



Judicial Discipline

Consultation on proposals about the judicial disciplinary system in England and Wales





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A consultation by the Lord Chancellor and Lord Chief Justice of England and Wales. It is also available at https://consult.justice.gov.uk/

About this consultation

To: Members of the public of the United Kingdom. (particular

relevance to judicial office-holders in England and Wales, and those who sit in tribunals with a UK-wide jurisdiction.)

Duration: From 15/11/21 to 07/02/22

Enquiries (including Simon Parsons

requests for the paper in an Judicial Conduct Investigations Office

alternative format) to: 80–82 Queen's Building

Royal Courts of Justice, London WC2AA 2LL

Tel: 020 7176 4811

Email: disciplinary.consultation@judicialconduct.gov.uk

How to respond: Please send your response by 07/02/22 to:

Simon Parsons

Judicial Conduct Investigations Office

80-82 Queen's Building

Royal Courts of Justice, London WC2AA 2LL

Email: disciplinary.consultation@judicialconduct.gov.uk

Response paper: A response to this consultation will be published in

early 2022.

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Foreword

The judiciary of England and Wales is regarded as one of the best in the world. Alongside independence and expertise, high standards of personal behaviour play an important part in maintaining the exceptional reputation of our 22,000 judicial office-holders.

As Lord Chancellor and Lord Chief Justice, we are jointly responsible for judicial discipline. We are supported in this role by the Judicial Conduct Investigations Office ("JCIO"), tribunals chamber presidents and regional conduct advisory committees.

We regard it as vital to public confidence in the judiciary that effective action is taken on those rare occasions when judicial office-holders do not behave as they should. The fact that successive Lord Chancellors and Lord Chief Justices have not hesitated to act in such cases demonstrates that misconduct is taken seriously and that it has consequences for the transgressor.

It is now approaching a decade since the late Lord (then Lord Justice) Toulson led the review that resulted in our current disciplinary system. In many ways, that system has stood the test of time well. Since its formation in 2013, the JCIO has dealt with over 10,000 complaints. Over the same period, chamber presidents and advisory committees have dealt with thousands of complaints about tribunals office-holders and magistrates. At around 50 cases a year, misconduct by judicial office-holders is rare.

The system is not without drawbacks, however. First, in a small proportion of cases, investigations take too long. Second, while it would be wrong to describe the system as closed, we recognise that more could be done to aid public understanding of disciplinary decisions.

We believe that the proposals in this consultation document, which a senior-judge-led working group produced following a comprehensive year-long review, will improve what is already a well-regarded disciplinary system.

We look forward to receiving your views on the proposals.

The Right Honourable Dominic Raab MP

Lord Chancellor & Secretary of State for Justice

The Right Honourable Lord Burnett of Maldon

Lan Burnett

Lord Chief Justice

Executive summary

- 1. This consultation welcomes views on proposals for improvements to the judicial disciplinary system in England and Wales. It is published jointly on behalf of the Lord Chancellor and Lord Chief Justice, reflecting the constitutional position that responsibility for judicial discipline lies jointly with them.
- 2. The disciplinary system covers salaried and fee paid courts judges, tribunal judges and non-legal members, magistrates and coroners in England and Wales: approximately 22,000 judicial office-holders. The system also encompasses tribunals with a UK-wide jurisdiction.
- 3. The Lord Chief Justice and the Senior President of Tribunals are responsible for setting the principles which guide judicial office-holders' personal conduct. The *Guide to Judicial Conduct*¹ documents those principles. Depending on the judicial office in question, other relevant documents include terms and conditions of appointment, the declaration and undertaking signed by magistrates on appointment, and subject-specific guidance on issues such as use of social media.
- 4. Misconduct is a term which refers to improper personal conduct by a judicial officeholder that is serious enough to call for formal disciplinary action. Some examples of behaviours which can result in a finding of misconduct include:
 - Offensive remarks/loss of temper in court
 - Improper conduct towards colleagues/staff
 - Misuse of judicial status
 - Misuse of social media
 - Failure to report relevant matters such as personal involvement in legal proceedings.
- 5. Allegations of misconduct usually arise from a complaint by a third party such as a member of the public or a legal representative. Questions of misconduct may also arise in the absence of a complaint, for example from press reports, a referral from a leadership judge, or self-reporting.
- 6. The disciplinary system provides the framework in which allegations of misconduct are investigated and, if appropriate, action is taken. The final decision in cases of misconduct rests jointly with the Lord Chief Justice (or his senior judicial delegate)

Guide to Judicial Conduct – Revised March 2018 (Updated September 2020) | Courts and Tribunals Judiciary

and the Lord Chancellor. The sanctions for misconduct range from formal advice to removal from office.

- 7. The vital principle of judicial independence means that the disciplinary system is not a mechanism for dealing with complaints about judicial decisions. Such matters can only be challenged by appeal to a higher court.
- 8. Under sections 115 and 117 of the Constitutional Reform Act 2005, the Lord Chief Justice may, with the Lord Chancellor's agreement, make rules and regulations for the investigation and determination of complaints about misconduct. The current rules and regulations were first published in 2013 following a review headed by the late Lord (then Lord Justice) Toulson.
- 9. In 2019, the Lord Chancellor and Lord Chief Justice agreed that the time was right to review the operation of the disciplinary system. The proposals in this paper were developed following a year-long review carried out by a working group formed by Dame (then Lady Justice) Rafferty DBE and, following her retirement in July 2020, chaired by Lady Justice Carr DBE. The group's members included judges, officials from the JCIO, Judicial Office, Her Majesty's Courts and Tribunals Service and the Ministry of Justice, and a lay judicial disciplinary panel member.
- 10. The group's overarching aim was:

To review the judicial disciplinary system in England and Wales, and to make recommendations to ensure that the consideration of complaints about misconduct is proportionate, efficient, fair and strikes the right balance between confidentiality and transparency.

- Key interests, including bodies representing the judiciary, were informed about the review and encouraged to give their views. Ad hoc advice was obtained from judges and officials outside the group on specific issues.
- 12. The proposals in this consultation document are intended to improve, rather than reinvent, a system that has stood the test of time well since it was last reviewed almost a decade ago. The proposals cover a range of issues including:
 - Defining the purpose of the disciplinary system
 - Transferring responsibility for dealing with complaints about tribunal members from chamber presidents to the JCIO
 - Classifying different levels of misconduct
 - Improving the statutory process for investigating complaints, including proposals about the separate process for complaints involving magistrates
 - Providing the public with more information about disciplinary decisions
 - Promoting diversity amongst those who carry out statutory roles in the system.

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- 13. **Appendix A** contains an overview of how the modern judicial disciplinary system developed and how it operates today. We recommend that respondents unfamiliar with the system read the appendix before considering the proposals.
- 14. The statutory rules and regulations referred to throughout this document can be viewed at: https://complaints.judicialconduct.gov.uk/rulesandregulations/

Introduction

- 15. This paper sets out for consultation proposals for improvements to the judicial disciplinary system in England and Wales. We welcome views from all members of the public in the UK but note that the proposals will be of particular interest to judicial office-holders within the scope of the system, their representative bodies and those who currently perform roles within the system.
- 16. A Welsh language summary will be published alongside this consultation document.
- 17. Copies of the consultation paper are being sent to:

Lord President (Scotland)

Lady Chief Justice of Northern Ireland

Master of the Rolls

President of the Queen's Bench Division

President of the Family Division

The Chancellor of the High Court

Senior Presiding Judge

Chief Coroner

Mrs Justice Cheema-Grubb DBE

Nominated Judges

High Court Judges' Association

Association of High Court Masters

Council of Circuit Judges

Association of Her Majesty's District Judges

Council of Her Majesty's District Judges (Magistrates' Courts)

Coroner's Society for England and Wales

Heads of Legal Operations (and, via them, the Regional Conduct Advisory

Committees)

Magistrates' Leadership Executive

Magistrates' Association

Association of Lord-Lieutenants

Bench Chairs

Judicial Appointments and Conduct Ombudsman

Judicial Office Press Team

Judicial HR

Judicial College

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Welsh Government
Scottish Government
Northern Ireland Government
Law Society
Bar Council
CILEX
Law Commission

18. This list is not meant to be exhaustive or exclusive. Responses are welcome from anyone with an interest in, or views on, the subject covered by this paper.

Next Steps and Timing

19. This consultation will be open for three months to provide an opportunity for anyone with an interest to comment on the proposals. Once the consultation has closed, we will consider the views received and then issue a formal response.

Legislation

20. Changes to statutory processes for considering complaints will require Parliament's approval via the negative resolution procedure. Changes to disciplinary sanctions will require primary legislative change to section 108 of the Constitutional Reform Act 2005.

The proposals

- 21. The proposals in this consultation document are grouped as follows:
 - Proposals 1–3 are about defining the purpose of the system and the JCIO's remit
 - Proposals 4–19 are about improvements to the JCIO complaint-handling process
 - Proposals 20–30 are about improvements to the process for considering complaints against magistrates
 - Proposals 31–34 are about disciplinary sanctions
 - Proposals 35–38 are about transparency
 - Proposals 39–41 are about measures to promote diversity amongst those who have a statutory role in the processes for considering complaints.

The Purpose of the Disciplinary System and the JCIO's Remit

Proposal 1: The purpose of the judicial disciplinary system should be defined

- 22. The review working group noted that while documents such as the *Guide to Judicial Conduct* cover how judicial office-holders should conduct themselves, and statutory disciplinary rules and regulations provide the process for dealing with complaints, there is no clear statement of what the disciplinary system is for.
- 23. Particularly given the need to maintain a clear separation between issues which can be dealt with under the disciplinary system and those which cannot, such as challenges to judicial decisions, we propose the adoption of a formal definition:
 - The purpose of the judicial disciplinary system is to promote public confidence in the independence, reputation, and good standing of the judiciary by ensuring that allegations of misconduct are dealt with efficiently, fairly and proportionately.
- 24. We intend that the definition would be published on the JCIO's website and in related guidance for complainants and the judiciary.
 - Q1: Do you agree that the purpose of the judicial disciplinary system should be formally defined? If so, do you agree with the proposed definition? Please give your reasons.

Proposal 2: The disciplinary system should continue to be based on the concept of misconduct, which should be categorised by levels of seriousness

- In some regulatory systems misconduct refers to only the most serious breaches of professional standards, while in the judicial disciplinary system it encompasses a broader spectrum of acts. A finding of misconduct is what triggers a disciplinary sanction. Lower level misconduct will typically result in a sanction of formal advice. Depending on its severity, more serious misconduct will result in either a formal warning, a reprimand or, in the most serious cases, removal from office.
- 26. The concept of misconduct helps to maintain the important distinction between issues which are within the scope of the disciplinary system and complaints about the substance of judicial decisions and case management, which fall outside the remit of the disciplinary system and can only be pursued by appeal to a higher court.
- 27. The requirement in the statutory rules for a complaint to contain an allegation of misconduct is also important because 70% of complaints to the JCIO do not raise a question of misconduct.
- The review working group considered whether to propose a formal definition of misconduct. The group concluded that, because of the need to avoid straitjacketing, any such definition would have to be so imprecise as to be of no real use. However, categorising misconduct as minor, serious or gross is an established and easily understood method of categorisation. We believe that its adoption would provide a framework for consistent decision-making and promote understanding of disciplinary decisions.

Q2: Do you agree that the disciplinary system should continue to be based on the concept of misconduct, and that misconduct should be categorised as minor, serious or gross? Please give your reasons.

