



JUDICIAL COMPLAINTS PROTOCOL FOR BERMUDA

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JUDICIAL AND LEGAL SERVICES COMMITTEE FOR BERMUDA

Convening Note and Judicial Complaints Protocols (2018)

PART I CONVENING NOTE - Introductory

1. Bermuda is the only British Overseas Territory in the Atlantic and Caribbean region whose judges are not appointed by a constitutionally-established Judicial Service Commission.
2. Anguilla, the British Virgin Islands (BVI) and Montserrat are served by the Eastern Caribbean Judicial and Legal Services Commission; the Cayman Islands and Turks and Caicos Islands (TCI) have had their own constitutional bodies through constitutional amendments implemented in the first decade of the 21st century¹. The Cayman and TCI Commissions both (a) advise the Governor on judicial appointments at all three local court levels; and (b) advise the Governor on the exercise of his disciplinary powers over judges at all court levels.
3. The United Kingdom has recently established its own Judicial Appointments Commission, and modernised its disciplinary regime through the establishment in 2005 of an Office of Judicial Complaints².
4. In Bermuda, the Justice Review Committee chaired by Justice Wade-Miller recommended in March 2004 that “*a Judicial Service Commission, or some similar body, should be established*”.
5. The Governor has recently relied on *ad hoc* Judicial Appointment Committees, convened each time an appointment has had to be made. This has self-evidently lacked continuity and institutional memory in terms of administrative processes. It has also lacked transparency and any institutional framework within which recruitment and promotion issues can be addressed.
6. The absence of any transparent and formal procedure for complaints against judges leaves no clear channel for public dissatisfaction and, arguably, exposes the Judiciary to avoidable and unjustifiable ‘wildcat’ public attacks.

¹ Cayman Islands Constitution Order-in-Council, UK SI 2009: 1379, Schedule 2, section 106 (“*Functions of Judicial and Legal Service Commission*”); Schedule 2 to the 2006 Turks & Caicos Islands Constitution Order 2006, UK SI 2006: 1913, section 81 (“*Judicial Service Commission*”). The substance of section 81 of the TCI Constitution was not affected by the 2009 suspension of parts of the Constitution.

² Constitution Reform Act 2005, Part 4 (“*Judicial appointments and discipline*”).

7. In due course, and perhaps not very far off, the identified gap may be filled by an amendment to the Bermuda Constitution Order 1998. But meanwhile, the Governor has appointed a standing, non-statutory group to advise him on matters relating to both judicial appointments and complaints against the judiciary. Within a non-statutory framework, it broadly follows the pattern of the Cayman Islands, but includes the Chief Justice and two senior overseas judges.

BACKGROUND TO FUNCTIONS

Appointments

8. Under the Bermuda Constitution, the Chief Justice is appointed by the Governor after consulting the Premier, who in turn must consult the Opposition Leader, while Puisne Judges are appointed by the Governor after consulting the Chief Justice (section 73(3),(4)). Court of Appeal Judges are appointed by the Governor acting in his discretion (section 77(3)). Magistrates, somewhat anomalously, are not dealt with under Chapter V of the Constitution (“The Judiciary”) at all. Section 89 in Chapter VI (“The Public Service”) provides that Magistrates, the Registrar of the Supreme Court and any other legally qualified court officers are appointed by the Governor acting in consultation with the Chief Justice in accordance to JLSC advertising policy for judicial posts (Annex A):

9. Criteria for Renewal of Supreme Court Appointments at 65

Judges of the Supreme Court can, subject to the Governor’s approval (Section 74(1) (a) & (b), can have appointments extended up to the age of 70 subject to the following conditions being met:

- (i) The specific judicial expertise and skills required by the Court at the relevant time
- (ii) The expertise, skills and other judicial qualities possessed by the extension applicant
- (iii) The aim to give preference to Bermudians
- (iv) The aim to promote judicial diversity.

Discipline and security of tenure

10. Section 89 of the Constitution expressly provides that the power to remove magistrates, etc, is vested in the Governor acting in consultation with the Chief Justice. As far as Supreme Court Judges and Court of Appeal Judges are concerned, the Governor’s disciplinary powers for matters other than removal are implicit rather than explicit.

