Commission of New South Wales include anonymous case histories in their annual reports these are very instructive.<sup>10</sup>

<sup>7</sup> The Australian Constitution [http://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Constitution](http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution) and The Federal Court of Australia Act 1976 – Part 11 [http://www.comlaw.gov.au/Details/C2013C00644/Html/Text#\\_Toc369251397](http://www.comlaw.gov.au/Details/C2013C00644/Html/Text#_Toc369251397)

<sup>8</sup> New South Wales seems to favour confidentiality but even there provisions allow that disciplinary hearings **may** be public. see <http://www.judcom.nsw.gov.au/complaints>

<sup>9</sup> e.g. Canada

<sup>10</sup> CJC [http://www.cjc-ccm.gc.ca/english/about\\_en.asp?selMenu=about\\_main\\_en.asp](http://www.cjc-ccm.gc.ca/english/about_en.asp?selMenu=about_main_en.asp) and JCNSW <http://www.judcom.nsw.gov.au/about-the-commission/annual-reports>

#### 4.4 THREE GUIDING PRINCIPLES FOR COMPLAINTS HANDLING PROCEDURES

From all of this we can identify the following principles which should guide the development of your complaints handling procedures.

1. Only the disciplinary authority identified by law can impose a disciplinary sanction.
2. Judges should be judged by judges. Judicial independence requires that the judiciary takes responsibility for promoting high standards of conduct and ensuring that complaints are dealt with.
3. As Head of the Judiciary, the Chief Justice is in a position to counsel the judiciary with regard to its duties and responsibilities.

## 5 CREATING YOUR COMPLAINTS PROCEDURE

Your procedures for receiving and handling complaints should be clearly set out in writing. In describing how to make a complaint it is important to use simple clear language free from ambiguity and from any unnecessary legal jargon because these instructions will be used by court users with no formal legal training. The procedures will need to be well publicized and information explaining how to make a complaint should be readily available to all court users<sup>11</sup>.

### 5.1 MAPPING THE STRUCTURE OF YOUR COMPLAINTS AUTHORITY

Practical considerations are likely to play a large part in what suits your jurisdiction. The size of the judiciary and the resources it commands will be a primary consideration; what you can do will depend on your budget. You may find it helpful to illustrate the structure you propose as a flow chart or in a step by step analysis such as the one described below in the account of the pilot of this toolkit in Vanuatu during July 2014<sup>12</sup>.

There is a great deal to be learned from looking at the complaints systems of other jurisdictions. Many can be found on the internet, see below. These websites explain the procedure for making complaints and usually have links to annual reports as well as relevant sources of law. But in looking at what other jurisdictions have done it is important to look carefully at the responsibilities and the powers associated with the role of different title holders. Some large jurisdictions have set up independent statutory bodies<sup>13</sup> to receive and manage complaints<sup>14</sup>. Typically the legislation creates an office for the person in charge of the complaints authority<sup>15</sup>. It should be noted that these statutory bodies are primarily administrative in function and whilst they may conduct initial inquiries, substantive decisions are directed to judges or to conduct panels and where appropriate to disciplinary panels composed predominantly of senior judges acting under the authority of those with disciplinary power. This is consistent with the independence of the judiciary.

Here follows a review of the structures adopted in four major jurisdictions. These are the 'bare bones', a lot more information can be obtained through their websites.

#### Canada

**The Judges Act 1985** creates the Canadian Judicial Council which is charged with investigating complaints against any federally appointed judge. <http://laws-lois.justice.gc.ca/eng/acts/J-1/index.html>

The membership of the Canadian Judicial Council is prescribed by statute and includes the most senior judges and is chaired by the Chief Justice of Canada.

In the most serious cases an Inquiry Committee is convened to investigate and hear the complaint where it finds the judge guilty of misconduct the committee may recommend to parliament that the judge be removed from office.

The website of the Canadian Judicial Council is exemplary in its clarity. [http://www.cjc-ccm.gc.ca/english/conduct\\_en.asp?selMenu=conduct\\_main\\_en.asp](http://www.cjc-ccm.gc.ca/english/conduct_en.asp?selMenu=conduct_main_en.asp)

<sup>11</sup> The responsibilities of the judiciary as regards providing information for court users are examined in the PJDP toolkit on Public Information <http://www.fedcourt.gov.au/pjdp/pjdp-toolkits>

<sup>12</sup> See section 7 below The Vanuatu experience.

<sup>13</sup> e.g. New Zealand - Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 and in England and Wales, The Head of the Judicial Conduct Investigations Office.

<sup>14</sup> It should be noted that this does not preclude the involvement of judges in investigating and determining complaints.

<sup>15</sup> In New Zealand this is the office of Judicial Conduct Commissioner. The current Commissioner, Sir David Gascoigne, KNZM CBE LL.M. is a lawyer from private practice.

### Australia - Federal Court

The Federal Court of Australia Act 1976 contains provisions which authorise the Chief Justice to handle complaints or to authorise other judges to handle complaints individually or as a complaints handling body. [http://www.comlaw.gov.au/Details/C2013C00644/Html/Text#\\_Toc369251397](http://www.comlaw.gov.au/Details/C2013C00644/Html/Text#_Toc369251397)

Where appropriate a Conduct Committee of senior judges can be formed to investigate a complaint.