Proposal 3: The JCIO should be responsible for considering complaints about chamber presidents and tribunal members

- In the current system, chamber presidents consider complaints about tribunal members under the Judicial Conduct (Tribunals) Rules 2014. The JCIO considers complaints about chamber presidents under the Judicial Conduct (Judicial and other office-holders) Rules 2014.
- 30. We propose that the JCIO should be given responsibility for dealing with complaints about tribunal members as well as chamber presidents. We believe that there are compelling arguments for unification:
 - Dealing with complaints is a significant burden on chamber presidents
 - There is a risk of conflict arising between chamber presidents dealing with complaints and their leadership and pastoral roles
 - The Judicial Conduct (Tribunals) Rules 2014 are convoluted and confusing in places.
- 31. This proposal means that complaints against tribunal members and chamber presidents would all be dealt with by the JCIO under the same rules as apply to salaried and fee-paid courts judges and coroners. This will reduce the burden on chamber presidents and promote a more consistent approach to complaint-handling. It also resonates with the policy of bringing the operation of courts and tribunals closer together.
- 32. To ensure that complaints which require substantive investigation continue to be dealt with by those with relevant knowledge and experience, we also propose that the pool of nominated judges is expanded to include tribunals judges (see proposal 12).
- 33. Having consulted chamber presidents' offices, the JCIO estimates that the extra cost of taking on this additional work would be £170,000 per year, based on 700–800 more complaints per year. This equates to a need for four additional caseworkers and one casework manager. An additional £5,000 would be needed to make the necessary changes to the JCIO's digital case management system.
- 34. There would be consequential savings elsewhere. Given that under the *Judicial* Conduct (Tribunals) Rules 2014 judges have a greater role in considering complaints than in the JCIO process, this proposal should result in a saving of judicial time. Based on information provided by chamber presidents' offices, we estimate that time spent by chamber presidents, their judicial delegates and staff on dealing with complaints equates to a cost of approximately £280,000 a year.

Q3: Do you agree that the JCIO should deal with complaints about tribunal members and chamber presidents? Please give your reasons.

The JCIO Process

The next set of proposals is about the process for considering allegations of misconduct, currently set out in the Judicial Conduct (Judicial and other officeholders) Rules 2014 ("the 2014 rules"). Some of the proposals would also apply to the process for considering complaints about magistrates, currently set out in the Judicial Conduct (Magistrates) Rules 2014. We have indicated which proposals apply to both processes.

Expedited Procedure

Proposal 4: There should be an expedited procedure for lower-level cases in which the facts are agreed

- 36. In the interests of the timely and proportionate disposal of disciplinary cases, we propose the introduction of an expedited procedure for certain types of case. This would be similar in some respects to procedures used by regulatory bodies such as the Bar Standards Board and many employers, including the Ministry of Justice.
- 37. Such a process could be utilised for cases in which:
 - There is no dispute as to the facts (accumulated points for speeding offences) being a typical example)
 - The JCIO is satisfied that:
 - · the Lord Chancellor and Lord Chief Justice would be very likely to agree that misconduct had occurred; and
 - the sanction would be very unlikely to exceed a formal warning.
- 38. The JCIO would agree a statement of facts with the office-holder and then refer the case to the Lord Chancellor and Lord Chief Justice for decision.
- 39. JCIO staff would receive training and guidance on the procedure, which would also have inbuilt safeguards:
 - Its use would require the office-holder's informed consent
 - The office-holder would be entitled to change his/her mind and opt for a full investigation at any point prior to the case being sent to the Lord Chancellor and Lord Chief Justice for decision
 - A JCIO senior manager's approval would be required to offer the procedure in each case.
- 40. Additionally, as now, the Lord Chancellor and Lord Chief Justice would be able to send a case back to the JCIO for further investigation if, for example, they decided that a more serious sanction was called for.

- 41. The JCIO estimates that up to 30% of cases which result in a sanction might be suitable for the expedited procedure. Given the pressures on nominated judges' time, this could result in a significant reduction in the time taken to conclude some cases.2 This should in turn help to reduce anxiety for office-holders and enable better use of JCIO resources.
- 42. This proposal also applies to the process for complaints about magistrates (see proposal 29).
- 43. If this proposal is adopted, the JCIO/advisory committees will operate the procedure on a pilot basis initially.

Q4: Do you agree with the introduction of an expedited procedure for lower level cases in which the facts are agreed? Please give your reasons.

Making a Complaint

44. One of the JCIO's key roles is to filter out complaints which do not raise a question of misconduct. This is especially important because although the JCIO publishes clear guidance about its remit it still receives many complaints about issues which do not raise a question of misconduct. Nobody benefits if a disproportionate amount of time and resources is spent dealing with such complaints. The next set of proposals is therefore intended to make this part of the process as clear, straightforward and efficient as possible.

Proposal 5: In the criteria for a complaint to the JCIO, 'must contain an allegation of misconduct....' should become: 'must contain an allegation of misconduct supported by relevant details'

45. Rule 8 (rule 12 in the magistrates' rules) contains the criteria for a complaint to the JCIO:

"A complaint document is a document in writing which -

- a) is legible;
- b) contains an allegation of misconduct on the part of a named or identifiable person holding an office;
- c) states the date, or dates, the alleged misconduct took place; and
- d) states the name or address of the person who is making the complaint."

The average time between a case being referred to a nominated judge and receipt of his/her report in 2019/20 was 38 days.

- 46. Although the JCIO publishes guidance for complainants about the details they need to provide with a complaint, it frequently receives generalised complaints with no supporting details such as: "the judge was rude to me".
- 47. Proper consideration of a complaint of misconduct is impossible if the complainant does not give details of the alleged behaviour, not least because it is unfair to expect the subject of a complaint to respond to unspecific allegations. The 2014 rules therefore oblige the JCIO to dismiss a complaint that is 'inadequately particularised'. Before doing so, the JCIO must request further details and give the complainant 15 business days to respond. In most cases, such complaints are eventually dismissed, either because the complainant has not responded to the request for details, or because the response does not give grounds for further investigation.
- 48. We believe that the proposed change, along with clear guidance for complainants on the meaning of 'relevant details', would reduce the time spent dealing with generalised complaints. This would enable the JCIO to spend more time dealing with those complaints which do merit further consideration.
- 49. This proposal also applies to the process for complaints about magistrates.

Q5: Do you agree with a requirement for complaints to be supported by relevant details? Please give your reasons.

Proposal 6: The rules should make clear that complaints which do not satisfy the criteria for a complaint must be rejected

- 50. The ability to deal efficiently with complaints which do not meet the criteria referred to in paragraph 45 is crucial. Such complaints make up around 70-80% of all complaints to the JCIO. They are, therefore, a significant drain on time and resources.
- 51. In addition to generalised complaints, another example of complaints received in abundance is complaints solely about judicial decisions, which do not raise a question of misconduct. As noted earlier in this document, judicial independence means that such matters can only be challenged through the appeals process.
- 52. The JCIO works on the basis that while all complaints must be considered carefully, those which clearly do not meet the criteria set out in rule 8 will be rejected, rather than the alternative, which is to accept and then dismiss them under rule 21 of the 2014 rules (see also proposal 8).

- 53. Although the approach described above is well-established, experience has shown that the lack of an express duty to reject complaints which do not meet the criteria has led to inconsistent treatment of complaints across the disciplinary system.
- 54. We believe that the proposed change will provide clarity, promoting a more consistent and efficient approach to dealing with invalid complaints. This will benefit complainants and the subjects of complaints by enabling more time and resources to be directed to dealing with complaints which merit further consideration.
- 55. This proposal also applies to the process for complaints about magistrates.

Q6: Do you agree that the rules should make clear that complaints which do not satisfy the criteria for a valid complaint must be rejected? Please give your reasons.

Proposal 7: The rule which sets the time limit for making a complaint: 'A complaint must be made within three months of the latest event or matter complained of' should be amended to: 'A complaint must be made within three months of the matter complained of'

- The 2020 review working group agreed with its predecessor's conclusion that a time limit of three months for making a complaint strikes the right balance between fairness to complainants and the subjects of complaints. However, experience has shown that the inclusion of 'latest event or matter complained of' in the wording of the time limit rule can be problematic.
- 57. The JCIO occasionally receives complaints which include multiple allegations, some of which go back much further than three months, sometimes years. In some cases, there are substantial gaps in time between the allegations. However, due to the inclusion of 'latest event or matter complained of', if one or more of the allegations falls inside the three-month limit the JCIO considers itself obliged to accept the full complaint for consideration, even if there has been a substantial gap between the acts complained of. This raises concerns about fairness to the subject of the complaint, who may be expected to recall events from several years ago.
- 58. In making this proposal, we acknowledge that there can be good reasons for accepting a complaint which contains allegations older than three months. A complaint of bullying for example may be the result of the cumulative effects of behaviour over time. This proposal would **not** preclude the JCIO from accepting such complaints.

- If this proposal is accepted, guidance for complainants will make clear that the JCIO is able to use its discretion under the rules to accept complaints which are about a pattern of behaviour over time, provided that one or more of the allegations is made within the three-month time limit. The aim of the proposal is to give the JCIO the discretion to make sensible, proportionate decisions about accepting complaints.
- 60. Additionally, as now, complainants will have the option to make representations to the JCIO to accept complaints out of time in exceptional circumstances. This includes requests for reasonable adjustments in cases where illness or disability has prevented a complaint being made within the three-month time limit.
- 61. This proposal also applies to the process for complaints about magistrates.

Q7: Do you agree that, subject to the JCIO being able to accept complaints which are about a pattern of behaviour over time and complainants being able to make representations for an extension in exceptional circumstances, the time limit for a complaint to the JCIO should be within three months of the matter complained of? Please give your reasons.

Consideration by the JCIO

This part of the complaint-handling process includes the JCIO accepting and then dismissing a complaint or referring it to a nominated judge for further consideration.

Proposal 8: The rule which governs the dismissal of complaints should be simpler and clearer

63. Rule 21 (rule 32 in the magistrates' rules) sets out the criteria under which a complaint must be dismissed. The JCIO considers that the rule works well in practice. However, some of the 12 criteria in it are used rarely, if ever. We believe that in the interests of clarity for complainants and the subjects of complaints, the rule would benefit from the following proposed revisions:

Current	Proposed
The Judicial Conduct Investigations Office must dismiss a complaint, or part of a complaint, if it falls into any of the following categories—	The Judicial Conduct Investigations Office must dismiss a complaint, or part of a complaint, if it falls into any of the following categories—
(a) it does not adequately particularise the matter complained of;	(a) it does not adequately detail the matter complained of;

Current

- (b) it is about a judicial decision or judicial case management, and raises no question of misconduct;
- (c) the action complained of was not done or caused to be done by a person holding an office;
- (d) it is vexatious;
- (e) it is without substance;
- (f) even if true, it would not require any disciplinary action to be taken;
- (g) it is untrue, mistaken or misconceived:
- (h) it raises a matter which has already been dealt with, whether under these Rules or otherwise, and does not present any material new evidence;
- (i) it is about a person who no longer holds an office:
- (j) it is about the private life of a person holding an office and could not reasonably be considered to affect their suitability to hold office;
- (k) it is about the professional conduct in a non-judicial capacity of a person holding an office and could not reasonably be considered to affect their suitability to hold office;
- (I) for any other reason it does not relate to misconduct by a person holding office.

Proposed

- (b) the alleged facts are obviously untrue, or the complaint is misconceived;
- (c) even if the alleged facts were true, they would not require disciplinary action;
- (d) it relates to a judicial decision or case management, and raises no question of misconduct:
- (e) it is vexatious;
- (f) it relates to the private life or professional conduct in a non-judicial capacity of an office-holder and raises no question of misconduct;
- (g) it raises a matter which has already been dealt with, whether under these Rules or otherwise, and does not contain any relevant new evidence;
- (h) for any other reason, it does not relate to misconduct by an office-holder.

64. This proposal also applies to the process for complaints about magistrates.

Q8: Do you agree with the proposed changes to the criteria for dismissing a complaint? Please give your reasons.

<u>Proposal 9: The JCIO should be able to invite a complainant to comment on an office-holder's response to their complaint if the response contains relevant information:</u>

- i. of which the complainant may have been unaware; and
- ii. in respect of which it would assist the JCIO's consideration of the complaint to obtain the complainant's comments
- 65. There is currently no provision for complainants to be asked to comment on an office-holder's response to their complaint. We do not believe that it is necessary to routinely allow complainants to see and comment on responses to their complaints. The disciplinary process is not adversarial: the complainant's role in the process is to make their complaint. Giving every complainant the right to comment would drag the process out, usually for no benefit. However, the JCIO frequently receives responses to complaints which contradict the complainant's description of events. Such responses may contain information previously unknown to the complainant.
- 66. In such cases, it could assist the proper investigation of complaints for the JCIO to be able to invite the complainant to comment on the response. The complainant's comments might also be useful to a nominated judge if the complaint is later referred to one. There may also be instances in which having sight of the office-holder's response to the complaint puts a different complexion on the issue for the complainant and leads to the complaint being withdrawn.
- 67. If this proposal is adopted, the JCIO will ensure that office-holders are given prior notice that, although not a step which will automatically apply to complaints, their response may be shared with the complainant for comment.
- 68. This proposal also applies to the process for complaints about magistrates.

