INFORMAL RESPONSES TO JUDICIAL MISCONDUCT: ASSESSING CHAPTER 4 OF THE JUDICIAL COUNCIL ACT

Abstract: The Judicial Council Act 2019 contains a process for statutory informal resolution of complaints against judges. This article surveys a number of disciplinary systems in common law countries and draws comparison with the 2019 Act. The Act introduces an informal disciplinary process that effectively operates as a form of 'mediation', as it depends on the consent of the complainant and judge involved. Comparative evidence from other jurisdictions suggests that this mediation approach leads to less use of informal discipline than occurs in systems which offer more discretion, so it is possible that the informal process in the 2019 Act will not be used significantly. Aspects of the detailed process contained in Chapter 4 are also ambiguous and may result in minor complaints being forced through the formal disciplinary process.

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Introduction

The introduction of a disciplinary system for judges under the Judicial Council Act 2019 offers a long-overdue process that is capable of both holding Irish judges to account and reinforcing their credibility and quality to the general public. However, exposing allegations of misbehaviour to the public is a double-edged sword. This is complicated when, as is common in workplace disciplinary matters, the balance between the welfare needs of a judge who has misbehaved and the importance of holding them accountable is not clear-cut. Judges are in a special position, and it is reasonable to expect high standards of conduct from them; yet the inexorable move towards a more collegiate and managerial judicial structure also entails something more like traditional industrial relations approaches.

In this article I argue that informal disciplinary processes are valuable and should be encouraged within the confines of the new system. Evidence from other jurisdictions suggests that statutory informal processes are used more when investigating judges are allowed more discretion. The evidence further suggests that using informal processes to respond to judicial misconduct can produce better outcomes than recourse to formal investigation and sanction. To the extent that the Act adopts a 'mediation' approach to informal resolution, I argue that this is likely to constrain informal resolution. Finally, I raise some issues with the detailed provisions of the 2019 Act and the ambiguity of the process it envisages. The emphasis of the Act is on formal processes, and on the complaints system as something more akin to mediation than to an informal disciplinary system. Yet, the vast majority of misconduct issues will be minor and will not be escalated to this formal process. This is a missed opportunity, and to the extent that it may be remedied by the anticipated guidance from the Judicial Council, the guidance should attempt to carve out a meaningful role for informal approaches to judicial conduct issues.

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Formal and informal judicial accountability

Systems for regulating judicial conduct tread a difficult line. Almost by definition, judges are shielded from many forms of accountability that are normal in other professions. The set of protections that surround judges' salary and tenure in office – in effect, the institutional culture and set of guarantees that we label 'judicial independence' – arise out of the requirement that judges decide cases 'without fear or favour, affection or ill-will'.[2] To function as independent and impartial arbitrators, judges must be insulated against many of the political and personal pressures that apply to those in other walks of life.[3] Though judicial independence and judicial accountability are often described as 'two sides of the same coin,'[4] in reality the independence of judges is what is distinctive about their tenure. The space left for 'discipline' or broader 'accountability' is whatever can be made to fit around the core of judicial independence.

Duties of accountability can usefully be divided into two kinds. 'Sacrificial' accountability entails that the duty-holder might face penalties, or in serious cases lose their job, for misconduct. 'Explanatory' accountability requires the duty-holder to account for their conduct in office in the literal sense of explaining what they have done.[5] Judicial independence entails that judges are subjected to sacrificial forms of accountability only very rarely, and for 'stated misbehaviour or incapacity'.[6] Judges are subject to significant explanatory duties in connection with their judgments, which in most cases must be delivered in public with reasons. Aside from these duties, however, judges were traditionally subjected to only very limited explanatory duties. These primarily arose informally, through the connections between judges, politicians and civil servants that arose in the context of the general operation of the court system.

The move away from personal responsibility models of public administration, and towards greater emphasis on openness, accountability and regulation, began to affect judiciaries from the early 1980s onwards. Systems that had focussed on removal for the most extreme cases of misbehaviour or disability, and personal responsibility for everything short of that, began to put in place regulatory systems with a range of potential responses to judicial misbehaviour. This has come alongside movement towards a slightly different conception of judicial independence. Common law countries traditionally viewed judicial independence as an attribute of the individual judge, and protected it as such. Contemporary judiciaries have moved towards the idea of a collegiate judiciary, with judicial independence treated as a protection for the judiciary as a whole rather than purely at the level of the individual judge. This difference of emphasis does not by any means exclude the historical protections for the individual judge, but it does allow for more management of judges by other judges, and more collegiate and formal standards of behaviour imposed from within the judiciary.