If the Chief Justice is satisfied that grounds for removal exist he or she may refer a matter to the Attorney General or reference to parliament.

Website: <http://www.fedcourt.gov.au/feedback-and-complaints/judicial-complaints>

### England and Wales

In England and Wales the Constitutional Reform Act 2005 gives the Lord Chancellor and the Lord Chief Justice powers to discipline judges, make regulations and lay down procedures for the investigation of complaints. <http://www.legislation.gov.uk/ukpga/2005/4>

Delegated legislation then creates the Judicial Conduct Investigations Office (JCIO) and the procedural rules for the conduct of investigations.

[Judicial Discipline \(Prescribed Procedures\) Regulations 2013](#)  
[Judicial Conduct \(Judicial and other office holders\) Rules 2013](#)

But note: Most decisions are made by judges whether as a Nominated Judge, Investigating Judge or a member of a Disciplinary Panel; only judges can make a finding of misconduct.

Website: <http://judicialconduct.judiciary.gov.uk>

### New Zealand

In New Zealand the Judicial Conduct Commissioner and Judicial Conduct Panel Act 2004 provides for the appointment of a Judicial Conduct Commissioner by the Governor-General on the recommendation of the House of Representatives. The house is be advised by the Attorney-General who must consult the Chief Justice about the proposed appointment.

<http://www.legislation.govt.nz/act/public/2004/0038/latest/whole.html#DLM293588>

The Commissioner may decide to take no action or dismiss a complaint; otherwise his powers are limited to referring the matter to the relevant Head of Bench or recommend to the Attorney General that a Judicial Conduct Panel be convened. (see the overview in Schedule 1 of the Act)

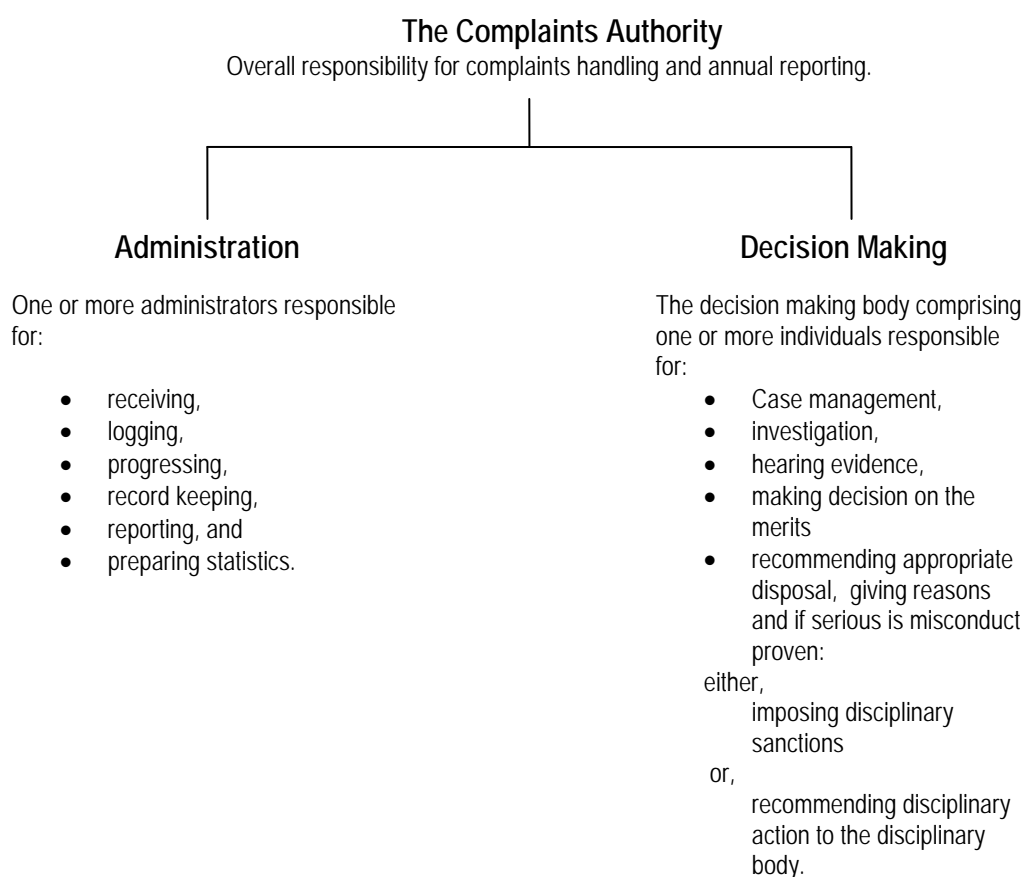
Website: <http://www.jcc.govt.nz>

If your jurisdiction has very few senior judges and is likely to struggle to find the human and other resources for complaints handling you will need a simpler system than any of the above but the essential elements will be the same. In the examples above legislation was passed. It is however possible for a judiciary to set up complaints handling procedures without legislation as was the case in Kiribati.

What is important is that the individual in charge of your complaints handling process is trusted and perceived as independent and capable of being objective and that the procedures ensure that parties are accorded a fair hearing. In smaller jurisdictions the obvious choice may well be the Chief Justice, but this may not always be practical, an alternative may be for another senior judge or perhaps an ethics committee to handle complaints under the authority of the Chief Justice.