11. 'Superior court' judges can only be removed during their term of office where the following procedure is followed (Constitution, sections 74(4), 78(4)):
 - (a) a tribunal composed of senior judges appointed by the Governor must recommend removal; and
 - (b) the Privy Council, having considered the tribunal report, also recommends removal of the judge.
12. By necessary implication, the Governor must exercise general disciplinary control over superior court judges in respect of matters which do not give rise to any consideration of removal. However, there is no constitutional or legislative support for the disciplinary process which ought to be followed and for the disciplinary measures (apart from removal) which can be imposed.
13. The position of magistrates and other judicial officers is opaque. There is no constitutional or legislative support for the disciplinary process which should be followed in all cases, including cases where removal is being considered. The security of tenure of such judicial officers is accordingly substantially less than superior court judges, despite the fact that the criminal jurisdiction exercised by magistrates is now equivalent (in many respects) to that of the English Crown Courts.
14. However, in 2008 Bermuda's Judiciary voluntarily adopted Guidelines for Judicial Conduct, following the practice in most Commonwealth countries including England and Wales.
15. As a matter of practice the Governor presently consults the Chief Justice with respect to disciplinary matters. Pending possible further revision to the Bermuda Constitution Order, there is advantage in standing Advisory Committee providing the Governor with advice in this area, as cases may arise or in respect of possible disciplinary structures.
16. The standing Judicial and Legal Services Committee is asked to:
 - (a) advise the Governor on judicial and legal appointments and discipline;
 - (b) develop and maintain a database of precedents and operational principles for judicial selection and promotion;
 - (c) develop and maintain a database of precedents and operational principles for judicial disciplinary matters.

PART II JUDICIAL COMPLAINTS PROTOCOL FOR BERMUDA

“Section 6 of the Bermuda Constitution entitles all civil and criminal litigants the right to a hearing before an “independent and impartial court”. Such independence and impartiality requires not only the adherence by Judges and Magistrates to supportive ethical principles, but also public awareness of and confidence in the relevant ethical rules.”

(‘Guidelines for Judicial Conduct of the Judges of the Supreme Court of Bermuda and the Magistracy’, Preface, paragraph 1)

A. INTRODUCTION

1. On July 21, 2006, Chief Justice Richard Ground published the Bermudian Judiciary’s ‘Guidelines for Judicial Conduct’ which were strongly influenced by New Zealand’s Guidelines. The Preface to the Guidelines emphasised that:

“...the guidance provided in these statements and comments is not intended to be a code of conduct. It does not identify judicial misconduct. It is advice. The advice is designed to assist judges to make their own choices informed by a checklist of general principles and illustrations drawn from experience...”

2. The Preface also pointed out that the only disciplinary regime which existed for the Judiciary in the Commonwealth legal world was that relating to removal from office for serious misconduct. The ground has shifted considerably since those words were written and the Preface to the Guidelines has been updated accordingly.
3. The current trend is clearly in the direction of creating a framework for members of the public to be able to make complaints about the conduct of judges which relates to the propriety of their ethical conduct in cases where no suggestion of serious misconduct calling for removal from office arises. A few examples illustrate this shift in the direction of increasing the accountability of the Judiciary to the public in a way which supports judicial independence:
 - (a) in England and Wales a legislative scheme for judicial complaints was introduced in 2006, the same year our own Guidelines for Judicial Conduct were adopted;
 - (b) in Australia non-statutory judicial complaints procedures have been developed at the Federal and State level in recent years;

(c) the Cayman Islands 2009 Constitution obliges the Judicial and Legal Service Commission to both create a code of judicial conduct and a procedure for making complaints of judicial misconduct;

(d) the Isle of Man Judiciary introduced non-statutory '*Procedural Notes in Respect of Complaints of Personal Misconduct against Members of the Judiciary of the Isle of Man*' in October, 2012.