[2] Drawn from the text of the judicial declaration contained in Art 34.6.1º of Bunreacht na hÉireann.
[3] Judges are not unique in being protected in this way. Independence is a tool used in many societies for roles that are deemed to require particular independence of mind if they are to be done successfully. Useful analogies can be drawn with rules guaranteeing the independence of central bank, and with traditional academic tenure.
[4] Stephen Burbank, 'The Architecture of Judicial Independence' (1998-1999) 72 S Cal LR 315, 339.
[5] The terms 'sacrificial' and 'explanatory' accountability are taken from Vernon Bogdanor, 'Parliament and the Judiciary: The Problem of Accountability' (Third Sunningdale Lecture on Accountability, 9 February 2006).
[6] The test for removal contained in Art 35.4.1º.

The Judicial Council Act 2019 ('the Act') represents another step for the Irish court system towards this more corporate understanding of the judiciary and towards a more contemporary understanding of accountability. For the first time it creates a formal disciplinary process for investigating and sanctioning misconduct. The Act, also for the first time, introduces formal sanctions short of the very limited 'nuclear option' of removal from office following resolutions of both Houses of the Oireachtas. The absence of such sanctions has been problematic for some time.[7] The Act also, however, specifies an *informal* disciplinary process whereby complaints may be resolved by agreement of the complainant and the judge. It is this process – together with informal judicial misconduct processes more generally – that are the focus of this article.

No judicial conduct scheme explicitly defines an 'informal' response. I will treat 'formal discipline' as referring to disciplinary procedures that are governed and controlled by formal rules. 'Informal discipline' covers everything else. Whereas formal rules control both process and outcome, when proceedings are run informally participants have a degree of discretion. For the purposes of this discussion, informal processes can further be broken down into informal *statutory* processes, which are explicitly created within the context of a formal disciplinary system, and informal *social* processes: conventions and interventions which arise completely outside of the disciplinary framework.

The use of informal social processes is not limited to minor incidents of misconduct. Historically, informal channels played an important role in reinforcing behavioural norms on the benches of common law jurisdictions.[8] Informal channels – in particular, encouraging colleagues whose behaviour had made their position untenable to resign – were often the primary mechanism of resolving incidents of misconduct. A rare public glimpse of this pressure could be seen in connection with Mr Justice Séamus Woulfe and the 'Golfgate' controversy in 2020, when then Chief Justice Frank Clarke released his correspondence with the judge.[9] As that correspondence made clear, Clarke had repeatedly stated in terms to Woulfe that he felt that Woulfe should resign over the matter. Woulfe refused. In this he had support in the form of an *ad hoc* report by former Chief Justice Susan Denham, commissioned by the judiciary, which had concluded that resignation would be disproportionate in this case. Denham recommended an informal resolution. Notwithstanding this, the senior judiciary appeared to feel quite strongly that Woulfe should resign. Ultimately, Woulfe was informally reprimanded by the Chief Justice and suspended without pay for three months, a course of action that required his consent. The incident was unsatisfactory for all sides. The judiciary found itself unable to impose sanctions on a judge who had very publicly misbehaved at a time of national crisis. Woulfe, on the other hand, could complain with some justification of sharp treatment on the basis that the senior

[7] MacCormaic cites the example of a semi-naked judge who approached and swore at a group of British tourists in an hotel, apparently enraged by their noise. In the absence of disciplinary powers '[a]ll the senior judges could do was sit down with the judge over a cup of tea and suggest that he take a rest'. Ruadhán MacCormaic, *The Supreme Court* (Penguin 2016), 382. Cahillane cites the example of a District Court Judge who was charged with driving a vehicle without an NCT certificate. Laura Cahillane, 'Ireland's System for Disciplining and Removing Judges' (2015) 38 DULJ 55, 60.

[8] As John Bell puts it in respect of the system in England and Wales, an 'ethos of doing the decent thing predominates in the system.' John Bell, *Judiciaries within Europe: A Comparative Review* (Cambridge University Press 2006), 323.

[9] 'Letters in full: What Chief Justice said to Mr Justice Seamus Woulfe over golfgate dinner and his reply' (*The Irish Times*, 9 November 2020) <https://www.irishtimes.com/news/crime-and-law/letters-in-full-what-chief-justice-said-to-mr-justice-seamus-woulfe-over-golfgate-dinner-and-his-reply-1.4404867> accessed 14 January 2022.

judiciary effectively rejected the recommendation of a report they themselves had commissioned. The response of the senior judiciary appears (according to the correspondence) to have prompted a mental health crisis in the judge and to have significantly prolonged the episode.

Whilst the unhappy and rather messy response to the 'Golfgate' controversy owed a great deal to the absence of structured processes for handling judicial misconduct, the end of the old approach and the introduction of statutory informal processes does not mean the end of informal social pressure on conduct issues. Charles Geyh quotes a chief judge commenting on the US federal complaints system as stating that 'In my experience here, the most serious allegations of misconduct never hit the complaints process.'[10] Informal social interactions could not be ended by any system. This need not necessarily be regarded as a bad thing. As the US experience (discussed below) shows, the introduction of a formal system of discipline can make informal social interventions more effective.