Decisions on the merits must be made judicially. You may well decide to make provision for a small panel to consider the more difficult cases. The panel can be constituted on a case by case basis and should comprise individuals who can act independently in a judicial capacity. The majority should probably be active or retired judges but you could permit the inclusion representatives from civic society so long as they are not closely associated with government or the legislature. The rules of the Federal Court of Australia permit the inclusion of judges from other commonwealth jurisdictions. In drafting your procedures you may wish to consider giving the panel the power to co-opt, as an advisor, a member of the judiciary working at a similar level to the judge to whom the complaint relates. Of course such a person should have no significant connection with the complainant or the judge who is the subject of the complaint.

Given the number of possible structures this toolkit will use the term **Complaints Authority** to refer compendiously to the individual or group with power to handle and determine complaints.





## 5.2 WHO SHOULD RECEIVE COMPLAINTS AND MANAGE THE COMPLAINTS PROCEDURES?

You will need to identify someone who is responsible for the day-to-day administration of the system; receiving complaints, ensuring they are progressed and managing records. This might be someone from the permanent staff of the registry and need not necessarily be a lawyer provided they are offered adequate training.

## 5.3 RECEIVING COMPLAINTS

Receiving and logging complaints is a purely administrative task. Information on how to make a complaint and to whom it should be sent will need to be clearly set out stating:

1. What constitutes a complaint – Guidance for potential complainants should explain that:
  - a. the objective of the complaints process is to ensure that judges adhere to the standards of personal conduct expected of a judge. Therefore the complaints procedures only deal with allegations of improper or inappropriate conduct and will not entertain complaints regarding the exercise of judicial function.
  - b. the decision of the complaints process cannot alter the outcome or decision of any case. If unprofessional conduct or misconduct is identified the only outcome will be a warning or sanction imposed on the judge in question.
  - c. if the complaint relates to behaviour which would found an appeal or an application for review, that is the appropriate course to follow if the complainant is seeking to overturn the decision. This is because the appeal or reviewing court can overturn or set aside a decision. This is most likely to arise in relation to case management and the conduct of the hearing.
  - d. if the complaint alleges criminal wrongdoing by the judge it should be addressed to the police.
2. How a complaint should be made (orally, written, on-line) - where and to whom the complaint should be delivered.
3. Formalities - every complaint should clearly identify:
  - a. the complainant – name address – contact details, and
  - b. the judge to whom the complaint relates, and
  - c. the occasion when the misconduct is alleged to have occurred – date – time – place, and
  - d. the behaviour complained of must be described clearly and fully.
4. The time limit for making a complaint.
5. What happens next, i.e. information on what the complainant can expect after lodging a complaint including:
  - a. time within which receipt of the complaint will be acknowledged,
  - b. time within which a substantive response or explanation of future action will be given, and
  - c. what happens next – an explanation of the procedures for progressing and, where necessary, investigating a complaint.

## 5.4 INITIAL EXAMINATION - COMPLIANCE WITH FORMALITIES - SUBSTANCE

Once a complaint is received the first step will be to check whether it is valid:

- Is it made within the time limit?
- Does it comply with required formalities?
- Is it a complaint about inappropriate behaviour by a judge rather than the way in which the judge managed the case or the judge's decision and the outcome of a case?
- Is it neither frivolous nor vexatious?

This first examination of the complaint is analogous to the need to establish a *prima facie* case and should be straight forward and quick to undertake. Complaints which do not meet the requirements for validity should be quickly rejected with a full and careful explanation of why. It may be appropriate to include a procedure permitting the officer responsible for this decision to ask the complainant for further more detailed information before making a determination.

By framing the requirements for validity clearly and without ambiguity it is to be hoped that this stage can be kept simple and uncontentious.<sup>16</sup>

This initial examination might be delegated to administrative staff so long as they receive adequate training and very clear guidance and oversight. Provision should be made allowing any case of doubt to be taken forward for further consideration.

## 5.5 PROGRESSING COMPLAINTS – CONSIDERING THE MERITS

As has been seen at 5.1 above some jurisdictions have put in place a tiered system which allows complaints to progress from simple initial consideration to more formal investigations and 'trial like' hearings according to their complexity and, or the seriousness of the misconduct alleged<sup>17</sup>. Simple matters can thus be determined quickly and with the minimum of formality. But if your jurisdiction is small, practical considerations may necessitate a simpler approach; an example of such can be found in Kiribati. The complaints procedure was drafted by the Chief Justice Sir John Muria and appended to the Kiribati Code of Judicial Conduct when it was published in 2011. A copy is included in the Additional Documentation to this toolkit. Examples of more complex sets of procedures can be found in the regulations applicable in New Zealand and those for England<sup>18</sup>. What is described below is a generalised simple one step approach.

Once the decision that the complaint merits consideration has been taken, the judge to whom the complaint relates should be informed and invited to make a response<sup>19</sup>. This can be a written process subject to reasonable time limits. The judge's response will identify whether there are disputed issues which need to be investigated and resolved. The complaints authority will then be able to determine the appropriate way forward in order to ensure that the procedure adopted reflects the severity of the allegation and accords with natural justice.

At this stage the complaint will fall into one of the following categories:

- Minor misconduct i.e. unprofessional behaviour with no dispute as to facts.
- Allegation potentially serious but requires investigation.
- Clearly serious and requiring disciplinary action i.e. suspension, removal from office or formal reprimand.