Q9: Do you agree that the JCIO should be able to invite a complainant to comment on an office-holder's response to their complaint? Please give your reasons.

Proposal 10: The JCIO should have the power to stop dealing with complaints which have no reasonable prospect of resolution before the office-holder leaves office

- From time to time the JCIO receives complaints which, for reasons beyond its control, it has no prospect of resolving before an office-holder leaves office. The JCIO does prioritise cases in which it is known that an office-holder is due to retire soon. However, there are cases in which time is so short that it simply is not possible to conclude the process of considering a complaint. Nevertheless, the JCIO is obliged to continue to process a complaint until the office-holder leaves office. This is not in the best interests of complainants or office-holders and is a poor use of JCIO resources.
- 70. Subject to the safeguards described below, we propose that the JCIO should have the power to stop considering a complaint which has no reasonable prospect of being concluded before the office-holder leaves office.
- 71. We propose that a decision to stop dealing with a complaint in these circumstances should be subject to:
 - Mandatory checks to establish whether the office-holder has applied for authorisation to sit in retirement
 - Review and approval by the JCIO's head of operations
 - Full written explanation of the decision to the complainant and (if they are aware of the complaint) the office-holder.
- 72. Whilst we envisage that use of this provision is likely to be rare, perhaps no more than one or two cases a year at most, we believe that it aligns with creating a more proportionate and efficient way of dealing with complaints.
- 73. It should also be noted that, as with any part of the process, the parties to the complaint would have a right to seek a review by the Judicial Appointments and Conduct Ombudsman.
- This proposal does not apply to the process for complaints about magistrates. On retirement, magistrates transfer to the supplemental list. They remain judicial office-holders, albeit with no judicial powers, and can continue to use the suffix 'JP' with their names. Supplemental list magistrates remain within the scope of the disciplinary system.

Q10: Subject to the proposed safeguards, do you agree that the JCIO should have the power to stop dealing with complaints which have no reasonable prospect of resolution before the office-holder leaves office? Please give your reasons.

Further Consideration of Complaints

This part of the process starts when the JCIO refers complaints which have not been dismissed to a nominated judge to make findings and, if necessary, recommendations to the Lord Chancellor and Lord Chief Justice. This stage may also involve consideration of complaints by investigating judges and/or disciplinary panels.

Proposal 11: Nominated judges, investigating judges and disciplinary panels should continue to consider complaints which the JCIO has not rejected or dismissed

- 76. Complaints which the JCIO does not reject or dismiss must be referred to a nominated judge who considers all the available information, including the officeholder's response to the complaint, and makes findings. In some circumstances, complaints may be referred to an investigating judge and/or a disciplinary panel.
- 77. Each of these roles has a distinct purpose in the process:
 - Nominated judges consider complaints to decide whether misconduct has occurred and, if so, recommend a sanction
 - Investigating judges investigate complaints which need more in-depth enquiry to decide whether misconduct has occurred and, if so, recommend a sanction
 - Disciplinary panels (composed of two office-holders and two lay members) review cases in which an office-holder has been recommended for suspension or removal from office before deciding whether misconduct has occurred and, if so, recommend a sanction.
- Together these roles have proved capable of dealing effectively with the wide range of misconduct complaints received by the JCIO. Office-holders' skills in weighing up evidence and making reasoned findings are an asset to the work, as is the range of skills and experience lay panel members bring to the process.
- 79. The involvement of office-holders in considering complaints helps to maintain judicial confidence in the system. Lay involvement helps to reinforce the fact that this is not simply a system of 'judges judging their own'. The system benefits from clear separation between the JCIO carrying out the preliminary consideration of complaints before referring those which raise a question of misconduct on to those who understand, from direct experience, the judicial working environment. This arrangement reflects the important principle inherent in an independent judiciary that civil servants cannot make findings about the conduct of judicial office-holders.
- 80. While nominated judges do not deal with complaints about magistrates, this proposal applies to the process for complaints about magistrates insofar as, in certain circumstances, investigating judges and disciplinary panels have a role in that process. See also proposals 22-27 regarding the creation of a role analogous to that of nominated judge in the magistrate complaints process.

Q11: Do you agree that nominated judges, investigating judges and disciplinary panels should continue to consider complaints which the JCIO has not rejected or dismissed? Please give your reasons.

Proposal 12: The pool of nominated judges should be expanded to include Circuit judges, district judges, salaried tribunals judges and coroners

- The Lord Chief Justice appoints nominated judges as and when new ones are needed. They are recruited via an expressions of interest exercise.
- 82. Although not mandated by the statutory regulations, which require only that a nominated judge must be of at least equal rank to the subject of the complaint, nominated judges are drawn from senior courts judiciary. There are currently eight nominated judges: four from the High Court and four from the Court of Appeal.
- 83. We believe that it would be beneficial to widen the pool to include judges from jurisdictions which, due to numbers of office-holders and case volumes, account for many more complaints to the JCIO than senior courts judges.
- 84. Although experience of the work of a particular judicial office is not a prerequisite for dealing with a complaint of misconduct, we believe that adding Circuit and district judges and coroners to the pool of nominated judges would broaden the range of experience in the pool of the sorts of environment in which the subjects of complaints operate.
- 85. For the same reasons, we believe that if the JCIO is given responsibility for complaints about all tribunals office-holders (proposal 3), salaried tribunals judges should be eligible for inclusion in the pool of nominated judges.

Q12: Do you agree that the pool of nominated judges should be expanded to include Circuit, district and salaried tribunals judges and coroners? Please give your reasons.

Proposal 13: The JCIO should decide whether information received in the absence of a complaint requires investigation

86. Most of the JCIO's day-to-day work involves dealing with complaints from members of the public, and occasionally other parties such as legal professionals. However,

- information may also come to light which raises a question of misconduct from other sources such as press reports.
- 87. When such a matter arises, the JCIO must send the information to a nominated judge and ask him/her to consider referring it formally to the JCIO for investigation. This circular process adds time and creates extra work for nominated judges and the JCIO. We believe that it makes sense for the JCIO to be able to decide whether information it has received in the absence of a complaint requires investigation.
- 88. As the body that supports the Lord Chancellor and Lord Chief Justice on disciplinary matters, the JCIO is well placed to have an overview of cases which do and do not result in a finding of misconduct. As such, it is well placed to make informed decisions about whether information received in the absence of a complaint gives grounds for investigation.
- 89. As an additional safeguard, a senior JCIO manager's approval would be required to investigate a matter in the absence of a complaint.
- 90. This proposal also applies to the process for complaints about magistrates (see proposal 30).

Q13: Do you agree that the JCIO should be responsible for deciding whether information received in the absence of a complaint should be investigated? Please give your reasons.

Proposal 14: The power to dismiss a complaint in Part 4 of the rules should reside solely with the nominated judge

- 91. Rule 41 in Part 4 of the 2014 rules sets out the options available to a nominated judge who has considered a complaint:
 - "41. The nominated judge may—
 - (a) advise the Lord Chancellor and the Lord Chief Justice that a complaint should be dismissed;
 - (b) dismiss a complaint;
 - (c) deal with a complaint informally and direct that it may be considered as a pastoral or training matter;
 - (d) recommend that disciplinary action should be taken; or
 - (e) refer a complaint to an investigating judge in accordance with rule 44."

- 92. The working group responsible for the review which led to the current rules and regulations considered that there should be the option to refer a complaint to the Lord Chancellor and Lord Chief Justice for a decision on dismissal where, for example, the complaint had attracted media attention. This was enacted in rule 41(a).
- 93. With the benefit of having considered views from the JCIO and the nominated judges who work with the 2014 rules, we believe this option is unnecessary. We understand that having two routes to achieve the same outcome can cause uncertainty for nominated judges. Additionally, referral to the Lord Chancellor and Lord Chief Justice for a decision to dismiss a case inevitably draws out the process, when in fact nominated judges have the necessary expertise to decide whether complaints should be dismissed. We therefore propose that nominated judges should have unilateral power to dismiss a complaint in this part of the process.
- 94. This proposal has no bearing on the power of the Lord Chancellor and Lord Chief Justice to decide to dismiss a complaint in which a nominated judge has recommended disciplinary action.

Q14: Do you agree that the power to dismiss a complaint which has been referred to a nominated judge should reside solely with the nominated judge? Please give your reasons.

Proposal 15: Disciplinary panels, currently composed of two judicial and two lay members, should in future be composed as follows:

- i. for JCIO cases two lay members and one judge of a senior rank to the subject of the complaint. The judge should chair the panel; and
- ii. for magistrates one lay member, one magistrate and one judge of a senior rank to the subject of the complaint. The judge should chair the panel
- 95. The disciplinary regulations provide that disciplinary panels will consist of four members:
 - "(a) either an office-holder or former office-holder who is of a higher rank than the office-holder concerned:
 - (b) either an office-holder or former office-holder who is of the same rank as the office-holder concerned; and
 - (c) two other members, neither of whom has been—
 - (i) an office-holder, or
 - (ii) a practising or employed lawyer."

- 96. The value of lay involvement in the justice system is recognised in roles such as magistrate and juror. Lay people also play an important part in the disciplinary process as members of disciplinary panels and conduct advisory committees (see 'Complaints About Magistrates' further below).
- 97. We believe that the function of a disciplinary panel: to consider cases in which an office-holder is facing suspension or removal from office, can be carried out effectively by a suitably constituted panel of three.
- 98. Legal knowledge or experience is not required to consider cases of misconduct as this relates to the personal behaviour of an office-holder, not how they have interpreted the law in dealing with a case. We believe that an office-holder who is senior to the subject of the complaint alongside two independent lay members will provide a good balance of judicial and lay input. A lay majority is in line with modern practice and should help to demonstrate to the public that the process is independent and fair. The judicial chair will help to ensure that the panel remains focussed on the relevant issues.
- 99. A requirement for a magistrate member in cases involving magistrates will ensure that those cases benefit from the involvement of people who have direct knowledge and experience of the jurisdiction.
- 100. A secondary benefit of this proposal is that panels would be quicker and easier to organise as it would be necessary to coordinate the availability of three rather than four people.

Q15: Do you agree with our proposal for the composition of disciplinary panels? Please give your reasons.

Proposal 16: An office-holder whose case is referred to a disciplinary panel should have a right to an oral hearing

101. There can be little, if any, question that for purposes such as assessing credibility and determining facts, especially when deciding between conflicting evidence, an oral hearing is preferable to deciding a disciplinary case on the papers alone. As such, it must be right that office-holders who are subject to the most serious allegations of misconduct, and for whom the consequences may be extremely

- serious, should have the right to be heard by the panel that will make findings and recommendations to the Lord Chancellor and Lord Chief Justice.
- 102. Equally for the panel, there is significant merit in being able to ask direct questions, follow up on emerging points and assess not only the substance of the office-holder's responses, but also *how* they respond.
- 103. Rule 80 provides that:
 - "A disciplinary panel must take oral evidence from the office-holder concerned unless it considers it unnecessary to do so."
- 104. While this rule appears to recognise the value of an oral hearing, anecdotal evidence suggests that, in practice, it has led to some cases in which office-holders wanted to address the panel in person being decided on the papers alone. Views from disciplinary panel members also suggest that this rule has led to inconsistency between different panels when deciding whether to take oral evidence.
- 105. Bearing in mind the potential consequences for the office-holder of the disciplinary panel's findings, we consider that natural justice requires a right to an oral hearing. Panels should only decide cases on the papers alone if the office-holder declines an oral hearing or does not cooperate with attempts to arrange one.
- 106. This proposal also applies to complaints about magistrates.
- 107. Fee paid office-holders and lay members are entitled to a fee for attending disciplinary panel hearings. The fee payable to an eligible panel member depends on the length of the hearing: half-day (under three hours) = £200, full day (three or more hours) = £300. Eligible panel members also receive a reading fee of £200.00 for preparatory work.
- 108. The average cost of each panel is approximately £9,000. We estimate that reducing the number of panel members to three would save approximately £2,500 per panel. However, some of this saving would be offset if, as a result of proposal 16, there was an increase in the number of panels which meet on two separate occasions, which is typical for cases involving an oral hearing. We estimate that a) if proposal 16 is implemented and b) if every disciplinary case involves the panel meeting twice, the average cost of each panel would be approximately £8,000.