Before going further into the detail of judicial complaints systems, I want to consider the various ways in which disciplinary problems can be framed. Let's take a hypothetical judge who is behaving erratically in her personal life and has significantly delayed writing judgments.[11] Depending on how we frame the judge's behaviour and the surrounding context, and on the weight we place on performance and standards as against welfare and management concerns, we might arrive at a variety of responses to the same scenario. Firstly, this may be a case for formal discipline focussing on public accountability and setting standards of behaviour. The disciplinary process of committees, investigations and a public reprimand can be called into action. Secondly, as a problem at the lower level of misconduct, this might be a case for informal discipline, focussed on reinforcing standards of behaviour through social pressure and convention. Colleagues might take the judge aside and suggest that she change her behaviour, or consider reducing her workload. Thirdly, there is a more managerial response, which focusses on the workload and needs of the judiciary and the courts: does the judge require further training? Should her practice as a judge be restricted in some way, or should it be overseen by another judge? Finally, there is a welfare response, focussed on the personal needs of the judge herself. What has driven the change in behaviour? If it arises out of something in her personal life, does she need to take a period of leave to resolve it? If it is a health matter, can it be addressed through special workplace provisions?

These responses are not always incompatible with one another, and one can envisage that in many scenarios the response will gradually escalate depending on the response of the judge. Each case and context will suggest different priorities. An obvious health problem affecting capacity – such as the dementia that appeared to afflict the Lord Chief Justice of England and Wales, Lord Widgery, towards the end of his tenure in office in the late 1970s – may simultaneously require a sensitive welfare response and a robust formal response that examines fitness to remain in office.[12] Conversely, a very public incident of misconduct in a

[10] Charles Geyh, 'Informal methods of judicial discipline' 142 U Penn LR (1993) 256.
[11] This example is loosely based on the late career of Sir Jeremiah Harman of the High Court of England and Wales. 'Sir Jeremiah Harman obituary', *The Times* (13 March 2021).
[12] Lord Widgery was put under private pressure to resign but ignored this for a long period, and was unable to discharge his functions for at least eighteen months prior to his resignation. It appears that the Lord Chancellor at the time was reluctant to use the statutory powers available to him to remove Widgery from office: Graham Gee, Robert Hazell, Kate Malleson and Patrick O'Brien, *The Politics of Judicial Independence in the UK's Changing Constitution* (Cambridge University Press 2015) 60. As Lord Chief Justice he appears to have

judge's personal life might require a swift formal response to ensure confidence in the judiciary, even if the misconduct itself might not in other circumstances be regarded as particularly serious.[13] These different responses engage with different facets of management, welfare and accountability concerns. An informal response to incapacity or serious issues in a judge's private life will preserve the dignity of the judge and may achieve the desired result, but will leave little or no public narrative by which the process can be made accountable. A formal response may be good for accountability, but may damage the morale and functioning of the judiciary for a time (especially if the judge resists the process). These different considerations can also influence the design of a system and its processes. The Scottish system, for example, includes a right for a judge to be accompanied to a disciplinary interview for moral support and advice.[14] The US Federal system keeps the disciplinary process confidential if the judge agrees to informal resolution of the complaint.[15]

Informal discipline in comparative perspective

The very nature of informal approaches to discipline makes them a difficult object for study. It is, firstly, inherent in their informality that they are normally off the record. Even statutory informal systems do not normally record the nature of the resolution, only the fact that it has occurred. Second, discipline is a particularly sensitive matter for judges. That a judge has misbehaved may be fatal to her authority in the courtroom – particularly in criminal matters – and there are powerful incentives, both for the judge personally, but also for the judiciary and the courts system more broadly, to avoid that outcome. Consequently, disciplinary processes are often subject to strict confidentiality rules. In England and Wales, for example, the legislation governing the disciplinary process specifically requires any material about judicial discipline cases that is capable of identifying an individual must be treated as confidential.[16] Both judges and those responsible for investigating judicial misconduct tend (for understandable reasons) to be less willing to engage with researchers in this area than in other aspects of the professional lives of judges. As a result of these restrictions, such information may render tends to be anecdotal in nature and must as a result be treated with a degree of caution.[17]

Statutory informal processes arise within disciplinary systems in two ways. Firstly, there is the judicial discretion model, in which the rules explicitly allow a degree of discretion to the judicial authorities in choosing how (or even whether) to respond to an allegation of misbehaviour. Secondly, there is the mediation model. Systems of this kind that refer to 'informal resolution' are in effect describing a system of mediation in which the consent of both complainant and judge is required to achieve an agreed resolution. I will now outline a sample of these two categories.

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been in a different position to lower ranked judges. Shetreet and Turenne note the earlier example of an unnamed High Court judge in the 1950s who was put under pressure by colleagues to resign after losing capacity, and had no work assigned to him until he did so: Shimon Shetreet and Sophie Turenne, *Judges on Trial* (CUP 2013) 288-289.

[13] See the guidance for the US federal complaints system, discussed below.

[14] Complaints about the Judiciary (Scotland) Rule 2017, Rule 14(2)(b).

