Who judges the judges?

An open & rigorous process for dealing with complaints of judicial misconduct is essential to maintaining public trust, says John Gould

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It may come as a surprise to learn that there are 22,000 judges in England and Wales. If judges were a regulated profession, they would be the second largest body of individuals involved in legal services. By comparison, as at 1 April 2021 there were only 17,123 barristers and only 8,769 Chartered Legal Executives out of a total CILEX membership of around 21,000.

There is no doubting that all of these judicial appointees do important work and that maintaining very high levels of confidence in them is perhaps the key element in maintaining confidence in the rule of law itself. Yet, how judges are regulated and disciplined, as well as when and why, is not well known even among legal professionals; still less among the public at large.

Means of investigation

Since it was formed in 2013, following a review by the late Lord Toulson, the Judicial Conduct Investigations Office (JCIO) has dealt with more than 10,000 complaints. Over the same period, chamber presidents and advisory committees have dealt with thousands of complaints about tribunal officeholders and magistrates. Findings of misconduct, however, are rare, amounting to only around 50 cases a year.

The JCIO deals with complaints about salaried and fee-paid judiciary in the courts. Complaints about magistrates are dealt with by regional conduct advisory committees, and the relevant chamber president deals with tribunal members. The JCIO website reported fewer than 40 findings for 2021, and as yet no findings for 2022.

The JCIO's publication policy is that a statement will normally be published only when a disciplinary sanction has been issued to a judicial officeholder following a finding of misconduct. Statements about sanctions below the removal from office are deleted after one year, with statements about removal deleted after five years. The Lord Chief Justice and Lord Chancellor may decide jointly to issue press statements in any case, to decline to issue a statement, or to delete statements, based on the individual circumstances of a case.

The published findings, which are referred to as 'disciplinary statements', are usually restrained and generally no more than a short paragraph in length. Many appear simply to record removal based on the failure to undertake sufficient sitting days without a reasonable excuse. Statements based on conduct tend to restrict themselves to its characterisation rather than its particulars. For example, a judge was formally 'advised' after being criticised on appeal for showing 'anger and sarcasm' but what was actually said was never revealed.

The statements are listed by the name of the judge and sorted in reverse reference number order, which makes it rather difficult to identify the more serious cases where a judge has been removed. From the JCIO's last annual report published in December 2020, 66% of complaints in the year were rejected because they concerned judicial decisions or case management. The 325 complaints of inappropriate behaviour and comments, amounting to some 25% of complaints, were mostly 'found to be unsubstantiated or, even if true, insufficiently serious to require disciplinary action to be taken'. In 2019-20, fewer than 3% of all complaints resulted in a finding of misconduct. Many of these findings are likely to be 'advice' relating to behaviour for which there are found to be mitigating circumstances or failures to deliver the required number of sitting days.

Maintaining public confidence

There are two possible views of all of this information. The first is that judges hardly ever misconduct themselves and that the 1,300 annual complaints are either rejected as being about judicial decisions or largely come from timewasters making unsubstantiated complaints which, 'even if true', are trivial.

The second is that there is limited public awareness of either the conduct to be expected of judges or the way in which issues may be raised. Lawyers, who may be better informed, are likely to be reluctant to complain at all.

Underlying this question is a choice as to how best to maintain public confidence in the judiciary. It is possible that confidence is best preserved by minimising the publication of information which might lead people to doubt judicial integrity or competence. The alternative, and polar opposite approach, is to be so transparent that openness itself builds confidence. The former approach has some bad associations with single-party states, whereas the latter has the advantage of being aligned with the way by which confidence in legal proceedings themselves is generally maintained. It might be thought that there is a disconnection between the judges' wholehearted defence of open justice and the way complaints against judges are dealt with.