Q16: Do you agree that an office-holder whose case is referred to a disciplinary panel should have a right to an oral hearing? Please give your reasons.

Proposal 17: Office-holders should have a right to be accompanied to disciplinary interviews and hearings by a judicial colleague for moral support

- 109. Involvement in disciplinary proceedings can be stressful for office-holders who already have busy, and at times stressful, working lives. The prospect of attending a disciplinary hearing or interview can be a particular source of anxiety.
- 110. Rules for the Scottish disciplinary system, issued in 2017, include a right to be accompanied to a disciplinary interview. With the welfare of office-holders in mind, we propose that the rules for the disciplinary system in England and Wales should give office-holders the right to be accompanied to disciplinary hearings and interviews by a judicial colleague.
- 111. We do not intend that the accompanying person's role should be to make representations on behalf of the office-holder: it should be to provide moral support to help ease any anxiety the office-holder may be feeling.
- 112. This proposal also applies to the process for complaints about magistrates.

Q17: Do you agree that office-holders who attend a disciplinary interview or hearing should have a right to be accompanied by a judicial colleague for moral support? Please give your reasons.

Proposal 18: The obligation to invite an office-holder's representations about how an investigating judge intends to investigate a complaint should be deleted

- 113. The Lord Chief Justice appoints investigating judges to consider cases which, due to their seriousness and/or complexity, require more in-depth investigation than most disciplinary cases.
- 114. While there are typically fewer than five judicial investigations per year, they tend to be the longest-running disciplinary cases. They often involve the investigating judge, who must balance the work of the investigation with his/her usual judicial duties, interviewing numerous parties and considering a large quantity of documents before writing a detailed report for the Lord Chancellor and Lord Chief Justice.
- 115. Under the current rules, investigating judges are required to inform office-holders how they intend to conduct their investigation and invite representations on their proposed approach. Any representations must be provided within 10 business days. However, substantive representations about the proposed approach to a judicial investigation are rare. Experience has shown that this step draws out what is already likely to be a lengthy process for little benefit.

- 116. We therefore propose that the JCIO should inform the office-holder how the investigating judge intends to approach the investigation, but not invite representations. It would still be open to the office-holder to raise any concerns or make suggestions about the proposed approach should he/she wish to do so.
- 117. It should also be noted that the Judicial Appointments and Conduct Ombudsman provides a route of complaint for anyone who believes that any part of the disciplinary process, including a judicial investigation, has been mishandled.

Q18: Do you agree that the requirement to invite representations about how a judicial investigation will be conducted should be deleted from the rules? Please give your reasons.

Proposal 19: The reports of nominated judges, investigating judges and disciplinary panels should only be sent to the office-holder for comment if suspension or removal from office has been recommended

- 118. The parts of the 2014 rules which provide for office-holders to comment on the reports of nominated judges, investigating judges and disciplinary panels are inconsistent. In summary:
 - A nominated judge's report is sent to the JCIO and then on to the office-holder who may, within 15 business days, comment; make representations as to the need for further investigation; or request a disciplinary panel if the recommendation is for suspension or removal from office. There is no requirement for the nominated judge to consider comments received from the office-holder
 - An investigating judge is required to send his or her report to the office-holder in draft. The office-holder then has 10 business days to comment, including with proposals for changes to the report. The investigating judge is required to consider any comments received before finalising the report
 - A disciplinary panel is required to send its report to the office-holder in draft for comment (to be made within ten business days) and to 'have regard' to any comments received.
- 119. Leaving aside the issue of inconsistency, experience has shown that sending reports to office-holders for comment draws out the disciplinary process for little practical benefit.

- 120. Such reports contain findings and recommendations made following careful consideration of the relevant evidence. Office-holders will have typically made written representations earlier in the process and, in some cases, will have given evidence at an interview or hearing.
- 121. The JCIO's experience is that when office-holders do provide substantive comments on a report, such comments often simply reiterate representations the office-holder has made earlier in the process. It is extremely rare that they result in a change to the report itself or to the final decision in the case. This is, therefore, another aspect of the 2014 rules which draws out the process of concluding disciplinary cases for little benefit.
- 122. We therefore propose that the requirement to send reports to office-holders for comment before cases are referred to the Lord Chancellor and Lord Chief Justice for decision is deleted. Reports would instead be provided to the office-holder for information along with the Lord Chief Justice's letter confirming the outcome of the case.
- 123. As additional safeguards in the most serious cases, we propose that:
 - There should be an exception for cases in which a nominated or investigating judge has recommended suspension or removal from office. In such cases, the report should be sent to the office-holder to help him/her decide whether to request that a disciplinary panel considers the case
 - Where a disciplinary panel has recommended suspension or removal from office, the office-holder should be able to make final representations on the panel's report (within ten business days), which the JCIO should send to the Lord Chancellor and Lord Chief Justice with the report.
- 124. This proposal applies to the process for complaints about magistrates insofar as it refers to the reports of investigating judges and disciplinary panels. It would also apply to the reports of the proposed new role in the process: nominated committee member (see proposal 22).

Q19: Do you agree that, except for cases in which suspension or removal from office is recommended, the reports of nominated judges, investigating judges and disciplinary panels should not be sent to office-holders until the end of the disciplinary process? Please give your reasons.

Complaints about Magistrates

- 125. With approximately 13,000 office-holders, the magistracy makes up over half of the judiciary in England and Wales. Magistrates are an integral part of the judiciary and must be held to the same high standards of conduct and treated with the same respect and fairness in disciplinary matters as salaried and fee paid judiciary.
- 126. The process for considering complaints about magistrates is set out in the *Judicial* Conduct (Magistrates) Rules 2014 ("the magistrate-rules)". Advisory committees carry out the work of considering complaints. In any case in which an advisory committee finds that misconduct has occurred, the case is referred, via the JCIO, to the Lord Chancellor and Lord Chief Justice (or his senior judicial delegate) for final decision. As with other office-holders, the power to discipline a magistrate rests jointly with them.
- 127. Advisory committees are non-departmental public bodies. They are normally composed of:
 - A lord lieutenant, invited by the Lord Chancellor and Lord Chief Justice to chair the committee for their county
 - Magistrates, who make up two thirds of the membership and are appointed via a recruitment and selection process
 - Independent lay members, who make up one third of the membership and are appointed in accordance with the code of practice issued by the Office of the Commissioner for Public Appointments. In addition, each advisory committee is supported by a secretary, this role being filled by the delegate of the relevant HMCTS head of legal operations, with other administrative support provided by HMCTS.
- 128. Prior to 2018, each advisory committee had two main roles:
 - Recruiting and recommending candidates for the magistracy
 - Investigating complaints about misconduct.
- 129. In 2018, following a public consultation, the advisory committee system was reorganised. Amongst other changes, seven regional conduct advisory committees were formed to deal with complaints and related matters, while the remaining advisory committees would focus primarily on the recruitment and selection of new magistrates.

Proposal 20: Advisory committees should continue to consider complaints about magistrates. As now, the process should be set out in rules which are separate to those for complaints made to the JCIO

- 130. One of the key benefits of advisory committee involvement in the process is that it ensures people with relevant knowledge and experience are directly involved in considering complaints. The committees are ably supported by their legally trained secretaries (senior HMCTS employees) who provide valuable advice on issues such as application of the disciplinary rules and regulations. The committees can also call on the Judicial HR Team at the Judicial Office for support in dealing with health and welfare issues should they arise during disciplinary proceedings.
- 131. The creation of regional conduct committees has enabled members of those committees to build experience and expertise by specialising in disciplinary cases.
- 132. As advisory committees do not have the pastoral or leadership roles that tribunal chamber presidents have, the difficulties mentioned earlier in this document (see proposal 3) do not arise from their involvement in dealing with complaints. Given the distinct role of the advisory committees in the process for considering complaints about magistrates, we believe that it makes sense to continue to maintain a separate set of rules for this process.
- 133. Although it would in theory be possible to construct a single set of rules covering all types of complaints, they would be complicated and unwieldy due to the need to encompass the role of both the JCIO and advisory committees.

Q20: Do you agree that advisory committees should continue to consider complaints about magistrates under a separate set of rules? Please give your reasons.

- 134. The review working group was surprised to learn that the process for considering complaints about magistrates is often more involved and time consuming than it is for other office-holders.
- 135. Especially because magistrates give their time on an unpaid voluntary basis, it is unacceptable that they should be expected to go through a disproportionate process when subject to a complaint. The following proposals are therefore intended to create a process which is more streamlined and, while maintained in a separate set of rules, consistent with the improved JCIO process proposed in this document.

Proposal 21: Advisory committee secretaries should have a filtering role which mirrors that of the JCIO

- 136. As with the JCIO process, an effective mechanism to filter out complaints which lack merit, and to determine which complaints raise a question of misconduct, is vital. The Judicial Conduct (Magistrates) Rules 2014 do not provide such a mechanism because every complaint must be referred to the advisory committee chair for review.
- 137. We propose that advisory committee secretaries should have the same powers to reject and dismiss complaints as the JCIO. As experienced legal professionals whose role requires familiarity with the disciplinary process, the secretaries are well placed to take on this responsibility. They also have teams who can assist with the administrative work, including making any enquiries necessary to enable the secretary to decide whether a complaint should be dismissed or referred to the nominated committee member (see proposal 22).
- 138. Experience suggests that secretaries typically carry out most of the work required to inform a decision to dismiss a complaint. As such, for the secretary to become the decision-maker will add little, if any, additional work to the role. Moreover, any additional work/cost that does arise would be offset by savings from no longer having to support conduct panels (see proposal 22).
- 139. If this proposal is adopted, the JCIO will work with HMCTS heads of legal operations, who manage the secretaries, to ensure that they receive the training and support they need to take on this work.

Q21: Do you agree that advisory committee secretaries should have a filtering role which mirrors that of the JCIO? Please give your reasons.

Proposal 22: Conduct panels should be replaced by a new role analogous to that of nominated judge: nominated committee member

- 140. Under the current rules for complaints about magistrates, a three-member conduct panel must be formed to consider any complaint which is not dismissed, regardless of its seriousness.
- 141. The preparatory work for a conduct panel, along with the logistics of organising and supporting a hearing and producing the panel's report are considerable. Anecdotal evidence suggests that the nature of conduct panel hearings increases negative reactions from the individuals concerned: magistrates are understandably proud of their judicial office; the more formal and convoluted the process for addressing alleged misconduct, the greater the risk that the individual will react adversely.

- 142. There is also anecdotal evidence that complainants are sometimes deterred by the bureaucracy and length of the process. Similarly, those responsible for considering complaints may be tempted to interpret less serious ones, which should nevertheless be dealt with formally, as pastoral matters to avoid having to go through a lengthy formal process.
- 143. For all these reasons, and in the interests of alignment with the JCIO process, we propose replacing conduct panels with a new role: nominated committee member ("NCM").
- 144. We propose that the NCM should have functions and powers which mirror those of the nominated judge (as envisaged in the revised JCIO rules):

Functions	Powers
Consider a complaint and: i. determine the facts ii. determine whether the facts amount to misconduct; and if so: iii. advise [Lord Chancellor & Lord Chief Justice] as to sanction	When considering a complaint: i. make enquiries ii. request documents iii. interview persons Having considered a complaint: i. dismiss complaint ii. deal with complaint informally & direct that it be treated as a pastoral or training matter iii. (if misconduct is found) recommend a sanction

- 145. We believe that, supported by a legally-qualified secretary as an advisor (see proposal 27), a trained NCM will be well-placed to do a thorough investigation. This investigatory work must precede a conduct panel in any event, because the subject of the complaint cannot be surprised by revelation of evidence at the panel hearing.
- 146. In making this proposal, we note that the magistrate-rules already provide a safeguard by enabling a magistrate who is recommended for suspension or removal from office to request a disciplinary panel.
- 147. We also consider it important to retain the option for the JCIO, on receipt of a case from an advisory committee (which if this proposal is accepted will have been considered by the NCM), to ask a nominated judge to refer a particularly complex or serious case to an investigating judge.3
- 148. As now, the Lord Chancellor and Lord Chief Justice (or his judicial delegate) will jointly decide the outcome of each case. The Judicial Appointments and Conduct

³ See rules 98–102 of the Judicial Complaints (Magistrates) Rules 2014.

Ombudsman will continue to provide a means by which to seek a review of the handling of a complaint.