[15] Rules for Judicial-Conduct and Judicial-Disability Proceedings, Rule 24(a)(1) (discussed below).

[16] Section 139, Constitutional Reform Act 2005. This restriction does not apply to the outcomes of cases, which may be disclosed if there is a formal consequence.

[17] Geyh (n 10) 247.

Judicial Discretion Systems

Table 1: Complaints statistics for England and Wales[18]					
Year	2019-20	2018-19	2017-18	2016-17	2015-16
Total complaints	1183	1895	2009	2078	2661
Upheld	42	55	39	42	43
Upheld (%)	4%	3%	2%	2%	2%

The complaint system for England and Wales is ultimately governed by the Constitutional Reform Act 2005, with specifics contained in the Judicial Conduct Rules 2014.[19] The 2005 Act explicitly acknowledges the residual character of informal discipline. Section 108(3) of the Act provides that references to discipline '… do not restrict what [the Lord Chief Justice] may do informally or for other purposes …'. The disciplinary process is overseen by the Lord Chief Justice and Lord Chancellor (justice minister) jointly. In this system, complaints are initially received by the Judicial Conduct Investigations Office (JCIO), through a number of sources: direct complaints, or a complaint from the Lord Chancellor and Lord Chief Justice for example. If the complaint is not dismissed at the admissibility stage, the JCIO may deal with the complaint summarily in circumstances where a very serious matter has arisen – eg a criminal conviction resulting in a prison sentence. In normal circumstances, the matter will be referred to a nominated judge.[20] The nominated judge may make inquiries, request documents and interview any person they consider appropriate. Having done so, the nominated judge is given a wide range of options, from dismissal of the complaint to recommending disciplinary action or referring the complaint to an investigating judge.

Key to this discussion is Rule 41(c): the nominated judge may deal with a complaint informally and direct that it be considered as a pastoral or training matter. This, however, may only be done if the nominated judge considers that there has been no misconduct (Rule 42). Neither misconduct nor discipline are defined anywhere in the Regulations, in the Rules or in the parent statute, no doubt because these are terms used in their ordinary sense and because specification of 'misconduct' would be extremely problematic. As Shetreet and Turenne put it, misconduct issues 'defy neat categorisation'.[21] We must presume that the nominated judge might take informal action if she considers that there was an issue with the judge's conduct, which nonetheless did not reach some threshold beyond which more formal consequences would be appropriate.[22] The nominated judge is presented with guidance and precedents to assist their decision-making in this respect.[23] If there is an informal resolution,

[18] JCIO annual reports <https://www.complaints.judicialconduct.gov.uk/reportsandpublications/> accessed 14 January 2022. The statistics for 'upheld' do not include informal resolutions, as in the England and Wales system an informal resolution is possible only if there has not been a finding of misconduct.
[19] The Judicial Conduct (Judicial and other office holders) Rules 2014 add detail to the process described by the Judicial Conduct Regulations 2014, which were in turn issued under the Constitutional Reform Act 2005. There are equivalent rules for tribunal judges that prescribe very similar processes. These are not explored here.
[20] A complaint may also be referred directly to the nominated judge by the Lord Chancellor and Lord Chief Justice, or by the Ombudsman.
[21] Shetreet and Turenne (n 12) 293.
[22] This appears similar to the approach taken in the US system. See Geyh (n 10) 253.
[23] Information from author's correspondence with the JCIO. The ambiguity in this area arises because the JCIO are unable to make training material or scenarios used in the process public, because they are subject to a statutory duty of confidentiality in relation to the complaints process.

the nominated judge must inform the judge and the complainant of this, and of the reasons for it.

Finally, in the event that the Lord Chief Justice and Lord Chancellor agree that the conduct did not amount to misconduct, the Lord Chief Justice may deal with the matter informally. Where there has been an investigation these informal responses sometimes come into the public domain. In 2010, a complaint was made by the National Secular Society about sentencing remarks by Cherie Booth QC who, whilst acting as a recorder (part-time judge), suggested that she would have sentenced a non-religious offender more harshly. The Office for Judicial Complaints (as the JCIO was then known) concluded that the matter did not amount to misconduct. However, the Office also made it known that Ms Booth would be given informal advice by a senior judge in relation to the matter.[24] In 2017, Judge Patricia Lynch, a Circuit Judge, was the subject of a complaint regarding her use of language in court. When a defendant used the c-word to describe the judge in court, the judge replied, 'Well, you're a bit of a [c-word] yourself. Being offensive to me doesn't make things better at all.' The matter was dealt with by informal advice to Judge Lynch to respond appropriately to parties in court at all times.[25] A more recent example of 'anger and sarcasm' used in court led, however, to formal advice to the judge in question.[26]

Table 2: Judicial Complaints statistics for New Zealand[27]

Year	*2020-21*	*2019-20*	*2018-19*	*2017-18*	*2016-17*
Total complaints	364	195	272	271	378
Referred to head of bench (section 17) - informal	14	8	8	7	2
Section 17 (%)	4%	4%	3%	3%	1%
Judicial Conduct Panel	1	1	0	0	0
Judicial Conduct Panel (%)	0.003%	0.005%	0	0	0