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<sup>16</sup> cf the decision of the judicial conduct commissioner for NZ in the case of three complaints against Justice Wilson. Available as a download at <http://www.jcc.govt.nz/>

<sup>17</sup> In England a complaint can progress from initial consideration by the Judicial Investigations Office to a nominated judge and from a nominated judge to either an investigating judge or a disciplinary panel.

<sup>18</sup> <http://www.jcc.govt.nz> and <http://judicialconduct.judiciary.gov.uk>

<sup>19</sup> This can be a written process subject for which you will need to determine reasonable time limits.

## 5.6 MINOR MISCONDUCT

A minor misconduct is one which is not sufficiently serious to warrant disciplinary action. Judges are not infallible and will from time to time fail to meet the exacting standards expected of them. If the judge does not dispute either the facts or that the behaviour complained of was unprofessional then the complaints authority will have to decide what course of action, if any, should be taken. These minor shortcomings are usually addressed through pastoral care and advice and additional training where a training need has been identified. In practice where judges realise that they have behaved inappropriately they often resolve the matter by apologising to the complainant.

## 5.7 ALLEGATION MERITS AN INVESTIGATION

In those cases where it is not immediately clear from the complaint whether the misconduct alleged is sufficiently serious to warrant disciplinary action the complaints authority will have to investigate in order to establish the facts; likewise if the judge's response indicates that material facts are disputed. The complaints authority's investigation and hearing must accord with the rules of procedural fairness (natural justice) which require that the subject of the complaint should be fully informed of all the evidence being considered and be given the opportunity to submit evidence and make submissions to the complaints authority. Provisions may allow for evidence and submissions to be received in writing but the complaints authority should retain the discretion to call for oral evidence and submissions where that seems appropriate.

The complaints authority decision will be one of the following:

- Dismiss as unproven or as frivolous and vexatious.
- Minor misconduct no further action required.
- Minor misconduct merits further training or pastoral advice.
- Serious misconduct has taken place and disciplinary action is required<sup>20</sup>.

In practice, where it becomes clear that there is a serious issue to be investigated, the judge under investigation often chooses to retire<sup>21</sup>. For the judge this has the advantage that pension rights are preserved and once the judge is no longer a judge the complaints authority has no jurisdiction to continue proceedings. The matter is thus often resolved informally.

## 5.8 CLEARLY SERIOUS AND REQUIRING DISCIPLINARY ACTION

If the complaint is that the judge has been convicted of an offence and the conviction is final and proved<sup>22</sup> to the satisfaction of the complaints authority, the matter can be referred directly to the disciplinary stage. The appropriate action will be determined by the severity of the offence. The judge should be given the opportunity to make representations regarding the conviction or the appropriate sanction at a hearing. Whilst some minor offences, such as speeding, may be overlooked, a judge who repeatedly disregards the law is clearly unfit for office as is one who commits an offence of dishonesty or violence. Some jurisdictions produce schedules of those offences that will lead to disciplinary sanctions being considered<sup>23</sup>.

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<sup>20</sup> In a 'tiered system' the recommendation may be that a further, more formal hearing is required before the matter can be decided.

<sup>21</sup> This is evident from the reports issued by complaints authorities.

<sup>22</sup> i.e. beyond further challenge by the judge

<sup>23</sup> e.g. England and Wales - Judicial Conduct (Judicial and other Office Holders) Rules 2013 Part 3 Summary Process <http://judicialconduct.judiciary.gov.uk/rules-and-regulations.htm>

## 5.9 DISCIPLINARY ACTION

If the Complaints Authority also has disciplinary authority over the judge in question then it can impose the disciplinary sanction directly. More often the Complaints Authority will have to report its findings and recommendations to a separate disciplinary authority, which will then proceed in accordance with the relevant legislation. It may be that the law gives a judge who faces removal or suspension from office a right to a further 'disciplinary hearing' at which he or she can make submissions as to why the recommended sanction should not be imposed.

## 6 NOTES FOR GUIDANCE

### 6.1 INFORMING THE SUBJECT OF THE COMPLAINT - WHEN SHOULD THE JUDGE BE TOLD?

Clearly natural justice<sup>24</sup> requires that the judge be informed as soon as the allegation against him or her is being taken forward. It is for you and your judiciary to decide whether judges should be informed of complaints against them which are rejected as invalid. On the one hand a judge may wish to know but on the other, since summary rejection indicates that there is no case to answer, there is something to be said for the argument that there is nothing to tell.

### 6.2 FINALITY V FAIRNESS

The law identifies grounds upon which judicial decisions can be reviewed or appealed. An appeal or review is instigated by one of the parties and is primarily concerned with ensuring a just outcome for the proceedings.

The legitimate exercise of judicial discretion and the decision a judge reaches on the evidence and the law are clearly not aspects of judicial conduct. There are however some aspects of judicial behaviour which whilst capable of founding either an appeal or a review might also constitute misconduct. By way of example a procedural unfairness might arise because the judge lost his or her self control or became angry. It is not unusual for an appeals or reviewing court to be quite blunt in pointing out just where the trial judge went wrong and we must hope that judges heed the advice implicit in such comments.

#### Example

*"Whereas we entirely endorse robust case management and the importance of ensuring that all court time is used sensibly, we are bound to say we consider that the exchanges between the judge and counsel, especially on the first day, betray a rudeness and discourtesy of which the judge should be ashamed."*

Cordingley (2007) EWCA Crim 2174.