4. A unifying feature of all of these judicial complaints procedures is that complaints will not be entertained where in substance a litigant is dissatisfied with whether or not a decision made by a judicial officer is right or wrong. The remedy for such a complaint lies in the appeals process. This non-statutory Protocol is designed to provide members of the public who consider that a judge has acted in a way which is inconsistent with the standards set in the Guidelines for Judicial Conduct with a clear pathway for having their concerns heard. This not only makes the Judiciary accountable to the public. It also affords judges against whom unmeritorious complaints are made with a mechanism through which they can be vindicated. Consistent with international best practice, the Protocol is also designed to preserve judicial independence by ensuring that the Executive is not directly involved in imposing penalties on serving judicial officers.
5. It is important to emphasise that this complaint procedure cannot be used by disgruntled litigants to express their dissatisfaction with a decision made against them or to gain a tactical advantage in proceedings that are still ongoing. Such a complaint would be liable to be dismissed without full consideration on the grounds that it was vexatious. For example, where a party to legal proceedings believes a judge was biased against them, this complaint should be pursued by way of appeal³. On the other hand, if a party or witness believes that a judge has dealt with them in a rude and disrespectful manner, this would be a complaint of judicial misconduct which could be pursued under this Protocol, assuming the relevant proceedings have concluded.
6. Subject to the Bermuda Constitution, the Governor appoints judicial officers and exercises disciplinary control over them. On 1 November 2013, the Governor H.E. Mr. George Fergusson announced the formation of a standing Judicial and Legal Services Committee to advise him on, *inter alia*, judicial complaints. The present Protocol has been voluntarily adopted by the Judiciary of Bermuda with the concurrence of the Judicial and Legal Services Committee. It applies to complaints about matters occurring on or after January 1, 2014, the effective date of this Protocol.

³ Where a litigant considers a judge is biased based on information known to him before the start of the relevant hearing, the litigant should first raise the issue with the court and ask the judge to step down from the case.

HOW TO COMPLAIN

Contents and form of complaints

7. A complaint against a judicial officer shall be made in writing (see Annex B) and sent to: His Excellency The Governor, Government House, Langton Hill, Pembroke, HM 13, Att'n : Executive Officer (Email: "executiveofficer@gov.bm"). All complaints shall be submitted using the form (Annex C) set out in the Schedule with such modifications as may be required.

Time for making complaints

8. Complaints shall be made as a soon as possible but no later than three months after the conduct complained of occurred. The Committee may extend the time for making the complaint in exceptional circumstances upon receipt of a request for an extension of time setting out the reasons for the delay.

Withdrawal of complaints

9. Without prejudice to paragraph 10, a complaint will be considered by the Committee to be withdrawn where:
 - 9.1 the complainant makes a written request to withdraw the complaint;
 - 9.2 the complainant indicates that he does not wish the complaint or any supporting materials to be forwarded to the judge complained against; or
 - 9.3 the complainant fails within a reasonable time to supply any information requested by the Committee.

Reference of information by Heads of Division

10. Where the President of the Court of Appeal, the Chief Justice or Senior Magistrate consider (either on the basis of a complaint that is withdrawn under paragraph 9 or on the basis other information received in the absence of any formal complaint) that judicial misconduct may have occurred, they may refer that matter to the Committee to be dealt with as a complaint.

CONSIDERATION OF COMPLAINTS

Summary dismissal of complaints

11. A preliminary assessment of the merits of complaints will be carried out by a Complaints (filtering) Sub-committee comprising the President (or such other member of the Committee as he may designate) and a lay member of the Committee (i.e. a member of the Committee who is not legally qualified).
12. Complaints may be dismissed without any full investigation where they are unmeritorious on their face. Complaints will be summarily dismissed where:
 - (a) it does not adequately particularise the matter complained of;
 - (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 judicial office-holder;
 - (d) it is vexatious;
 - (e) it is without substance or, even if substantiated, would not require any disciplinary action to be taken;
 - (f) it is untrue, mistaken or misconceived;
 - (g) it raises a matter which has already been dealt with and does not present any material new evidence;
 - (h) it is about a person who no longer holds any judicial office;
 - (i) it is about the private life of a judicial office-holder and could not reasonably be considered to affect his or her suitability to hold judicial office;
 - (j) it is about the professional conduct in a non-judicial capacity of a judicial office-holder and could not reasonably be considered to affect his or her suitability to hold judicial office; or
 - (k) for any other reason it does not relate to misconduct by a judicial office-holder.
14. The Complaints Committee will not entertain any complaint which is anonymous and/or where the complainant provides no, or insufficient, contact information.