New Zealand is a useful example of the discretionary model because it makes statistics about informal resolution available. The process in New Zealand is primarily governed by the Judicial Conduct Commissioner and Judicial Conduct Act 2004. Complaints are submitted to the Judicial Conduct Commissioner. Section 15A of the Act gives the Commissioner power to 'take no further action' if to do so would, in all the circumstances, be unjustified. Indicative reasons why this might be done include that the complaint has been resolved to the complainant's satisfaction following an explanation from the judge concerned, or that there is no reasonable prospect of finding relevant information. Section 17 also allows the Commissioner to refer a complaint to the judge's Head of Bench. At this point, the matter will be left to the Head of Bench's discretion. The public advice on the complaints process advises that the Head of Bench may require the judge to apologise for misconduct or offer them assistance to prevent the issue recurring. The Commissioner may also recommend to

[24] See Shetreet & Turenne (n 12) 293.
[25] Owen Bowcott, 'Judge who swore at abusive defendant cleared of misconduct' *The Guardian* (9 January 2017).
[26] JCIO Statement on District Judge Najma Mian, 27 April 2021 <https://www.complaints.judicialconduct.gov.uk/disciplinarystatements/Statement1021/ > accessed 14 January 2021.
[27] Annual report of Judicial Conduct Commissioner of New Zealand for 2020/21 <https://www.jcc.govt.nz/reportsandnews.html> accessed 14 January 2022.

the Attorney General that a Judicial Conduct Panel be appointed (section 18). As the statistics in Table 2 show, section 17 is much more frequently used than the conduct panel option.

Table 3: Judicial Complaints statistics for the United States[28]				
Year	*2020*	*2019*	*2018*	*2017*
Total active[29]	2112	2636	2307	2199
Concluded by Chief Judge (includes informal/voluntary resolution)	13	29	20	27
Concluded by Chief Judge (%)	1%	1%	1%	1%
Remedial action	2	5	1	2
Remedial action (%)	0.001%	0.002%	0.0004%	0.001%

In the US federal court system, complaints are sent to the chief judge of the relevant circuit for review. The chief judge is then given options as to how to proceed, including to dismiss the complaint or to conclude it because voluntary action has been taken.[30] The voluntary action may include 'an informal resolution satisfactory to the chief judge' that was reached before the complaint was filed. The chief judge may also conclude the matter on the basis that the judge 'has taken appropriate voluntary corrective action that acknowledges and remedies the problems raised by the complaint' (Rule 11(d)). Rule 5 also provides that the chief judge can initiate an inquiry of her own motion if she has reasonable grounds to believe that a judge has engaged in misconduct or has a disability. A chief judge in this position 'may seek an informal resolution that he or she finds satisfactory' (Rule 5(a)).

The commentary on Rule 5 explains that '[d]iscretion is accorded largely for the reasons police officers and prosecutors have discretion in making arrests or bringing charges. The matter may be trivial and isolated, based on marginal evidence, or otherwise highly unlikely to lead to a misconduct or disability finding.' In this situation:

> [a]n informal resolution is one agreed to by the subject judge and found satisfactory by the chief judge. … In doing so, the chief judge must balance the seriousness of the matter against the particular judge's alacrity in addressing the issue. The availability of this procedure should encourage attempts at swift remedial action before a formal complaint is filed.[31]

However, the commentary also notes that in very public situations ('high-visibility situations'), it may be appropriate for the judge to identify a complaint without first seeking an informal resolution.[32]

The informal process offers an important benefit to judges: anonymity. The judge's name will not normally be disclosed where the process is concluded on the basis of voluntary action.[33] The commentary on the rules is explicit that this is done in order to encourage

[28] US Courts Service: Complaints Against Judges <https://www.uscourts.gov/statistics-reports/complaints-against-judges-judicial-business-2020#f1> accessed 14 January 2022.
[29] This figure combines the statistics for 'complaints commenced' and 'complaints terminated'.
[30] Rules for Judicial-Conduct and Judicial-Disability Proceedings, Rule 11(a).
[31] See the commentary to Rule 5.
[32] ibid.
[33] Rule 24(a)(1).

informal disposition.[34] Perhaps because of this, the statistics show that use of the informal/voluntary method of disposition is much more frequent than use of formal remedial action (comprising roughly 1% of complaints as against one hundredth of one percent for formal action).