The law favours both consistency and finality and therefore recognizes that a multiplicity of actions in respect of the same matter is to be avoided<sup>25</sup> and further that a complainant should not be allowed to relitigate<sup>26</sup> the same issue in the hope of getting a different decision.

If the judicial behaviour complained of could constitute grounds for an appeal or review and the complainant has either not taken or has exhausted that course, it may be vexatious to attempt to reopen matters or avoid the time limit for appeal by lodging a complaint.

#### Example

*If a complaint is received about matters that are, or were, capable of being dealt with by an appeal or any other application to a court, the Chief Justice will write to the person who has made the complaint advising that person that the matter cannot be dealt with under the complaints procedure.*

Federal Court of Australia website

<sup>24</sup> i.e the rules of procedural fairness

<sup>25</sup> *Union Steamship Co of New Zealand Ltd v The Caradale* [(1937) 56 CLR 277 at 281]

<sup>26</sup> To do so is generally considered an abuse of process cf *Henderson v Henderson* (1843) 3 Hare 100.

## Example

### A matter for appeal of a complaint?

*In brief, the Canadian Judicial Council investigates complaints about an individual judge's inappropriate conduct, not a judge's decision in a court case.*

*Every year, judges in Canadian courts make hundreds of thousands of decisions on matters ranging from procedural issues to determining important points of law. When one party in a legal dispute thinks the judge made the wrong decision, the justice system allows that person to appeal to a higher court. For example, if you think that a judge of the Ontario Superior Court of Justice reached the wrong decision in your case, you can appeal the decision to the Ontario Court of Appeal.*

*Judges can make mistakes. An appeal court can reverse or vary the decision made by the judge who heard the case. The fact that an appeal court overturns a judge's decision does not mean that the judge's conduct was improper or that the judge should be removed from office. It simply means that the appeal court believed the judge made a mistake about the law or the facts of the case.*

*All judges are expected to uphold a high standard of personal conduct, both inside and outside the courtroom. So, aside from the decision the judge reaches in your case, the judge must be impartial when hearing your case, be respectful and courteous throughout the proceedings, and maintain a high standard of integrity. For example, it is appropriate for members of the public to ask the Council to investigate complaints about judges who are thought to have shown biases based on race, gender, or religion. Complaints can arise from judges' comments in the courtroom, from speeches or interviews given outside the courtroom.*

*If you are concerned about the conduct of a federally appointed judge, think carefully about the kind of action you may take:*

- *If you believe the judge made the wrong decision in your case, consider appealing your case to a higher court.*
- *If you believe a judge's conduct was improper, either during your case or in public, consider making a complaint to the Canadian Judicial Council.*

Canadian Judicial Council Website

In the interests of finality your jurisdiction may choose to provide that the final decision of the complaints process is unappealable.

In New Zealand appeal lies from a Judicial Conduct Panel to the Court of Appeal whereas in England there is no appeal, although alleged procedural failings may be subject to review<sup>27</sup> by the Judicial Appointments and Conduct Ombudsman.

<sup>27</sup> England <http://judicialconduct.judiciary.gov.uk/not-satisfied-with-service.htm> and <http://www.justice.gov.uk/about/jaco>

## 7 THE VANUATU EXPERIENCE - A CASE STUDY

### 7.1 THE PILOT

This toolkit was piloted in Vanuatu during July 2014.

Chief Justice Vincent Lunabek selected three judges to form a working group to develop procedures for receiving and handling complaints. They were Judge Oliver Saksak, Senior Magistrate Nesbeth Wilson and Magistrate (now Senior Magistrate) Hannaline Nalau Ilo. The members of the Working Group prepared for their work by reading this toolkit.

At our first meeting we discussed the group's remit and how work would be progressed. The group identified times when it could meet. It was agreed that the important work of the group was to discuss how complaints should be processed and to decide exactly what procedures should be put in place. It was agreed that, in order to minimize the number of court sittings which would be cancelled due to meetings, one person (myself<sup>28</sup>) would undertake the drafting<sup>29</sup>.

The group went on to discuss the legislative provisions regarding the discipline of judges and how the procedures should relate to the statutory provisions<sup>30</sup>; in particular at what point should a complaint be passed to the disciplinary authority<sup>31</sup>?

The group spent some time considering whether or not the procedures should admit a complaint where the behaviour complained of could have founded an appeal or review. The group favoured the simpler option of allowing no overlap. Taking the view that if a court conducting an appeal or review identified misconduct by a judge, it would say so and if the matter was sufficiently serious the disciplinary body could initiate steps. The group put this to the Chief Justice for his view and it was agreed to proceed on this basis whilst being prepared to review the matter in the future and in the light of experience.

Meetings progressed over the next two weeks with the group deciding what provisions should be made and my producing a draft for their consideration and amendment or further development at the next meeting. During those meetings the group decided it should produce a 'Users' Guide' to be available for anyone wishing to make a complaint.

#### 7.1.1 Can you have a complaints procedure in the absence of guidance on conduct?

This was a question which arose in Vanuatu. In theory it is technically possible but could be problematic because the individual or group handling complaints would have to decide what is and is not acceptable conduct on a case by case basis; guidelines would effectively evolve as precedents developed. Furthermore, it is hard to answer the objection that it is not fair to criticize judges if they get it wrong when they have not the benefit of guidance. The Vanuatu team was firmly of the view that judges should have clear guidance on conduct before any complaints procedures are introduced.