- 149. We anticipate that there would be some efficiency savings as a result of this proposal, although we are not yet able to quantify them:
 - The secretary's work and supporting administration work in organising and facilitating conduct panels of three members will be replaced by a lighter administrative burden in supporting a single NCM
 - The overall size of conduct committees is likely to reduce over time as the need to deploy three decision-makers to each complaint will be replaced by the need to deploy a single NCM
 - Smaller committees will require less administrative support
 - There will be a reduction over time in the costs associated with recruitment, training and members' travel and subsistence expenses.

Q22: Do you agree that conduct panels should be replaced by the new role of nominated committee member, which should have the same powers as that of nominated judge? Please give your reasons.

150. Our next set of proposals is intended to make sure that the role of NCM is performed by people with the right skills, training and support.

Proposal 23: Magistrate members, non-magistrate members and chairs of conduct advisory committees should be eligible to apply for the role of nominated committee member

- 151. In the current process, conduct panels are composed of both magistrate and non-magistrate members of the advisory committee. A magistrate or a non-magistrate member may chair a panel. This arrangement reflects the equal value that judicial and non-judicial members bring to the process.
- 152. It is important that people with the right skills are selected for the role of NCM and receive the support and training that they need. Whilst office-holders have the skills required for this work: analysing evidence, making reasoned decisions, producing clear reports and so on, those skills are not exclusive to the judiciary. We believe that it makes sense for the role to be open to the full range of conduct committee members.
- 153. For the same reasons, we propose that conduct committee chairs should also be eligible to apply for the role of NCM. They should be treated the same as any other applicant and, if successful, should undergo the same training.

Q23: Do you agree that all members and chairs of conduct advisory committees should be eligible to apply for the role of nominated committee member? Please give your reasons.

Proposal 24: All candidates for the role of nominated committee member should be selected by a three-person panel composed of the committee secretary, a presiding judge or Family Division liaison judge, and a non-magistrate committee member

- 154. Advisory committee members are appointed following competitive recruitment and selection procedures, which follow public appointments principles. We therefore believe that candidates for the role of NCM need not be required to undergo another full application and interview process. Selection should, as with nominated judges, be based on a written expression of interest ("EOI"), assessed against a published set of skills/qualities and a role description, which includes the expected level of commitment.
- 155. Whilst members of conduct advisory committees will have experience of dealing with complaints, and some will have extensive experience, we propose that, in the interests of fairness and transparency, all applicants should undergo the same selection process.
- 156. In 2018, on re-constitution of the advisory committees, the Lord Chancellor and Lord Chief Justice approved an appointments process which involved the committee secretary forming part of the interview panel. We propose that the NCM process should include a panel composed as follows, to assess written EOIs against the criteria:
 - The committee secretary
 - A presiding judge or Family Division liaison judge
 - A non-magistrate committee member.
- 157. The option to interview would be available if necessary to choose between two or more candidates who are closely matched on paper.

Q24: Do you agree that all candidates for the role of nominated committee member should be selected by a three-person panel composed of the committee secretary, a presiding judge or Family Division liaison judge, and a non-magistrate committee member? Please give your reasons.

Proposal 25: All candidates for the role of nominated committee member should be required to train for the role. The JCIO should develop the training in consultation with HMCTS heads of legal operations (HoLOs)

- 158. We consider it vital that successful applicants, regardless of prior experience, are trained for the role of NCM.
- 159. We propose that the JCIO would develop the training in consultation with HoLOs, who have overall responsibility for the advisory committees. The JCIO would also be responsible for maintaining the training content while HoLOs would have overall responsibility for its delivery.
- 160. The content and format of the training would be for further consideration in due course. However, it should be:
 - Standardised to promote consistency across the conduct committees
 - Mandatory for all successful candidates
 - Reviewed regularly.

Q25: Do you agree that all successful candidates for the role of nominated committee member should be trained for the role, and with our proposals for the development and delivery of the training? Please give your reasons.

Proposal 26: Nominated committee members should not have limited tenure

- 161. Advisory committee members may serve for a total of nine years. Appointments may be extended in exceptional circumstances, but only by one year. Nominated judges, however, do not have limited tenure.
- 162. We believe that it would be wasteful to limit the tenure of NCMs to a period shorter than the nine-year limit on committee membership, not least because this will be a role in which experience will enable members to build up knowledge and expertise. We therefore propose that members who are appointed to the role should be able to serve up to the end of their appointment to the advisory committee.

Q26: Do you agree that nominated committee members should not have limited tenure and that their appointment should last until the end of their appointment to the advisory committee? Please give your reasons.

Proposal 27: The nominated committee member must carry out his/her duties in consultation with the advisory committee secretary

163. Committee secretaries already have an important role in the disciplinary system, advising their committees (including conduct panels) on practice, procedure and the rules of natural justice. Especially since NCM will be a new role, we propose that the rules should include a formal requirement for the NCM to carry out his/her duties in consultation with the committee secretary. This would not entail the secretary having a role in the NCM's decision-making. Rather, their role would be to give advice and guidance about the sorts of issues referred to above.

Q27: Do you agree that the nominated committee member should carry out his/her duties in consultation with the advisory committee secretary? Please give your reasons.

Proposal 28: The option to refer a complaint to the full advisory committee for consideration should be deleted and advisory committee chairs should not have the power to review or intervene in the nominated committee member's decisions.

164. The magistrate-rules allow for the full advisory committee to consider a complaint. They also enable a committee chair to decide to deal with a complaint personally. It is unclear why these provisions were thought necessary when the rules were drawn up in 2013. We understand that they are not used. We do not consider them to be necessary or appropriate. We therefore propose that they are deleted from the rules.

Q28: Do you agree that the redundant provisions for full advisory committee consideration of complaints and for committee chairs to decide to deal with a complaint personally should be deleted? Please give your reasons.

Proposal 29: The process for considering complaints about magistrates should include an expedited procedure

165. We believe that an expedited procedure, as described in proposal 4, has the same potential benefits for complaints about magistrates as for the JCIO process. We therefore propose that it is incorporated into the rules for considering complaints about magistrates.

- 166. We propose that the committee secretary should fulfil the same functions as the JCIO:
 - Identifying suitable cases in which to invite the magistrate to consider consenting to use of the procedure
 - Agreeing a statement of facts with the magistrate.
- 167. The case would then be sent to the JCIO where officials would prepare advice for the Lord Chancellor and Lord Chief Justice in the usual way.

Q29: Do you agree that the proposed expedited procedure should be part of the process for complaints about magistrates, and that the committee secretary should fulfil the same functions in the process as the JCIO? Please give your reasons.

Proposal 30: Advisory committee secretaries should decide whether information received in the absence of a complaint requires investigation

- 168. In proposal 13, we explained why we believe that the JCIO should be responsible for deciding whether information received in the absence of a complaint requires investigation. Under the current rules, this function rests with the advisory committee chair.
- 169. In line with the general thrust of our proposals to give the committee secretaries functions which mirror those of the JCIO, we propose that the decision should rest with the secretaries. Their experience and knowledge of the disciplinary process means that secretaries will be well placed to make sensible decisions about when an investigation is required.

Q30: Do you agree that advisory committee secretaries should decide whether information received in the absence of a complaint requires investigation? Please give your reasons.

Disciplinary Sanctions

- 170. Effective sanctions are vital in any disciplinary system. For the judicial disciplinary system, the sanctions are, in order of severity:
 - Formal advice
 - Formal warning
 - Reprimand
 - Suspension (in specific circumstances)
 - Removal from office
- 171. Section 108 of the Constitutional Reform Act 2005 contains the sanctions below removal from office. The power to remove office-holders resides in several different pieces of legislation.
- 172. The joint agreement of the Lord Chancellor and Lord Chief Justice is required to issue a disciplinary sanction. As permitted by the legislation, the Lord Chief Justice has delegated his disciplinary powers in certain circumstances. The Senior President of Tribunals has delegated authority to make decisions and issue sanctions in complaints about tribunals office-holders where the recommendation is formal advice or formal warning. Mrs Justice Cheema-Grubb DBE has the same authority in complaints about magistrates where the recommendation is formal advice, formal warning or reprimand.
- 173. The relatively small number of upheld complaints (around 50 a year) and infrequency of repeated misconduct suggests that the existing sanctions work well in practice. We do, however, propose some changes: first to widen the scope of the available sanctions and second, in the interests of transparency, to make clearer the link between a finding of misconduct and a disciplinary sanction.

Proposal 31: A period of suspension should be generally available as a sanction: the duration of the suspension to be agreed jointly by the Lord Chancellor and Lord Chief Justice on a case by case basis

Proposal 32: Any period of suspension following a criminal conviction or finding of misconduct should be without pay for salaried office-holders

Proposal 33: Before a period of suspension is imposed on a fee-paid or salaried office-holder, he/she should be given 10 business days to make representations as to any financial hardship that suspension would cause

174. Under the current legislation, the Lord Chief Justice, with the Lord Chancellor's agreement, may suspend an office-holder during an investigation which is being carried out under the disciplinary rules and regulations, or for an offence. This is

referred to as interim suspension. It is used on the rare occasions when the Lord Chancellor and Lord Chief Justice agree that it would be improper for an office-holder to continue to carry out judicial duties during an investigation. It is not a disciplinary sanction.

175. The legislation also enables the Lord Chief Justice, again with the Lord Chancellor's agreement, to suspend an office-holder in certain other limited circumstances. Section 108(4) of the Constitutional Reform Act 2005 provides that:

'He may suspend a person from a judicial office for any period during which any of the following applies—

- a. the person is subject to criminal proceedings;
- b. the person is serving a sentence imposed in criminal proceedings;
- c. the person has been convicted of an offence and is subject to prescribed procedures in relation to the conduct constituting the offence.

He may suspend a person from a judicial office for any period if—

- a. the person has been convicted of a criminal offence,
- b. it has been determined under prescribed procedures that the person should not be removed from office, and
- c. it appears to the Lord Chief Justice with the agreement of the Lord Chancellor that the suspension is necessary for maintaining confidence in the judiciary.'
- 176. We propose that a period of suspension should be an available sanction in any case of misconduct which falls just short of warranting removal from office. We believe that this would be a useful addition to the disciplinary sanctions available to the Lord Chancellor and Lord Chief Justice, for example in a case of gross misconduct, which would ordinarily result in removal from office, but in which there is exceptional mitigation.
- 177. Suspension could also be used in cases in which an office-holder has already received a reprimand; a further sanction is justified, but the Lord Chancellor and Lord Chief Justice decide that removal would be too harsh. At present, the only option in such cases is another reprimand. A period of suspension would enable the Lord Chancellor and Lord Chief Justice to send a powerful message to the office-holder, the judiciary, and the public that they will take more serious action in cases of repeated misconduct.
- 178. Whilst it must be right that salary is unaffected in cases of interim suspension during an investigation, under the current legislation a salaried office-holder who is suspended following a criminal conviction would continue to receive a salary. We propose that, in the interests of public confidence in the judiciary, any period of

- suspension following a criminal conviction, or a finding of misconduct, should be without pay.
- 179. As a safeguard, we propose that office-holders for whom suspension would have financial consequences should have ten business days to make representations to the Lord Chancellor and Lord Chief Justice if they believe that it would cause them financial hardship. If the representations were accepted, the options for the Lord Chancellor and Lord Chief Justice would be suspension without loss of salary, or a shorter suspension.

Q31: Do you agree that a period of suspension should be generally available as a sanction for misconduct? Please give your reasons.

Q32: Do you agree that a period of suspension following a criminal conviction, or a finding of misconduct, should be without pay for salaried office-holders? Please give your reasons.

Q33: Do you agree that office-holders for whom suspension would have financial consequences should be able to make representations about hardship before a final decision is made? Please give your reasons.

Proposal 34: The naming of sanctions below removal should be amended to make clearer the seriousness of receiving a sanction

- 180. In the interests of transparency, we believe that it is important for the link between a finding of misconduct and a disciplinary sanction to be clearer. This is particularly the case with formal advice, which may not be recognised as a disciplinary sanction and risks confusion with informal advice, which is given by leadership judiciary on a pastoral basis. We therefore propose to revise the names of the sanctions below removal from office as follows:
 - Notice of misconduct with formal advice
 - Notice of misconduct with formal warning
 - Notice of misconduct with reprimand
 - Notice of misconduct with period of suspension.