The US system is the only one of these systems in respect of which any empirical work of significance appears to have been conducted. Charles Geyh's interviews with senior judges suggests that in the US system, informal mechanisms for disciplining judges are more effective than formal ones. However, perhaps unexpectedly, these informal mechanisms for disciplining judges are significantly more effective than formal ones. Not only did informal approaches to judges' behaviour survive the introduction of a formal system in 1980,[35] according to judges involved, such mechanisms thrived 'not despite, but because of the formal disciplinary process.'[36] Geyh offers three reasons for this. Firstly, most judges are dedicated individuals who are unlikely to need much more than a gently nudge from their superiors to modify their behaviour. Secondly, judges are more likely to respond cooperatively to a friendly informal approach than to a colder and perhaps more threatening order from the Judicial Council. Thirdly, the existence of the formal machinery for addressing misconduct in itself creates an incentive to comply with informal guidance, simply to avoid the disciplinary process.[37]

Mediation Systems

Table 4: Judicial Complaints Statistics for Scotland[38]

Year	*2020-21*	*2019-20*	*2018-19*	*2017-18*	*2016-17*	*2015-16**
Total complaints	98	68	68	97	95	104
Informal resolution (Rule 12)	2	1	1	0	2	1
Informal resolution (%)	2%	1%	1%	0%	2%	1%
Investigated	0	7	4	3	4	3
Investigated (%)	0	10%	6%	3%	4%	3%
Total upheld	0	0	3	1	0	2
Upheld (%)	0	0	4%	1%	0	2%

Judicial complaints in Scotland are regulated by the Complaints about the Judiciary (Scotland) Rules 2017. Complaints are handled by the Judicial Office for Scotland, which carries out an initial assessment for admissibility. If the complaint is admissible, the Judicial Office will inform the complainant, notify the judge concerned, and refer the matter on to a disciplinary judge. The disciplinary judge also has the power to dismiss a complaint on various grounds (eg that it provides insufficient information, is vexatious, or is without substance). If not dismissed, the complaint will then be further referred on to a nominated judge for investigation. The formal process allows for informal resolution on what is effectively a

[34] See commentary to Rule 24.
[35] Judicial Conduct and Disability Act 1980.
[36] Geyh (n 10) 246.
[37] ibid, 282-283.
[38] Judiciary of Scotland Complaints Reports < https://www.judiciary.scot/home/publications/judicial-complaints/judicial-complaints-archive > accessed 14 January 2022.

mediation basis. Rule 12(6) provides that if at any point in the process the nominated judge feels that the matter could be resolved 'to the satisfaction of the person complaining and the judicial office holder concerned without further investigation, he or she may communicate with them both with a view to securing that outcome.' If this is done, the matter ends at that point (Rule 12(7)). No particular process is specified: informal resolution is done on an *ad hoc* case-by-case basis.[39] The statistics for Scotland suggest that this approach is less common than formal investigation of complaints.

Table 5: Judicial Complaints statistics for Northern Ireland[40]				
Year	2019	2018	2017	2016
Total complaints	59	57	54	48
Total withdrawn/dismissed	59	49	49	46
Investigated but not upheld	0	7	5	1
Upheld or upheld in part	0	1	0	1
Upheld/in part as %	0	2%	0	2%

The process applying to judges in Northern Ireland is described by a Code of Practice issued by the office of the Lady Chief Justice.[41] The Code makes clear that informal resolution is the preferred method of resolving complaints: 'Dealing with complaints informally helps to get a relatively speedy outcome that is agreeable to both parties, and saves time and effort being spent on a formal investigation.'[42] Resolving the complaint informally requires the consent of both the judge in question and the complainant. If they consent, a complaints officer will attempt a resolution and will offer the complainant a written plan for resolution. If the complainant disagrees with the proposed resolution, the complaints officer will then make a decision whether 'further steps should be taken to resolve the matter informally, or if the matter should be subject to formal investigation.'[43] If an informal resolution is not possible, 'any explanation by the judge will be considered in the context of the issues arising.'[44] If the judge decides that the complaint cannot be resolved this way, or that it is not suitable for informal resolution, the complaint will be dealt with using the formal procedure. Northern Ireland does not publish separate statistics for informal resolution, so it is difficult to draw conclusions about the effectiveness and prevalence of informal resolution. Finally, as in some of the other systems discussed above, even after a formal investigation the Lady Chief Justice retains the option to issue an 'informal warning' to a judge whose conduct 'is inappropriate but does not merit a formal warning.'[45]

[39] The Judicial Office for Scotland were unable to provide me with further information, on the basis that this part of the process is exclusively a matter for the disciplinary judge and so that the Office does not get involved. (Correspondence with author).
[40] Northern Ireland judicial complaints statistical returns < https://www.judiciaryni.uk/judicial-conduct-and-complaints > accessed 14 January 2022.
[41] *The Conduct of Judicial Officers – Making a Complaint: Code of Practice*, 31 August 2021.
[42] ibid 14, para. 5.1.
[43] ibid para. 5.3.
[44] ibid.
[45] ibid 22, para. 9.2.