When the working group submitted the draft procedures and the users' guide to Chief Justice Lunabek for his comments, he explained that he felt that the existing guidelines on conduct were not sufficiently specific for non-law trained judges and he was therefore reluctant to apply the new procedures to the Island Court Justices without providing them with clearer guidance on the standards of conduct expected of them.

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<sup>28</sup> i.e. Kerin Pillans, the author of this toolkit. I visited Vanuatu to participate in piloting the toolkit.

<sup>29</sup> It is probably more efficient to appoint one individual to produce a preliminary draft which can then be refined by the group.

<sup>30</sup> The Judicial Services and Courts Act 2006

<sup>31</sup> The Judicial Services Commission

The judges who work in the courts of first instance are the principal face of justice. Their courts are the courts where most people have their only meeting with the justice system and where the justice system is itself judged. It is important that these judges meet the highest standards. I was concerned that to exclude them from the operation of the procedures would be a mistake because it might suggest that they are less than full members of the judiciary; not quite 'proper' judges! Accordingly we set about drafting guidelines for the Island Court Justices.

The completed draft Guidelines on Conduct for Island Court Justices were considered by the members of the Working Group. As a supervising magistrate with responsibility for overseeing the work of Island Courts, Senior Magistrate Nesbeth was particularly qualified to identify the most troublesome issues.

### **7.1.2 The matter which caused most difficulty**

The group undoubtedly encountered most difficulty in working through the interrelation between the complaints procedures and the existing disciplinary provisions which are in The Constitution of the Republic of Vanuatu and The Legal Services and Courts Act 2006.

The legislation establishes the Judicial Services Commission (JSC) which is given responsibility for ensuring the quality of judicial service, for producing guidelines on conduct and powers to investigate disciplinary matters. Where it finds gross misconduct, incapacity or professional incompetence it can recommend suspension or removal from office to the President of the Republic.

The problems in the past have been firstly, the want of any procedure for raising a matter with the JSC and secondly, that it is not clear to whom a complaint about some minor misconduct which could not warrant disciplinary action should be directed. The result has been that dissatisfied individuals write letters of complaint to just about anyone they think might listen to them; some of these complaints raise issues relating to judicial conduct. Some complaints reach the Chief Justice or the Registrar and can be progressed but others may go nowhere because they are directed to someone with no authority to address them. So long as complaints are not collected in one place it is impossible to ensure that they receive a response and impossible to conduct any kind of analysis as to the nature of complaints received. The Working Group clearly could not limit the powers given to the JSC but the procedures do provide a clear mechanism for receiving and sorting complaints so that all can be logged and those which merit referral can be passed to the JSC. The Chief Justice will be in a position to counsel judges if their conduct has fallen below the expected standard and to identify any issues which merit a more general intervention, such as a programme of training or additional guidance.

In Vanuatu the JSC has all the powers necessary to put in place procedures to receive complaints regarding disciplinary matters. The membership which is prescribed by legislation includes the Chief Justice<sup>32</sup>. When the draft procedures are shown to the Commission it may choose to adopt them as an appropriate mechanism for ensuring that it receives those complaints which require its attention.

## **7.2 INTRODUCING THE PROCEDURES**

The Chief Justice has circulated the Draft Complaints Procedures and the Users' Guide to the judiciary for comment. At present the procedures are being considered by the judges and magistrates for feedback and comment. Once they are confirmed, the Chief Justice plans to write to the principal court user groups to notify them of the new procedures. Notices will also be put up in court where the Users' Guide will be available on request. Two notices were drafted which could be used to announce the introduction.<sup>33</sup>

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<sup>32</sup> The members are the Minister for Justice, the Chief Justice, The Chairman of the Public Services Commission and a nominated member of the National Council of Chiefs.

<sup>33</sup> See below



### 7.3 THE DOCUMENTS PRODUCED

The draft Procedures and Users' Guide are included in the Additional Documentation. During the early stages of the development process the following step by step analysis<sup>34</sup> was produced initially to provide an easy cross-check on the effect of procedures as they were drafted. Its greatest value proved to be in its uncompromising instance on a 'yes/no' answer; in the process of constructing the key you have to consider the order in which groups can be identified or eliminated, you must also rank your questions according to how unambiguously they can be put and how effective they will be in separating the categories you wish to separate. This helped the Working Group ensure that the procedures effectively identify and quickly dispose of those complaints which were without foundation<sup>35</sup> whilst identifying and quickly progressing those that raise issues of concern.

The group was concerned to set appropriate time limits, in the first instance it decided to allow six months for the complaint to be made. This was to take account of the fact that the procedures are new however the group recognizes that it should review the time limit in the future when the procedures have had time to bed in.