Q34: Do you agree with our proposal for renaming the disciplinary sanctions below removal from office? Please give your reasons

Transparency

- 181. Transparency is imperative for confidence in any disciplinary system. The nature of judicial office and the work it involves demands that judicial office-holders are held to the highest standards of personal conduct. It is therefore important that those who are involved with the disciplinary system, the judiciary in general, and the public, understand what is and what is not acceptable conduct by an office-holder; how complaints are dealt with, and that misconduct is taken seriously and dealt with properly.
- 182. Expectations about transparency must be balanced with necessary confidentiality requirements. Due to the nature of judicial office and the work that it involves, it is important that confidential information is protected. Under Section 139 of the Constitutional Reform Act 2005, information about judicial disciplinary cases which relates to an identified or identifiable individual is confidential and must not be disclosed without lawful authority. (This does not prevent the publication of statements about the outcome of disciplinary cases on the JCIO website in line with the publication policy of the Lord Chancellor and Lord Chief Justice.) Additionally, personal data is protected under the UK General Data Protection Regulation and the Data Protection Act 2018.
- 183. The next set of proposals aims to balance promoting transparency while recognising the particularly sensitive nature of information about judicial disciplinary cases.

Public Hearings

- 184. Recognising that the bodies which regulate solicitors, barristers, doctors and the police allow the public access to certain parts of their disciplinary processes, the review working group thought it important to consider whether to recommend the same for the judicial disciplinary system.
- 185. The working group therefore looked at arguments for and against disciplinary panel hearings, which involve the most serious cases and which are the only viable option for public hearings in the judicial disciplinary system, being open to the public. The group approached this issue on the basis that unless there were good reasons not to recommend public hearings it would do so.

- 186. After careful consideration, the group concluded that, while public hearings could help to promote transparency, the arguments against holding disciplinary panel hearings in public outweigh any potential benefits:
 - Only a small number of cases reach a disciplinary panel (typically five or so a year). Whilst the panels are an important part of the disciplinary process, they represent only a small part of it
 - Disciplinary panel hearings do not culminate in the panel deciding the outcome of a case. The panels make recommendations to the Lord Chancellor and Lord Chief Justice. Those recommendations are not made at a hearing; they are made later in a written report, which is not published. This sets the panels apart from other regulatory or disciplinary panels and, we believe, means that public hearings would have less value in terms of insight into the decision-making process
 - The personal involvement of the Lord Chancellor and Lord Chief Justice, whose joint decisions are published, provides validation of the process, which we believe carries considerable weight, lessening the need to open the process to the public
 - Public knowledge of an office-holder's involvement in disciplinary proceedings could result in undue damage to his/her reputation, which could have a major and lasting career impact
 - Similarly, it might be difficult for an office-holder to continue to function effectively during a disciplinary case if the public was aware, perhaps as a result of press reporting, of his/her involvement in a serious disciplinary matter. This could lead to an increase in complaints about the individual, requests for recusal and challenges to their decisions
 - The disciplinary rules require that, following a hearing, the panel must produce a report. When the report is finalised, the JCIO prepares advice for the Lord Chancellor and Lord Chief Justice. They then consider the case and reach a joint decision. This process necessarily takes some time. Public hearings could, therefore, lead to unbalanced press reporting, which focussed on the allegations against the office-holder without being able to report on the decision itself
 - Office-holders, particularly in serious cases, may refer in mitigation to sensitive personal issues such as mental health. It would, therefore, be imperative to give office-holders the option to request a private hearing. An unwanted side-effect would be an increase in press interest and speculation about hearings held in private
 - Magistrates are unpaid volunteers, many of whom have careers elsewhere. The prospect of a public hearing in the event of a disciplinary matter arising might deter applications for the role and increase resignations
 - Public hearings might also deter office-holders who face suspension or removal from office from requesting a disciplinary panel, for fear of publicity. They might also result in more office-holders wanting to be legally represented at hearings.

187. Having considered all the arguments, we are not convinced that public hearings would increase confidence in the system. Further still, we believe that the factors referred to above could undermine it. We believe that there are other, more effective, ways of improving transparency, which is the subject of the next set of proposals.

Disciplinary Statements

188. The policy for publication of disciplinary statements dates to 2012. The (then) Lord Chancellor and Lord Chief Justice, on the advice of the JCIO's predecessor, the Office for Judicial Complaints ("OJC"), agreed that statements should be published on the OJC (now JCIO) website about all cases which resulted in a sanction. They agreed that statements about sanctions below removal from office should be published for one year, and those about removal for five years. Current disciplinary statements can be viewed at:

https://www.complaints.judicialconduct.gov.uk/disciplinarystatements/

Proposal 35: Disciplinary statements should contain more detail and office-holders should be able to comment on the proposed wording of statements

- 189. As the only published record of the outcome of a judicial disciplinary case in which misconduct has occurred, disciplinary statements are an important source of information for the public and for the judiciary.
- 190. Having reflected on the recommendations of the review working group, we consider that the statements should be more detailed. We propose that, in the interests of increasing public and judicial awareness about disciplinary outcomes, statements should in future include more information about:
 - The circumstances in which misconduct occurred
 - The details of the misconduct
 - The office-holder's response
 - Any aggravating or mitigating factors (insofar as it is appropriate to make such information public), which the Lord Chancellor and Lord Chief Justice considered when deciding the sanction.
- 191. While the level of detail in the statements should not be excessive, it should give the reader a full picture of the circumstances in which misconduct occurred and an understanding of why a particular sanction was given for it.
- 192. We also propose that office-holders should have the opportunity to comment on the intended wording of statements. However, we do not propose that an office-holder's approval should be required for the wording. The final wording of disciplinary statements is a matter for the Lord Chancellor and Lord Chief Justice.

Q35: Do you agree that disciplinary statements should contain more detail and that office-holders should be able to comment on the intended wording of the statements? Please give your reasons

Proposal 36: Disciplinary statements should remain on the JCIO website for longer. The length of publication should increase with the level of seriousness as follows:

Notice of misconduct with formal advice: two years

Notice of misconduct with formal warning: four years

Notice of misconduct with reprimand: six years

Notice of misconduct with period of suspension: eight years

Removal from office (except for failure to meet sitting requirements): indefinite

- 193. For the same reasons that we believe disciplinary statements should be more detailed, we also believe that statements should remain in the public domain for longer than the current publication periods of one year for sanctions below removal from office and five years for removal.
- 194. While it must be right that an individual who remains in office after being sanctioned for misconduct can expect the matter to leave the public domain after a time, we believe that the current publication periods are too short. We believe that public confidence, and the deterrent effect of published sanctions, would be enhanced by longer publication periods, which are proportionate to the seriousness of the misconduct in question.
- 195. We believe that the public interest would be served best by indefinite publication of statements about the relatively few cases which are so serious as to render an office-holder unsuitable to remain in office.
- 196. We note, however, that approximately 75% of cases which result in removal from office involve failure to meet sitting requirements. With rare exceptions, they involve magistrates, who are unpaid volunteers. Many have work and other commitments, which occasionally prevent them from sitting as often as required. Magistrates in this position are expected to resign but some do not.
- 197. It is right that a mechanism exists to remove office-holders who fail to meet the sitting requirements of their role. But such cases are not comparable to other cases which result in removal. We believe that indefinite publication of statements about them would be disproportionate. We therefore propose retaining the current publication period for statements about these cases: five years.

Q36: Do you agree with our proposed publication periods for disciplinary statements? Please give your reasons.

Proposal 37: Statements which have been deleted following the expiration of their publication period should be available from the JCIO on request

198. We believe that it should be possible for anyone who is interested in the outcome of a disciplinary case to receive a copy of a deleted statement from the JCIO. While we envisage that such requests will be rare, we believe that providing access to this information is in line with the aim to promote transparency. It is also relevant to note that Section 139 of the Constitutional Reform Act 2005 does not prevent the disclosure of information which has already been available to the public.

Q37: Do you agree that deleted disciplinary statements should be available from the JCIO on request? Please give your reasons.

Proposal 38: The JCIO's annual report should contain a wider range of information and more detail

- 199. The JCIO publishes its annual report on its website. Publication is recorded in Parliament by written ministerial statements. Copies of the report are lodged in the libraries of both Houses. The report is of particular interest to the judicial associations. Publication usually results in a small amount of legal-press coverage.
- 200. The report contains information about the JCIO's performance against its targets for processing complaints and some statistics about complaint types and outcomes.
- 201. We propose that in future the report should include a broader range of information and more detail. The report should be interesting and informative. As well as showing the JCIO's performance, it should enable the public to understand how the disciplinary process works and who is involved in it. The report should also give an insight into the nature and context of cases which result in a disciplinary sanction.
- 202. In summary, we propose that the following should be included in the report along with information about the JCIO's performance:
 - More information about how the system works and how it fits into the constitutional framework, including the role of the Lord Chief Justice (and his senior judicial delegates) and the Lord Chancellor

- More information about the JCIO, its status, remit and role
- Information about other roles in the system, i.e. nominated and investigating judges and disciplinary panels
- Names of the judges and lay disciplinary panel members who have considered cases during the reporting year (JCIO to give prior notice in order that any objections can be raised in advance of publication)
- Information about the process for considering complaints about magistrates and, if practicable, numbers and types of complaints made to advisory committees
- A wider range of statistics about complaint types and outcomes
- More information about the reasons for sanctions given and the nature of the cases in question (using published disciplinary statements as a basis for categorised summaries, but not including office-holders' personal details).

Q38: Do you agree with our proposals for enhancing the JCIO's annual report? Please give your reasons.

Diversity

203. Much work has been done, and is being done, to promote a more diverse judiciary. Nevertheless, we recognise that office-holders who work in the disciplinary system are drawn from a judiciary which, in some parts more than others, does not reflect the diversity of wider society. The following proposals are intended to promote diversity amongst those who perform statutory roles in the disciplinary process.

Proposal 39: There should be a fresh recruitment drive for nominated judges, disciplinary panel members and nominated committee members, encouraging applicants from diverse backgrounds

- 204. Earlier we proposed expanding the pool from which nominated judges are drawn (proposal 12). In addition to broadening the range of judicial knowledge and experience in the pool, this presents an opportunity to increase its diversity, especially because the ranks we have suggested for inclusion are more diverse than the senior courts judiciary.
- 205. The Lord Chief Justice appoints judicial members of disciplinary panels following an expressions of interest exercise. There is no limit to the tenure of judicial members. We understand that the pool has not been refreshed for some time.
- 206. Lay panel members are appointed via the public appointments process. The current cadre is eligible to serve until October 2021. Pending the outcome of this review of

- the disciplinary system, the JCIO has sought ministerial approval to extend those appointments for two years.
- 207. The JCIO told us that there is nothing to prevent a fresh round of recruitment to add new members to both the judicial and lay lists at any time.
- 208. Proposal 22 envisages the creation of a new role that would replace conduct panels in the process for considering complaints about magistrates: nominated committee member. If this proposal is enacted, it will be necessary to recruit one or more individuals to this role for each of the seven regional conduct advisory committees.
- 209. For all the above roles, we suggest that recruitment should begin as soon as practicable and that, whilst appointment must be solely on merit, there should be an emphasis on encouraging applications from underrepresented groups.

Q39: Do you agree that there should be a fresh recruitment drive for nominated judges, disciplinary panel members and nominated committee members, encouraging applicants from diverse backgrounds? Please give your reasons.

Proposal 40: A diversity outreach strategy should be developed to encourage more office-holders and lay panel members from underrepresented groups to undertake roles in the disciplinary process. The strategy should include all jurisdictions and eligible ranks, with (subject to their agreement) involvement from the judicial associations

- 210. Looking further ahead, we propose the development of a strategy designed to raise awareness amongst office-holders from underrepresented groups of roles within the disciplinary system.
- 211. We acknowledge the ongoing work of the Judicial Office diversity team, including the newly published diversity strategy. We suggest that a strategy to promote involvement in disciplinary roles could use well-established networks and the expertise of office-holders and others.
- 212. The details of the strategy would require further thought. However, it might usefully include awareness-raising events and/or sessions as part of established forums with involvement from office-holders and lay panel members, particularly from underrepresented groups.
- 213. The JCIO should have a role in explaining its place in the system, and how the complaint-handling process works. The judicial associations should also be invited to

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take part. The strategy should aim to reach all parts of the judiciary in which officeholders are eligible to undertake disciplinary roles.