The informal process under the Judicial Council Act 2019

The systems described in the last section respond in different ways to the larger question of how (and to whom) should judges be accountable? The discretion approach takes a relatively holistic view of judicial misconduct, and treats the 'audience' for accountability as, to a significant extent, the senior judiciary. Whilst complaints may originate with litigants or members of the public, judges are given significant discretion in how to respond – to treat the matter as a 'welfare' or a 'management' issue on the one hand, or as a 'formal' matter on the other.[46] The New Zealand and US systems are notable for the leeway they give to senior judges to resolve disciplinary matters. This discretion is reflected in the statistics for complaints in those jurisdictions, which suggest that far more complaints are channelled into statutory informal approaches than are taken up for formal investigation. The mediation approach treats the primary audience for accountability as the complainant. Under this approach, an informal resolution is possible *primarily* in circumstances where the complainant and the judge agree. In this context, informal accountability is about resolving a dispute between the parties rather than addressing the broader welfare and managerial issues that may arise. Scotland and New Zealand are the only jurisdictions that appear to collate reliable statistics for informal statutory resolution. Comparing these statistics suggests that the more discretionary New Zealand approach is more likely than the mediation-focussed Scottish approach to channel complaints into informal resolution. In Scotland, formal investigation is used significantly more frequently than informal resolution. In New Zealand, the opposite is the case: only a tiny proportion of complaints end in a formal process. We must note, however, that these comparisons are based on very small numbers.

In this section, I outline the process for discipline and complaints under the Judicial Council Act 2019, focussing on the approach to informal complaints. The process envisaged under the Act is complex, and there are ambiguities in particular in relation to how informal resolution of complaints might happen. Some of these ambiguities are likely to be clarified. The Judicial Council may issue regulations and guidelines to provide for informal resolution of complaints (s 43 and s 52(3)(c) of the Act). At time of writing (early January 2022) no guidelines have been issued, though they are anticipated. This sketch of the process is therefore based solely on the statutory scheme.

Complaints about a judge may be brought in one of two ways. Firstly, they may be made by or on behalf of someone who is either affected by or has witnessed the conduct involved. (section 50). Alternatively, the Judicial Conduct Committee (JCC) may also investigate in the absence of a complaint (essentially on its own motion) where there is *prima facie* evidence of misconduct or it is necessary to do so to safeguard the administration of justice (section 59). Complaints will be made to the Registrar of the JCC, who will determine their admissibility. If admissible, the complaint will be referred to the JCC. Complaints are inadmissible if they relate to the merits of a judicial decision, or they have been pursued in other proceedings (eg judicial review). Once a complaint is before it the JCC has two options: to refer the complaint for informal resolution (covered by Chapter 4 of the Act) or to refer it to a panel inquiry for a formal investigation (covered by Chapter 5).

[46] Or indeed in some cases to ignore the matter altogether. One retired judge from England and Wales interviewed for this article described a recommendation from the JCIO that he should have a discussion with a senior judge as resulting in a meeting over tea at which the matter was pointedly not discussed at all.

If the JCC opts for the informal process, a number of conditions must be satisfied. Firstly, the JCC must be satisfied that the matter is 'appropriate' for an informal approach (section 60). If satisfied that it is, the JCC will request that a designated judge attempt an informal resolution. At this point, the designated judge must *also* examine the complaint to see if it is appropriate for informal resolution, and may refer the matter back to the JCC with a written report if she believes it is unsuitable (section 63(1)). Aside from 'appropriateness', the key constraint on informal resolution is that both the complainant and the judge must consent to it (s 61(1)).

The Act (in common with counterparts in other jurisdictions) does not offer guidance about what should happen within the informal process. Once an informal resolution has been attempted, the designated judge must prepare a report for the JCC. This will either state that the complaint has been resolved or explain why it has not been possible to resolve it. If the complaint has been resolved, that is the end of the matter. The JCC 'shall take note of the report and take no further action in relation to the complaint' (section 63(2)). If it has not been possible to resolve the matter informally the designated judge must submit a report giving the details of the complaint and explaining why it was not resolved (section 63(4)). The JCC *may* then choose to refer the complaint to a panel of inquiry 'where it considers it appropriate to do so' (section 60(4)).

This is a very *formal* and process-intensive kind of informality. The route into Chapter 4 informal resolution includes two checks for suitability: by the JCC and by the designated judge. In common with counterparts in other jurisdictions, the Act is silent on the nature of an informal resolution. This silence can be a strength if it allows for flexibility and creativity in reaching a resolution. However, the scope for flexibility is constrained by the fact that the Chapter 4 route is ultimately controlled by the consent of the complainant and the judge. This can therefore be characterised as a form of 'mediation' similar to that used in Scotland and Northern Ireland. The success of Chapter 4 is likely to hang on how the Judicial Council approaches its task of filling in the detail with regulations and guidelines.

An initial problem may arise at the admissibility stage. To keep minor complaints out of the formal system a high threshold will have to be applied. If this is not done, given the structure of the informal process within the Act it may be possible for complainants to force relatively minor complaints down the formal disciplinary process, at a potentially high cost to judicial administration and morale.[47] This is because Section 62(1), which creates the requirement for informal resolution, is silent on *when* consent is required. The section provides that: 'No attempt shall be made to resolve a complaint by informal means pursuant to this Chapter without the consent of the complainant and the judge concerned.'