Investigation of complaints which appear valid on their face

15. The Committee will consider all complaints which have been filed in time and which appear to raise a case to answer of judicial misconduct. Receipt of the complaint will be acknowledged and the judge complained of will be given a reasonable time to respond to the complaint and given an opportunity to be heard.
16. Where the judge complained about is a member of the Committee, that judge shall have no involvement in the Committee's handling of the complaint.
17. Where it appears that a complaint may be valid and the judge complained against admits the complaint is valid, the provisions of paragraphs 20-22 below shall apply.
18. Where it appears that a complaint may be valid but the misconduct alleged is disputed by the judge complained against, the Committee shall request the Governor to appoint a Sub-Committee to adjudicate the complaint ("the Sub-Committee). The Sub-Committee shall consist of such non-conflicted members of the Committee and other persons as the Committee deems appropriate.

Adjudication of complaints

19. The Sub-Committee may in its discretion afford both the complainant and the judge complained against an opportunity to be heard in person before the Sub-Committee arrives at a final decision on the merits of the complaint. However, the Sub-Committee may decide complaints solely on the basis of the documentary material received by it in electronic or hard copy form.
20. Where the Sub-Committee finds that a complaint of judicial misconduct has been substantiated, it shall report this finding to the Committee which may recommend to the Governor that the judge complained against should be admonished, either publicly or privately. The Committee may also in its discretion recommend such other remedial measures as appear appropriate in all the circumstances of any particular case or may recommend that no further action be taken. The Governor upon receipt of such a recommendation may either:
 - (a) accept the recommendation;
 - (b) decide that no action be taken; or
 - (c) decide that some other action should be taken,

and, in either case, shall as soon as practicable communicate his preferred course of action to the Chief Justice or (where the respondent to the complaint is the Chief Justice or a member of the Court of Appeal) to the President of the Court of Appeal.

21. As soon as possible after receiving the Governor's recommendation pursuant to paragraph 20, the Chief Justice or the President of the Court of Appeal, as the case may be, shall decide what action, if any, should be taken in respect of the proven complaint and shall communicate his proposed decision to the judge complained against and afford the judge an opportunity to be heard before finally deciding what action, if any, should be taken.
22. After informing the judge complained about of the action to be taken in respect of a proven complaint, the Chief Justice or the President of the Court of Appeal, as the case may be, shall immediately inform the Governor and the Committee. The Committee shall forthwith notify the complainant of the action taken.
23. Where the Sub-Committee decides that a complaint has no merit and should be dismissed, the Sub-Committee shall communicate this decision to the complainant and the judge complained against, and shall give brief reasons for its decision.

Complaints bringing a judicial officer's fitness for office into question

24. If a complaint appears to be sufficiently serious that, if proved, removal from office might be required, the Committee may recommend to the Governor:
 - (a) that the judge complained against should be suspended pending the determination of the complaint; and
 - (b) in the case of complaints against judges of the Supreme Court or Court of Appeal, that a tribunal be established pursuant to the provisions of section 73(4) or 78(4) of the Bermuda Constitution, as the case be.

Dated this 1st day of January 2014

Edward Zacca, President of the Court of Appeal/Ian Kawaley, Chief Justice.

(on behalf of the Judiciary of Bermuda and with the concurrence of the Judicial and Legal Services Committee for Bermuda).