Q40: Do you agree that a diversity outreach strategy should be developed to encourage more office-holders/lay people from underrepresented groups to undertake roles in the disciplinary process? Please give your reasons.

Proposal 41: Diversity training for office-holders and lay panel members who undertake roles in the disciplinary process should be mandatory

214. This proposal should not require much explanation. Subject to discussion with the Judicial College and consideration of resource implications, we suggest that the Judicial College's expertise could be utilised to assist in identifying (or, if necessary, developing) suitable training.

Q41: Do you agree that diversity training for office-holders and lay panel members who undertake roles in the disciplinary process should be mandatory? Please give your reasons.

Questionnaire

We would welcome responses to the following questions set out in this consultation paper.

- Q1: Do you agree that the purpose of the judicial disciplinary system should be formally defined? If so, do you agree with the proposed definition? Please give your reasons.
- Q2: Do you agree that the disciplinary system should continue to be based on the concept of misconduct, and that misconduct should be categorised as minor, serious or gross? Please give your reasons.
- Q3: Do you agree that the JCIO should deal with complaints about tribunal members and chamber presidents? Please give your reasons.
- Q4: Do you agree with the introduction of an expedited procedure for lower level cases in which the facts are agreed? Please give your reasons.
- Q5: Do you agree with a requirement for complaints to be supported by relevant details? Please give your reasons.
- Q6: Do you agree that the rules should make clear that complaints which do not satisfy the criteria for a valid complaint must be rejected? Please give your reasons.
- Q7: Do you agree that, subject to the JCIO being able to accept complaints which are about a pattern of behaviour over time and complainants being able to make representations for an extension in exceptional circumstances, the time limit for a complaint to the JCIO should be within three months of the matter complained of? Please give your reasons.
- Q8: Do you agree with the proposed changes to the criteria for dismissing a complaint? Please give your reasons.
- Q9: Do you agree that the JCIO should be able to invite a complainant to comment on an office-holder's response to their complaint? Please give your reasons.
- Q10: Subject to the proposed safeguards, do you agree that the JCIO should have the power to stop dealing with complaints which have no reasonable prospect of resolution before the office-holder leaves office? Please give your reasons.
- Q11: Do you agree that nominated judges, investigating judges and disciplinary panels should continue to consider complaints which the JCIO has not rejected or dismissed? Please give your reasons.

- Q12: Do you agree that the pool of nominated judges should be expanded to include Circuit, district and salaried tribunals judges and coroners? Please give your reasons.
- Q13: Do you agree that the JCIO should be responsible for deciding whether information received in the absence of a complaint should be investigated? Please give your reasons.
- Q14: Do you agree that the power to dismiss a complaint which has been referred to a nominated judge should reside solely with the nominated judge? Please give your reasons.
- Q15: Do you agree with our proposal for the composition of disciplinary panels? Please give your reasons.
- Q16: Do you agree that an office-holder whose case is referred to a disciplinary panel should have a right to an oral hearing? Please give your reasons.
- Q17: Do you agree that office-holders who attend a disciplinary interview or hearing should have a right to be accompanied by a judicial colleague for moral support? Please give your reasons.
- Q18: Do you agree that the requirement to invite representations about how a judicial investigation will be conducted should be deleted from the rules? Please give your reasons.
- Q19: Do you agree that, except for cases in which suspension or removal from office is recommended, the reports of nominated judges, investigating judges and disciplinary panels should not be sent to office-holders until the end of the disciplinary process? Please give your reasons.
- Q20: Do you agree that advisory committees should continue to consider complaints about magistrates under a separate set of rules? Please give your reasons.
- Q21: Do you agree that advisory committee secretaries should have a filtering role which mirrors that of the JCIO? Please give your reasons.
- Q22: Do you agree that conduct panels should be replaced by the new role of nominated committee member, which should have the same powers as that of nominated judge? Please give your reasons.
- Q23: Do you agree that all members and chairs of conduct advisory committees should be eligible to apply for the role of nominated committee member? Please give your reasons.

- Q24: Do you agree that all candidates for the role of nominated committee member should be selected by a three-person panel composed of the committee secretary, a presiding judge or Family Division liaison judge, and a non-magistrate committee member? Please give your reasons.
- Q25: Do you agree that all successful candidates for the role of nominated committee member should be trained for the role, and with our proposals for the development and delivery of the training? Please give your reasons.
- Q26: Do you agree that nominated committee members should not have limited tenure and that their appointment should last until the end of their appointment to the advisory committee? Please give your reasons.
- Q27: Do you agree that the nominated committee member should carry out his/her duties in consultation with the advisory committee secretary? Please give your reasons.
- Q28: Do you agree that the redundant provisions for full advisory committee consideration of complaints and for committee chairs to decide to deal with a complaint personally should be deleted? Please give your reasons.
- Q29: Do you agree that the proposed expedited procedure should be part of the process for complaints about magistrates, and that the committee secretary should fulfil the same functions in the process as the JCIO? Please give your reasons.
- Q30: Do you agree that advisory committee secretaries should decide whether information received in the absence of a complaint requires investigation? Please give your reasons.
- Q31: Do you agree that a period of suspension should be generally available as a sanction for misconduct? Please give your reasons.
- Q32: Do you agree that a period of suspension following a criminal conviction, or a finding of misconduct, should be without pay for salaried office-holders? Please give your reasons.
- Q33: Do you agree that office-holders for whom suspension would have financial consequences should be able to make representations about hardship before a final decision is made? Please give your reasons.
- Q34: Do you agree with our proposal for renaming the disciplinary sanctions below removal from office? Please give your reasons.

Q35: Do you agree that disciplinary statements should contain more detail and that office-holders should be able to comment on the intended wording of the statements? Please give your reasons.

Q36: Do you agree with our proposed publication periods for disciplinary statements? Please give your reasons.

Q37: Do you agree that deleted disciplinary statements should be available from the JCIO on request? Please give your reasons.

Q38: Do you agree with our proposals for enhancing the JCIO's annual report? Please give your reasons.

Q39: Do you agree that there should be a fresh recruitment drive for nominated judges, disciplinary panel members and nominated committee members. encouraging applicants from diverse backgrounds? Please give your reasons.

Q40: Do you agree that a diversity outreach strategy should be developed to encourage more office-holders/lay people from underrepresented groups to undertake roles in the disciplinary process? Please give your reasons.

Q41: Do you agree that diversity training for office-holders and lay panel members who undertake roles in the disciplinary process should be mandatory? Please give your reasons.

QIA-1: Do you agree that we have correctly identified the equality implications of our proposals? If you do not agree, please give your reasons, together with any evidence.

Thank you for participating in this consultation exercise.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box Address to which the acknowledgement should be sent, if different from above	(please tick box)
If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.	

Contact details/How to respond

Please send your response by 07/02/22 to:

disciplinary.consultation@judicialconduct.gov.uk

If you are unable to respond by email, please post your response to:

Disciplinary Consultation
Judicial Conduct Investigations Office
80–82 Queen's Building
Royal Courts of Justice
London, WC2AA 2LL

Complaints or comments

If you have any complaints or comments about the consultation process you should contact the Judicial Conduct Investigations Office at the above address.

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at https://consult.justice.gov.uk/.

Alternative format versions of this publication can be requested from disciplinary.consultation@judicialconduct.gov.uk

Publication of response

A paper summarising the responses to this consultation will be published in early 2022. The response paper will be available on-line at https://consult.justice.gov.uk/.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

By responding to this consultation, you acknowledge that your response, along with your name/corporate identity will be made public when the Department publishes a response to the consultation in accordance with the access to information regimes (these are primarily

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the Freedom of information Act 2000 (FOIA), the Data Protection Act 2018 (DPA), the General Data Protection Regulation (GDPR) and the Environmental Information Regulations 2004).

Government considers it important in the interests of transparency that the public can see who has responded to Government consultations and what their views are. Further, the Department may choose not to remove your name/details from your response at a later date, for example, if you change your mind or seek to be 'forgotten' under data protection legislation, if Department considers that it remains in the public interest for those details to be publicly available. If you do not wish your name/corporate identity to be made public in this way then you are advised to provide a response in an anonymous fashion (for example 'local business owner', 'member of public'). Alternatively, you may choose not to respond.

Judicial Discipline

Impact Assessment, Equalities and Welsh Language

Impact assessment

The proposals in this consultation will not affect businesses, charities, or the 1. voluntary sector. As most of the proposals are for changes to an existing statutory process, we do not expect them to have a significant impact on the public sector. As explained in the main body of the document, a small number of the proposals are expected to result in minor savings.

Equalities

- 2. Section 149 of the Equality Act 2010 ('the Act') and the Equality Act 2010 (Specific Duties) Regulations 2011 require public authorities, in the exercise of their functions, to have due regard to the need to:
 - Eliminate discrimination, harassment and victimisation, and any other conduct that is prohibited by, or under, the Act
 - Advance equality of opportunity between people who share a relevant protected characteristic and people who do not share it
 - Foster good relations between people who share a relevant protected characteristic and those who do not share it.
- 3. There are nine protected characteristics that fall within the Act: sex, race, disability, age, sexual orientation, religion and belief, gender reassignment, marriage & civil partnership, pregnancy & maternity. The characteristics of marriage and civil partnership are relevant only when considering the first limb of the duty.
- 4. Data on judicial office-holders is held by the Judicial Office. Published data is available at: Diversity of the judiciary: 2020 statistics - GOV.UK (www.gov.uk). At present, published data is available for: sex, race and age in relation to courts and tribunals office-holders and magistrates.
- 5. Data is more limited for coroners, partly due to the lack of centralised data. For the purposes of this assessment, we considered it disproportionate to request data from individual local authorities.

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- 6. At 1 April 2020:
 - 32% of courts judges and 47% of tribunal judges were women
 - 8% of courts judges and 12% of tribunal judges identified as Black, Asian or Minority Ethnic (BAME)
 - 76% of courts judges and 72% of tribunal judges were aged 50 and over, with 40% aged 60 and over in both courts and tribunals.
- 7. Broadly speaking, while there is no clear pattern on race, the proportion of women and people under the age of 50 reduces as judicial rank increases; for example, at 1 April 2020:
 - 44% of district judges (county courts) were women; 33% of Circuit judges were women; 28% of High Court judges were women
 - 41% of district judges (county courts) were under 50; 11% of Circuit judges were under 50; 5% of High Court judges were under 50
 - 56% of magistrates were women; 17% of magistrates were under 50.
- 8. Diversity data is not collected about complainants or about office-holders who are subject to disciplinary action. The JCIO intends to work towards collecting such data as soon as practicable.
- 9. Diversity data is not recorded for judicial members of disciplinary panels. The JCIO intends to work towards collecting such data as soon as practicable. Limited diversity data is recorded for lay members. Of the 14 current members:
 - 8 are women
 - 2 identify as BAME.

Direct discrimination

10. Direct discrimination is treating someone less favourably due to a protected characteristic. We do not believe that any of the proposals in this consultation would constitute direct discrimination. The disciplinary system applies equally to all judicial office-holders within its scope.

Indirect discrimination

- Indirect discrimination occurs when a policy applies in the same way to all individuals but would put those sharing a protected characteristic at a particular disadvantage.
- 12. We have assessed whether the proposals discriminate indirectly against judicial office-holders who share a relevant protected characteristic. We have identified only one proposal for further consideration in this respect:
 - Proposal 31 A period of suspension, without pay for salaried judiciary, should be generally available as a sanction: the duration of the suspension to be agreed jointly by the Lord Chancellor and Lord Chief Justice on a case by case basis.