Baroness Hale famously explained the benefits of open justice in *Cape Intermediate Holdings Ltd v Dring (for and on behalf of Asbestos Victims Support Groups Forum UK)* [2019] UKSC 38, [2019] All ER (D) 161 (Jul):

> 'The principal purposes of the open justice principle are two-fold and there may well be others. The first is to enable public scrutiny of the way in which courts decide

cases—to hold judges to account for the decisions they make and to enable the public to have confidence that they are doing their job properly… But the second goes beyond the policing of individual courts and judges. It is to enable the public to understand how the justice system works and why decisions are taken' (at paras 42-43).

The principle of open justice does not just apply after an adverse finding has been made; it also applies to a process leading to exoneration. Allegations of serious misconduct are raised in all forms of proceedings including professional discipline, and on the basis that there is no smoke without fire, the accused party and their organisation are likely to suffer reputational damage from the proceedings whatever the result. This has, however, never weighed heavily in the balance against openness. The damaged accused must find their vindication through the judicial process, not by preventing disclosure of the allegations (see *Global Torch Ltd v Apex Global Management Ltd; Apex Global Management Ltd v Fi Call Ltd* [2013] EWCA Civ 819, [2013] All ER (D) 127 (Jul)).

The argument that the public interest requires allegations of judicial misconduct to be dealt with by processes which are neither idiosyncratic nor inward-looking is a powerful one. Public confidence is not best maintained by systems which are difficult to understand, are untypical of disciplinary processes generally, or lack transparency. It is a mistake to think that information concerning one judge's misconduct damages the collective reputation of judges.

There is, undoubtedly, a strong public interest in protecting the collective reputation of the judiciary. Perhaps that does mean that allegations against judges have to be treated differently. If, however, there is to be no openness about allegations for which there is a case to answer pending their determination, the publication of detailed findings at the end becomes even more important. The usual principles for the content of judgments should surely apply because a collective reputation is enhanced rather than damaged by a process which can be seen to be fair and robust from the publication of the facts and reasons supporting a decision whether it be condemnation or exoneration.

Time for change?

If such openness were to be introduced, other reforms would be required.

The public interest would be served by a sufficiently high threshold of seriousness before conduct could be considered to be misconduct. High standards do not require the pursuit of the trivial or insignificant. The effective screening out of complaints which could never amount to misconduct is an essential ingredient in the speed and effectiveness of processes dealing with the cases which really do matter. That requires adequate resources which the JCIO may lack. If the number and prominence of typographical errors in the JCIO's annual report is anything to go by, it is an organisation under resource pressure.

The resolution of cases which are not serious, which are essentially performance issues or which are actually the resolution of an individual service complaint, should be dealt with by a different process from allegations of serious misconduct going to fitness to be a judge at all.

The stages and the decisions to be made need to be simplified and more clearly expressed. There appears to be too much crossover of roles concerned with investigation, referral and adjudication.

If the distinction between complaint handling and conduct investigation has been fully explored, that is not evident. A great deal of the activity in the system appears to be handling complaints with a much smaller workload relating to the investigation and adjudication of public interest conduct issues. Perhaps to reduce this effort, it appears that complainants are not routinely provided with a judge's answer to their complaint. This is unlikely to create the impression that the complaint has been properly considered.

It is not clear that the right resources are applied at the right level. Senior judges represent a scarce resource, and it is unclear how the balance between the use of officeholders and employed staff has been struck. Generally, it might be thought that judges are best used in judging rather than administering or investigating. The over-use of judges may create an unhelpful impression that judges are seeking to control processes in relation to their judicial colleagues.

A public consultation on the future of the judicial disciplinary system has recently closed and the outcome is awaited. It is a timely exercise with sensible proposals, but it suggests slow evolutionary change rather than arrangements derived from first principles. Clearly the independence of judges must be maintained, but that does not require the internalisation of disciplinary decisions just as it is no longer required for judicial appointments.

If wrong decisions are left to the appeal courts, failures to comply with the requirements of the job are left to the 'employer', the complaints and grievances of court users are resolved as any other service organisation would resolve them and issues which are insufficiently serious are screened out, very little may remain. That residue, however, should be dealt with through a process which is open and produces detailed reasoned outcomes which are clear for all to see. That is how public confidence can be maintained that our judges are, indeed, second to none. NLJ

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