ANNEX A:

JUDICIAL AND LEGAL SERVICES COMMITTEE – ADVERTISING POLICY FOR JUDICIAL POSTS

Statutory framework

- (1) Judges of the Supreme Court and Court of Appeal and Magistrates are appointed by the Governor under sections 73, 77 and 89 respectively of the Bermuda Constitution.
- (2) The Bermuda Constitution does not prescribe any selection procedures, whether as to advertising or otherwise.
- (3) Expatriate judges and magistrates appointed to the Supreme Court are special category persons under the Bermuda Immigration and Protection Act 1956 (section 59 and First Schedule, paragraph 1). As such expatriate judges and magistrates do not require work permits and are not subject to any advertising requirements which may be imposed pursuant to the 1956 Act.

Full-time appointments

- (4) The usual approach will be as follows:
 - vacancies for full-time appointment to the Supreme Court and Magistrates' Court will ordinarily be advertised;
 - advertisements will ordinarily be placed locally but will also be placed overseas when it is unclear whether an adequate pool of suitable local candidates exists.
- (5) Exceptions may be authorised by the Governor.

Part-time appointments

- (6) The usual approach will be as follows:
 - requests for expressions of interest will be advertised overseas periodically (at least every 3 years) for Court of Appeal vacancies to generate a pool of potential new candidates who are selected for potential appointment without a formal interview;

- no advertisement will take place prior to renewals or acting appointments;
- expressions of interest in part-time service on the Supreme Court or Magistrates' Court bench will be sought periodically (at least every 3 years) by the Chief Justice and Senior Magistrate, respectively.

(7) Exceptions may be authorised by the Governor.

ANNEX B

SCHEDULE: COMPLAINT FORM

PLEASE READ BEFORE PROCEEDING FURTHER:

1. Unless there are reasons why it believes that a complaint should be investigated, the Complaints Committee of the Judicial and Legal Services Committee (the JLSC) will 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;
- (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 judicial office-holder;
- (d) it is vexatious;
- (e) it is without substance or, even if substantiated, would not require any disciplinary action to be taken;
- (f) it is untrue, mistaken or misconceived;
- (g) it raises a matter which has already been dealt with and does not present any material new evidence;
- (h) it is about a person who no longer holds any judicial office;
- (i) it is about the private life of a judicial office-holder and could not reasonably be considered to affect his or her suitability to hold judicial office;
- (j) it is about the professional conduct in a non-judicial capacity of a judicial office-holder and could not reasonably be considered to affect his or her suitability to hold judicial office; or
- (k) for any other reason it does not relate to misconduct by a judicial office-holder.

2. The Complaints Committee will not entertain any complaint which is anonymous and/or where the complainant provides no, or insufficient, contact information.

ANNEX C

Part A – About You (the Complainant)

1. Name:Mr/Mrs/Miss/Ms

2.PhysicalAddress:

3. Mailing Address: _____ Postal Code: _____

4. Contact numbers: Home: _____ Work: _____
Cell: _____

5. Email:_____

Only fill out this section if someone is assisting you with the complaint – for example a lawyer

Name of representative: _____

Organisation: _____

Physical Address: _____

Mailing Address: _____ Postal Code: _____

Contact numbers:

Work: _____ Cell: _____

Email:_____

Part B – Your complaint

About whom are you complaining (the judicial office-holder)?:

What happened?

Please describe the events that you want to complain about. We need to know what you say happened and where and when it happened. Please give us all the dates and as many specific details as you can remember regarding the behaviour complained of.

I hereby declare that the above information is accurate to the best of my knowledge.

Signature: _____ Date: _____

Consent to Release Information: I understand that the Governor's office and the JLSC may have to work with various individuals and agencies to investigate my complaint. Therefore I give my consent to the use and release of my complaint, any or all of its subject-matter and any additional information that the Governor's office, the JLSC or any person investigating my complaint feels is necessary to complete that investigation. I also understand that they will have to be released to the person who is the subject of my complaint.

Signature: _____ Date: _____

Remember: to sign and date this document; and to attach copies of any relevant documents.

**FAILURE TO PROVIDE ALL INFORMATION AND DOCUMENTS REQUESTED WILL
DELAY CONSIDERATION OF YOUR COMPLAINT**

Send your completed form to:

His Excellency the Governor-Attention: Executive Officer

Government House,

Langton Hill

Pembroke HM13

Or by email to: executiveofficer@gov.bm