#### 7.3.1 The procedures step-by-step

Complaint to CJ



Is it procedurally complete? ► **NO** ►► REJECT + Notice explaining rejection



**YES**



Is it within 6 months of date of alleged behaviour? ► **NO** ►► REJECT+ Notice explaining rejection



**YES**



Would the behaviour complained of found an appeal or review? ► **YES** ►► REJECT+ Notice explaining rejection



**NO**



Is the complaint about CONDUCT and not about the legitimate exercise of the judge's function in case management and decision making? ► **NO** ►► REJECT+ Notice explaining rejection



**YES**



Is it frivolous or vexatious? ► **YES** ►► REJECT+ Notice explaining rejection



**NO**



**CONDUCT ENQUIRY COMMENCED** ►► + Notice explaining what will happen next



Subject of complaint notified ►► Response invited within 28 days



Upon response or lapse of time for response



<sup>34</sup> Note that the analysis presents a series of 'questions which all have only 2 possible answers true / false or yes / no

<sup>35</sup> It will be noted that the first two questions are purely factual and could be handled by an appropriate administrator; the third and fourth questions require some legal knowledge but could perhaps also be delegated.

- Are disciplinary proceedings merited? ▶ **YES** ▶▶ File passed to Judicial Services Commission  
 ▼ + Notice to subject and complainant explaining why and what next  
**NO**  
 ▼
- Are facts admitted ▶ **YES** ▶▶ CJ determines outcome (Retains power to refer up to JSC)  
 ▼ ▶▶ Decision + Notice to subject and complainant explaining decision  
 ▼  
**NO**  
 ▼
- CJ may conduct proportionate hearing to establish facts and determine appropriate decision  
 (Retains power to refer up to JSC)  
 ▶▶ Decision + Notice to subject and complainant explaining decision

### 7.3.2 Summary of time limits

The group wanted to allow a realistic time for complainants and for responses from the subject of the complaint whilst ensuring complaints are dealt with in good time and that there is no undue delay. It should also be noted that if a matter is referred to the Judicial Services Commission (JSC) the group had no power to prescribe time limits.

TIME LIMITS	EVENT
Complaint must be filed not more than <b>6 months</b> from incident to which complaint relates	<b>Alleged misconduct</b>
Start Date	<b>Complaint Received</b> Chief Justice opens record
Not more than 28 days	<b>Preliminary Examination</b> Summary rejection possible
Not more than 28 days	<b>Conduct Enquiry commenced</b> Judge invited to respond Early reference to JSC possible
Not more than 56 Days	<b>Decision, or referred to JSC, or CJ's hearing if necessary to determine disputed facts.</b>
Max 112 days (4 months) from Start Date	<b>Final determination issued</b>

**Note:** this document represents work in progress; it was produced to focus discussion and does not necessarily reflect the final position.

### 7.3.3 Draft letter to Law Society, Public Prosecutor, Public Solicitor, etc.

Dear .....

#### Procedures for receiving and handling complaints about the conduct of judicial officers

The Chief Justice has put in place new procedures for receiving and handling complaints about the conduct of judicial officers.

Up until now there has been no set procedure for receiving complaints. In consequence complaints have been sent to different people and not always reached individuals who can deal with them. Because of this it has been impossible to know how many complaints were made and if, or how, they were resolved.

The new procedures will ensure that in future every complaint can be recorded and dealt with in an appropriate and timely fashion.

In future all complaints should be marked "**Complaint – Confidential**" and addressed to the office of the Chief Justice.

#### An overview of the new procedures

The procedures require that a complaint be made **within 6 months** of the behaviour complained about and that the complaint be particularised. The complaint will be acknowledged on receipt and a Complaint Number allocated, the complainant will receive a **preliminary response within 28 days** that will say how the complaint will be progressed. If the complaint is out of time, incomplete or does not raise an issue of judicial conduct, it may be summarily rejected at this point.

Potentially **serious matters** will be referred to the Judicial Services Commission which has statutory powers to conduct disciplinary investigations and hearings. Where the conduct alleged is clearly **not sufficiently serious** to warrant disciplinary action the Chief Justice may institute a Conduct Enquiry.

**The objective of the complaints procedure** is to ensure the highest standards of conduct amongst the judiciary. A complaint alleging serious misconduct can lead to disciplinary action. In less serious cases, if a judicial officer is found to have fallen below the expected standard of conduct, he or she may receive advice or further training; the complainant may receive an apology.

The complainant should note that the complaint process can never affect the outcome of a case. The complaints procedures are **not an alternative to an appeal or review**; if the matter complained of might have founded an appeal or review that is the course the complainant should take. Whilst complaints can be made about behaviour both in and outside court, complaints about the exercise of the judicial function, such as case management or a judicial officer's decision will not be considered.

The procedures aim to resolve all complaints within 4 months of receipt; however a resolution may well take longer if the matter is referred to the Judicial Services Commission for a disciplinary enquiry.

A **Users' Guide to making a complaint about judicial behaviour** which explains the procedures in more detail is available at courts.

### 7.4 FEEDBACK FROM THE WORKING GROUP

Members of the Working Group were invited to write a short report for the PJDP newsletter. They wrote:

*The 'Procedures for Handling Complaints about the Conduct of Judicial Officers', 'The Users' Guide' and 'The Guidelines on Conduct for Island Court Justices of Vanuatu' are the product of three meetings of a small committee made up of a judge and two magistrates. Our main source of assistance was the draft Toolkit*

developed by PJDP and published in December 2013 without which the committee would have found it difficult to begin their work. During three working meetings the judge chaired and welcomed comments and ideas from the other two members in order to formulate the first draft. The committee is indebted to the assistance of Ms Kerin Pillans who was responsible for drafting provisions as directed by the committee. All drafts were discussed and changes were made prior to an agreed draft being circulated to our fellow judges and magistrates for feedback.