This might be interpreted either as applying to the JCC's initial decision to choose Chapter 4, or to the process existing *within* Chapter. This is important because different outcomes are possible within the scope of the statute, depending on the point at which consent is sought. There are three times at which consent is likely to be relevant. Firstly, consent may be requested by the JCC prior to referral to the designated judge. Secondly, consent may be sought by the designated judge *after* the JCC has referred the matter. Thirdly and finally, consent would appear logically to be required at the *end* of an informal process. In mediation there cannot be a resolution if both parties do not consent to it.

[47] An England and Wales judge interviewed by the author complained about the appearance of a 'star chamber' in that jurisdiction, within which very minor complaints were given undue weight.

Taking Chapter 4 as a whole, the intent behind it appears to be that the JCC should be left with the discretion not to refer minor complaints on to a panel if informal resolution has been unsuccessful. If consent is sought after referral to the designated judge, there is no problem. Once the matter has been so referred, section 63(4) gives the JCC the option to decline to refer a complaint to panel. It seems at least arguable, however, that this approach could be defeated by a canny complainant who makes it clear in their initial complaint that they refuse to consent to informal resolution under Chapter 4. By suggesting that 'no attempt' may be made at resolution, section 62(1) could be read as closing off Chapter 4 in its entirety if a complainant does this. In this event, section 60(1) would appear to oblige the JCC to refer the matter on to a formal investigatory panel.

Aside from the lacuna regarding the canny complainant described above, the best option appears to be to interpret the consent requirement as applying only at the third, final, stage: to whatever resolution the designated judge has attempted to achieve between the complainant and the judge. In these circumstances, the 'attempt' at resolution would have to be interpreted (perhaps a little obtusely) as the proposals put to the parties for a resolution. This approach leaves it open to the JCC to decline to refer the complaint to a formal panel if, following the designated judge's report, it decides that the matter does not merit further investigation.

It is thus likely that these potential issues can be resolved relatively easily, but it would be preferable for these issues to have been resolved on the face of the Act, by leaving a bit more space and discretion for the informal Chapter 4 stage of complaint resolution. Mediation is a valuable means of dealing with disputes, but it seems likely that informal resolution of complaints would be more effective if it were not entirely dependent on the goodwill of the complainant. The limited statistical evidence available from New Zealand and Scotland (and the somewhat more ambiguous statistical evidence from the US) seems to support this assumption: the Scottish mediation approach appears to constrain statutory informal resolution. The statutory informal route is used more liberally in the US and in New Zealand. We should be concerned about this because the evidence from the US courts system suggests that informal resolution, backed by a formal system, produces more compliance and better outcomes than formal disciplinary processes. This is better from a managerial and welfare perspective: it can improve the performance of the courts and respond more flexibly to the circumstances of the individual judges involved.

More statutory informal resolution is also potentially better for *public facing* judicial accountability in the round. The vast majority of complaints against judges are not formally investigated. Formal sanctions are even more rare. This is true of all the systems explored here, and we can assume that it will also be the case in the new Irish system. It seems likely that (as is the case in England and Wales) a certain threshold of alleged misconduct must be reached for the formal route to be justified, and that a relatively high threshold may be applied at the initial stage of screening for admissibility. As a consequence, however, low level misconduct is likely to be addressed through informal social pressures completely outside of the statutory framework. These responses will not leave any mark on the public record, creating a potentially misleading impression about the accountability of the judiciary. It would be better for *explanatory* judicial accountability and for public confidence in the judiciary if these informal responses were brought within a more discretionary statutory process, and left at least a numerical mark in the statistics (section 87(4)(d) requires the JCC

to public statistics for the number of complaints resolved under Chapter 4 in its annual report).

Even from a purely scholarly perspective, the tendency of judicial complaints systems to keep all but the most serious cases confidential makes it very difficult to get the empirical evidence required to make comparisons, and almost impossible to draw robust conclusions about the performance of each system. This too is an accountability problem. Instances of serious judicial misconduct are very rare. Short of serious misconduct, however, we normally do not know if, and how, judges are made accountable. If the statutory informal process in the 2019 Act is rarely used, this situation is unlikely to change.

Conclusion

Accountability is not all about sanction and sacrifice; about being publicly reprimanded or dismissed from office. Most of the time accountability is about smaller and less dramatic things: about narrative and explanation, about guidance and about apology. This is especially true of judicial accountability, given the special protections we give judges by virtue of their office. The space left by the Judicial Council Act 2019 to the Judicial Council to make rules for the disciplinary process allows the Council to consider its approach to accountability and the audiences to which judges should be held accountable. To what extent should accountability be about the resolving a dispute between complainant and judge, about improving the performance of the judge, or about providing an explanation to the general public? The evidence from other jurisdictions suggests that more use of statutory informal resolution will lead to better outcomes for the court system and, given the likely reluctance to pass serious matters onto a formal process, more accountability all things considered.