- Broadly speaking, of the 50 or so judicial office-holders who are sanctioned for misconduct each year, the majority will be from less senior offices. In the last 12 months for example, the 55 office-holders who received a disciplinary sanction included only one member of the senior courts judiciary.⁴ However, it is important to view these figures in the context of the different numbers of office-holders in different ranks. There are, for example, approximately 13,000 magistrates compared to fewer than 100 High Court judges. It is therefore unsurprising that more magistrates are subject to disciplinary action than High Court judges.
- 14. A period of suspension, without pay for salaried office-holders, following a finding of misconduct will obviously have financial consequences for a salaried office-holder. A fee paid office-holder could also be affected. However, it might be possible for a fee paid office-holder to recover any lost income from fees by undertaking additional sittings at a later date.
- Given that most office-holders who are subject to a disciplinary sanction are from the 15. less senior judicial ranks and given that it is those ranks which contain higher proportions of women and people under 50, this suggests that there is an increased likelihood that an office-holder who is suspended, and might therefore temporarily experience loss of income, will be from one of those groups.
- 16. However, we consider that there is a strong policy justification for this proposal in giving the Lord Chancellor and Lord Chief Justice an fuller range of sanctions to use in cases of misconduct. We also note that:
 - It is estimated that there would be one or two cases a year at most of suspension following a finding of misconduct
 - The decision to suspend an office-holder for misconduct would be taken only after a full investigation of all the relevant facts, carried out in accordance with prescribed procedures
 - In proposal 33, we have proposed enabling office-holders for whom suspension would have financial consequences to make representations about hardship. This is a significant safeguard
 - By providing an additional sanction option for conduct at the more serious end of the scale, it is possible that there would be cases in which an office-holder would otherwise, in the absence of the option to impose a period of suspension, be removed from office
- Overall, we do not consider that the proposals are likely to result in any office-holders with protected characteristics suffering a particular disadvantage when compared to someone who does not share the protected characteristic. We believe that the proposals are a proportionate means of achieving the legitimate aim of promoting public confidence in the independence, reputation, and good standing of the judiciary

⁴ Senior courts judiciary refers to High Court judges and above.

by ensuring that allegations of misconduct are dealt with efficiently, fairly and proportionately.

Harassment and victimisation

18. Harassment under the Act includes unwanted conduct related to a relevant protected characteristic which has the purpose or effect of violating the victim's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. We do not consider there would be a risk of harassment or victimisation as a result of the proposals. And while we recognise that harassment and victimisation can sometimes occur in any context, there are procedures in place to respond to it.

Discrimination arising from disability and the duty to make reasonable adjustments

We do not consider that the proposals are likely to result in any discrimination against people with disabilities. We recognise that it remains important to continue to make reasonable adjustments for those who participate in the judicial disciplinary system, complainants included.

Advancing equality of opportunity

20. We have considered how these proposals might impact on the advancement of equality of opportunity. We consider that while the impact of the proposals is likely to be largely neutral, proposals 39–41 are aimed at improving the diversity of those who perform roles in the disciplinary system, which will advance equality of opportunity for under-represented office-holders, particularly in relation to participation in public life.

Fostering good relations

21. We do not consider that these proposals will actively foster good relations between those who share a protected characteristic and those who do not. However, we do not believe that the proposals are incompatible with this aim.

QIA-1: Do you agree that we have correctly identified the equality implications of our proposals? If you do not agree, please give your reasons, together with any evidence for your suggestions.

Judicial Discipline

Consultation on proposals about the judicial disciplinary system in England and Wales

Welsh Language Impact Test

22. The proposals in this paper are relevant to Wales insofar as the judicial disciplinary system covers office-holders who serve in England and Wales. However, the proposals do not raise any issues specific to Wales/the Welsh language. A summary document will be published in Welsh alongside the consultation document. A summary response document will also be published following the consultation.

Consultation principles

The principles that Government departments and other public bodies should adopt for engaging stakeholders when developing policy and legislation are set out in the Cabinet Office Consultation Principles 2018 that can be found here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles__1_.pdf

Appendix A: Overview of the Judicial Disciplinary System

Introduction

This appendix aims to provide a brief overview of how the modern judicial disciplinary system developed and how it operates today.

Background

Prior to the Constitutional Reform Act 2005 ("CRA"), the Lord Chancellor was, as Head of the Judiciary, responsible for judicial discipline. Civil servants in the Lord Chancellor's Department, which later became the Department for Constitutional Affairs, and which is now the Ministry of Justice, were responsible for handling complaints about the judiciary and for supporting the Lord Chancellor in his disciplinary role. The processes for handling complaints were not based in statute.

One of the significant constitutional changes brought about by the CRA was to pass the role of Head of the Judiciary to the Lord Chief Justice. Thereafter, responsibility for judicial discipline has rested jointly and equally with the Lord Chancellor and Lord Chief Justice.

In 2006, the Office for Judicial Complaints ("OJC") was established. Although an associated office of the Department for Constitutional Affairs, and later the Ministry of Justice, the OJC was responsible to both the Lord Chancellor and Lord Chief Justice.

Another significant change arising from the CRA was to put the process for handling complaints on a statutory footing. The first set of disciplinary regulations, also known as "prescribed procedures", derived from the CRA was introduced in 2006 (an amended version was introduced in 2008).

In 2011, following a review of "arms-length bodies" by the Ministry of Justice, the OJC became part of the Judicial Office, which had been set up in 2006 to support the Lord Chief Justice with his new responsibilities as Head of the Judiciary. The OJC operated independently and continued to support both the Lord Chancellor and Lord Chief Justice in their joint responsibility for judicial discipline.

Standards of Conduct

The standards of conduct judicial office-holders are expected to maintain are set down principally in the *Guide to Judicial Conduct*.⁵ The Guide was first published in 2003, a result of extensive work by a Judges' Council working group.

There are three basic principles guiding judicial conduct: Judicial Independence, Impartiality, and Integrity, which are a distillation of the six fundamental values set out in the *Bangalore Principles of Judicial Conduct*.

The Guide has undergone regular revisions since 2003 to incorporate changes that have occurred in wider aspects of judicial and public life.

The Judicial Disciplinary System Today

In 2013, following a comprehensive review of the process for dealing with complaints about the judiciary, led by the late Lord (then Lord Justice) Toulson, new disciplinary regulations were introduced: *The Judicial Discipline (Prescribed Procedures) Regulations* 2014, along with three sets of supporting statutory rules:⁶

The Judicial Conduct (judicial and other office-holders) Rules 2014 govern the consideration of complaints about salaried and fee-paid courts judiciary and coroners. Complaints are made to the Judicial Conduct Investigations Office ("JCIO").

The Judicial Conduct (Tribunals) Rules 2014 govern the consideration of complaints about tribunals members. Complaints are made to the relevant chamber president.

The Judicial Conduct (Magistrates) Rules 2014 govern the consideration of complaints about magistrates. Complaints are made to one of seven regional conduct advisory committees.

In addition to making various changes to the process for handling complaints, the new disciplinary regulations saw the OJC replaced by the JCIO. Like its predecessor, the JCIO is based in the Judicial Office but operates independently of the rest of the Judicial Office and the Ministry of Justice in supporting the Lord Chancellor and Lord Chief Justice on disciplinary matters.

⁵ <u>https://www.judiciary.uk/publications/guide-to-judicial-conduct/</u>

⁶ The rules and regulations were originally dated 2013 but were reissued with a correction in 2014.

Judicial Independence

The principle of judicial independence is a fundamental feature of our democratic society. It means that judicial office-holders must exercise their powers impartially and must be free to do so without interference from external sources including the government and civil servants.

It is for this reason, that the judicial disciplinary system is limited to considering complaints about the personal conduct of the judiciary. The system cannot be used to seek to interfere in the exercise of independent judicial discretion or overturn judicial decisions. Such matters can only be challenged through the courts.

Misconduct

Misconduct is a term which refers to improper personal conduct by a judicial office-holder that is serious enough to call for formal disciplinary action. Examples of misconduct may include:

- Offensive remarks/loss of temper in court
- Improper conduct towards colleagues/staff
- Misuse of judicial status
- Misuse of social media
- Failure to report relevant matters (e.g. personal involvement in legal proceedings).

The Power to Take Disciplinary Action

Another critically important feature of the system, which again reflects the status of the judiciary as independent office-holders, is that disciplinary powers are vested jointly in the Lord Chancellor and Lord Chief Justice.

Sanctions below removal from office are issued by the Lord Chief Justice with the agreement of the Lord Chancellor. They are set out in the CRA. They are, in order of severity, *formal advice, formal warning,* and *reprimand*. Suspension is also available as a sanction in limited circumstances. The power of removal from office, which resides in various pieces of legislation, rests with the Lord Chancellor and requires the agreement of the Lord Chief Justice.

In relation to tribunals members, the Senior President of Tribunals holds delegated authority from the Lord Chief Justice to consider cases and issue sanctions up to and including a formal warning. In relation to magistrates, the Lord Chief Justice has delegated to Mrs Justice Cheema-Grubb DBE his powers to consider cases and issue sanctions up to and including a reprimand.

In cases involving judges assigned to the small number of tribunals with a UK-wide jurisdiction, the Lord Chief Justice's role in the disciplinary process is performed by the Lord President or the Lady Chief Justice of Northern Ireland if the office-holder sits mostly or solely in one of those jurisdictions.

In all cases, disciplinary action may only be taken after the relevant rules and regulations have been complied with.

Typically, only around 50 complaints of misconduct are upheld each year.

Judicial Conduct Investigations Office ("JCIO")

The status and role of the JCIO is set out in the 2014 disciplinary regulations. The process the JCIO follows in considering complaints is set out in The Judicial Conduct (judicial and other office-holders) Rules 2014 ("the rules").

While the JCIO can reject or dismiss a complaint, and can give advice to the Lord Chancellor and Lord Chief Justice on issues such as the level of disciplinary sanction recommended to them in a case, it has no powers to make findings of misconduct or to discipline an office-holder.

The JCIO currently receives around 1,200 complaints a year. However, it is obliged to reject a substantial proportion of those complaints (around 70%) because they are about issues which fall outside its remit such as judicial decisions. A further 25% are dismissed, either straightaway or after making provisional enquiries, because they are, for example, insufficiently particularised, misconceived, or contain allegations that, even if true, would not amount to misconduct. As such, the JCIO has an important role in assessing incoming complaints to identify the small proportion which raise a question of misconduct and therefore require further investigation.

The process by which the JCIO establishes whether a complaint raises a question of misconduct is set down in the rules. For complaints that it is not plainly obliged to reject or dismiss straightaway, the steps taken may include listening to the audio recording of a hearing, obtaining comments from third parties such as court staff or legal professionals, and obtaining comments from the office-holder against whom the complaint has been made.

Judicial and Lay Involvement in the Disciplinary Process

Independent judicial and lay involvement in the form of nominated judges, investigating judges, disciplinary panels, chamber presidents and advisory committees is a key part of the system. It is these authorities which make findings of misconduct and recommend disciplinary sanctions.

A complaint which the JCIO has not rejected or dismissed must be dealt with under the Summary Process (see below) or referred to a nominated judge.

The Lord Chief Justice selects nominated judges following an expressions of interest exercise. The number of nominated judges at any given time is based on having the ability to deal with complaints promptly while giving each nominated judge regular experience of the work. At present, there are eight nominated judges, three from the Court of Appeal and five High Court judges. Nominated judges consider complaints to decide whether misconduct has occurred and, if so, recommend a sanction. Approximately 20–30 cases per year are referred to a nominated judge.

Cases which are especially serious or complex may also be referred to an investigating judge. They are appointed on a case by case basis to consider complaints which need more in-depth enquiry to decide whether misconduct has occurred and, if so, an appropriate sanction. There are typically fewer than five such cases per year.

Additionally, disciplinary panels, composed of two judicial and two lay members appointed by the Lord Chancellor, consider cases in which an office-holder has been recommended for suspension or removal from office before deciding whether misconduct has occurred and, if so, recommending a sanction.

Summary Process

The Summary Process is an expedited process designed to deal with cases in which removal from office is recommended without a requirement for further investigation. Examples include conviction for a serious criminal offence and persistent failure, without reasonable excuse, to meet sitting requirements.

Final Decision

Following consideration of a case by a nominated judge, investigating judge or disciplinary panel, the JCIO refers the case to the Lord Chief Justice (or his senior judicial delegate) and the Lord Chancellor for a final decision. By convention, the Lord Chief Justice considers the case first followed by the Lord Chancellor.

Publication Policy

Once a decision has been made, the parties are informed in writing. To promote transparency, in cases which result in a disciplinary sanction the JCIO publishes a statement about the case on its website. Statements about sanctions below removal from office are deleted after one year. Statements about removal from office are deleted after five years.

Judicial Appointments and Conduct Ombudsman (JACO)

The independent JACO was set up as a result of the CRA. Whilst the JACO can review the process by which a complaint has been handled, he cannot review the merits of decisions made by the JCIO, chamber presidents, advisory committees or the Lord Chancellor and Lord Chief Justice. However, if the JACO finds that the handling of a complaint was seriously flawed, he can set aside a decision made as a result of that process and require that the matter be reinvestigated.



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