During the final meeting members of the Working Group were asked for feedback on their experiences:

- *"At first I had concerns about exposing ourselves" "there has never been anything like this ever since I have been a magistrate"*  
*"It is good to know whether or not you are doing the right thing" "We want respect"*  
*"People don't tell you" It's good to be transparent"*  
*"I want feedback but there is no way to ask for it" - This might help me know if I am out of line"*
- *"Court is different from other jobs – society expects judicial officers to conduct themselves well. I was concerned that we might be opening up a door to criticism people might focus more on our conduct. I have been reassured to some extent by the toolkit and as we developed the procedures. On the other hand we should be accountable. "*
- *"I felt some discomfort when the Guidelines on conduct were introduced several years ago, but as time went on I felt better. The guidelines help me judge myself and made me think about the way I conduct myself. These procedures are just the next step. I want to see what happens when other judicial officers are invited to consider the procedures - will they be discomfited? Will they take up positions?"*
- *"It will be interesting to see if people start to understand the judge's role better; at present some people complain because they don't like the decision."*
- *"If people understand what they can complain about and what not there will be fewer complaints."*
- *"Complaints will be addressed to the right place so they can be dealt with."*
- *"The procedures should boost peoples' confidence in the courts because they will see that we take responsibility."*
- *"We judge people we should be able to judge ourselves."*
- *"It will be more professional people can see that complaints are acknowledged and dealt with."*
- *"Boosting judicial integrity is the most important outcome. We must address complaints transparently so that people can see we are responsible. It will promote the integrity of the institution."*
- *"It will help judicial officers to be more careful now that complaints can be made – we should not feel above the law."*

## 7.5 FOLLOW UP VISIT

The Chief Justice later requested help in designing the administrative processes necessary to implement the procedures; lack of the time and resources necessary to set up an office system had proven to be an obstacle to their introduction. It was agreed that there should be a follow up visit in March 2015. The arrival of cyclone Pam interrupted that visit. Despite time being very short two important steps were taken towards introducing the procedures: Firstly, a meeting was held at which, after full consideration and discussion, the Supreme Court Justices endorsed the introduction of the procedures. Secondly, the Chief Justice and I were able to work through exactly how the procedures should be administered in the office on a day-to-day basis. A simple system for the creation and maintenance of records relating to complaints was devised; the Chief Justice decided that the principal record would be a paper file with a computer log providing a back-up.

The discussion with the Justices of the Supreme Court produced several minor amendments which have been incorporated into the procedures.

Subsequently, working from my discussion with the Chief Justice, I put the substantive and administrative procedures together in a '**Complaints Handling Procedures - Manual**'. The manual is in three sections: **Section 1** sets out the administrative procedures step by step **Section 2** includes supporting materials such as file cover-sheets, and various *pro forma* letters and notices. **Section 3** consists of the revised Complaints Handling Procedures and Users Guide

I also produced the basis of a simple computer log to act as a back-up to the paper filing system and, to capture information regarding the kinds of complaints received, time taken and the manner of their disposal. The information necessary for annual reporting should be easily retrievable from the log. A range of suggested tables for inclusion in an annual report was also produced.

The manual has been included in the annex to this toolkit

At the time of writing only two months have passed since Vanuatu was devastated by cyclone Pam and there has unsurprisingly been as yet no further progress with regard to implementation of the complaints procedures. It is to be hoped that when life eventually begins to return to normal the court will be able to complete the implementation of the procedures.

## 8 IN CONCLUSION


If your judiciary decides to embark on the design of complaints handling procedures, bear in mind that this is all very new. In response to the ever growing insistence on transparency and accountability in public office, Judiciaries are slowly acknowledging that they should be accountable. This toolkit has highlighted some of the conflicts that you will have to resolve where different principles impinge on one another. This will not always be an easy task<sup>36</sup>.

We do suggest you look at the websites established by those jurisdictions which have already set up procedures, however these are mainly large very well resourced jurisdictions and some of the structures they put in place would be unwieldy, unrealistic and inappropriate in a small Pacific Jurisdiction.

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<sup>36</sup> The Judicial Commission of New South Wales gives an account of its development including how some difficult issues were resolved in *From controversy to credibility: 20 years of the Judicial Commission of New South Wales*. This short pdf publication is a reassuring read. <http://www.judcom.nsw.gov.au/about-the-commission/judcom-20years-web.pdf/view>





# *TOOLKIT FOR BUILDING PROCEDURES TO HANDLE COMPLAINTS ABOUT JUDICIAL CONDUCT - ADDITIONAL DOCUMENTATION*

Available at:

<http://www.fedcourt.gov.au/pjdp/pjdp-toolkits/Complaints-Handling-Toolkit-AD.pdf>

Toolkits are evolving and changes may be made in future versions. For the latest version of this Additional Documentation please refer to the website - <http://www.fedcourt.gov.au/pjdp/pjdp-toolkits>.

Note: While every effort has been made to produce informative and educative tools, the applicability of these may vary depending on country and regional circumstance









# Pacific Judicial Development Programme

## *TOOLKIT FOR BUILDING PROCEDURES TO HANDLE COMPLAINTS ABOUT JUDICIAL CONDUCT*

PJDP toolkits are available on: <http://www.fedcourt.gov.au/pjdp/pjdp-toolkits>

