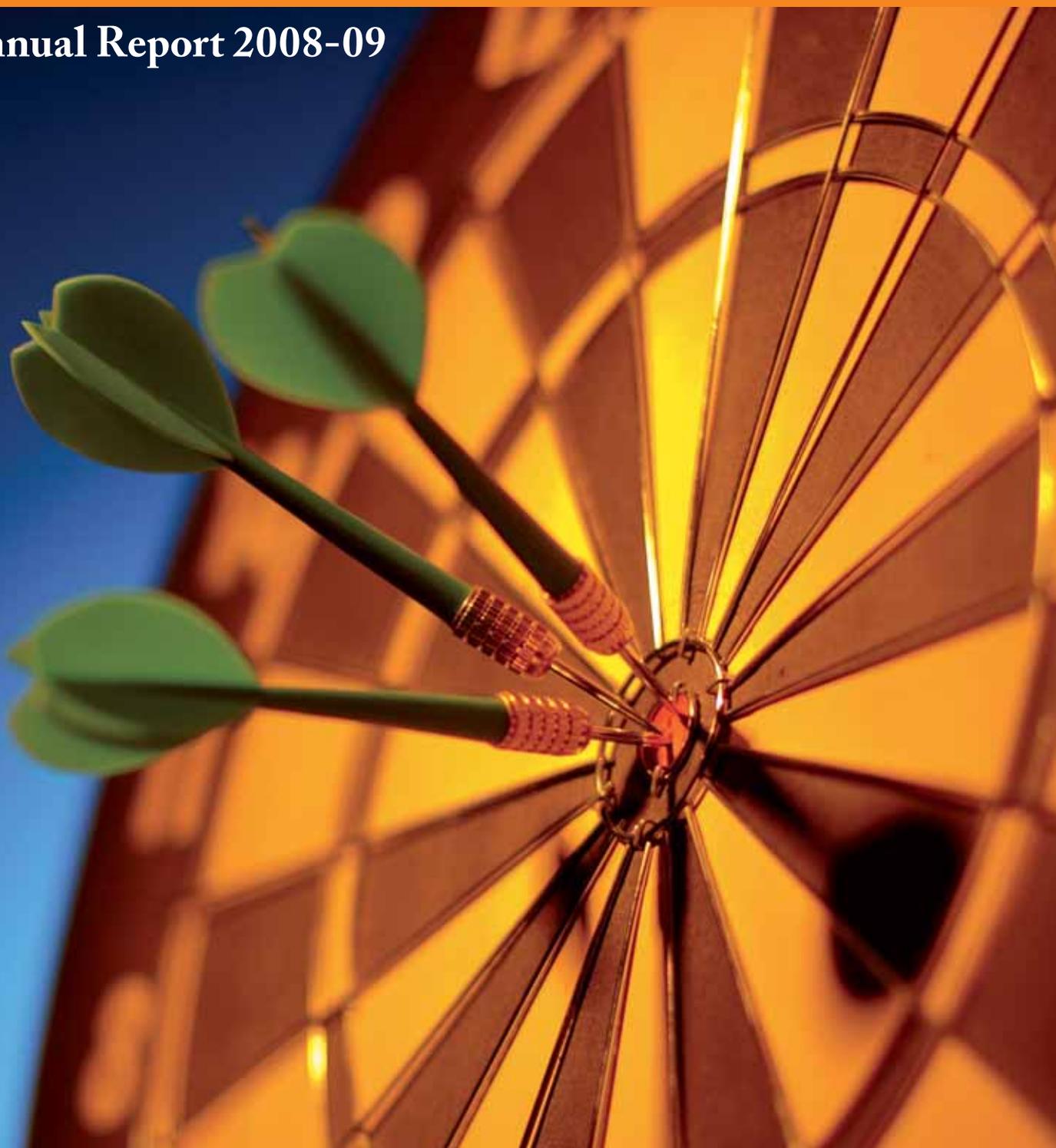


Judicial Appointments & Conduct Ombudsman

**Annual Report 2008-09**



# Judicial Appointments & Conduct Ombudsman

## Annual Report 2008-09

Presented to Parliament pursuant to Schedule 13, section 15 (4)  
of the Constitutional Reform Act 2005

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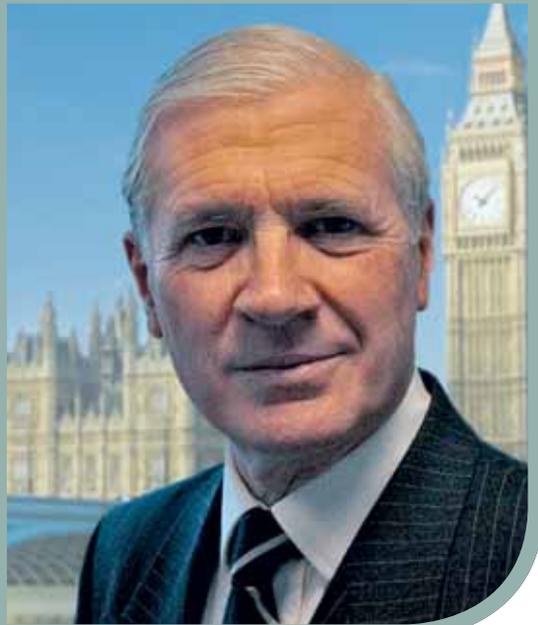
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## Overview

This is my third Annual Report as the Judicial Appointments and Conduct Ombudsman.

In 2008/09 I received 278 complaints; 12 concerned the handling of applications for judicial appointment, and 241 the conduct of judicial office holders (25 other enquiries were received). I determined 103 cases (against 101 in 2007/08), 12 appointment related and 91 conduct. The general complexity of cases has increased.

Additionally, at the joint request of the Lord Chancellor and the Lord Chief Justice, I conducted an audit of the Office for Judicial Complaints (OJC) under Section 113 of the Constitutional Reform Act 2005 (CRA). This showed that, since its recent reorganisation, the OJC is delivering an improved service.

To place these figures in context, the Judicial Appointments Commission (JAC), last year, handled applications from some 3,600 candidates. The small number of complaints that I have received suggests that the JAC's complaint processes are very effective.

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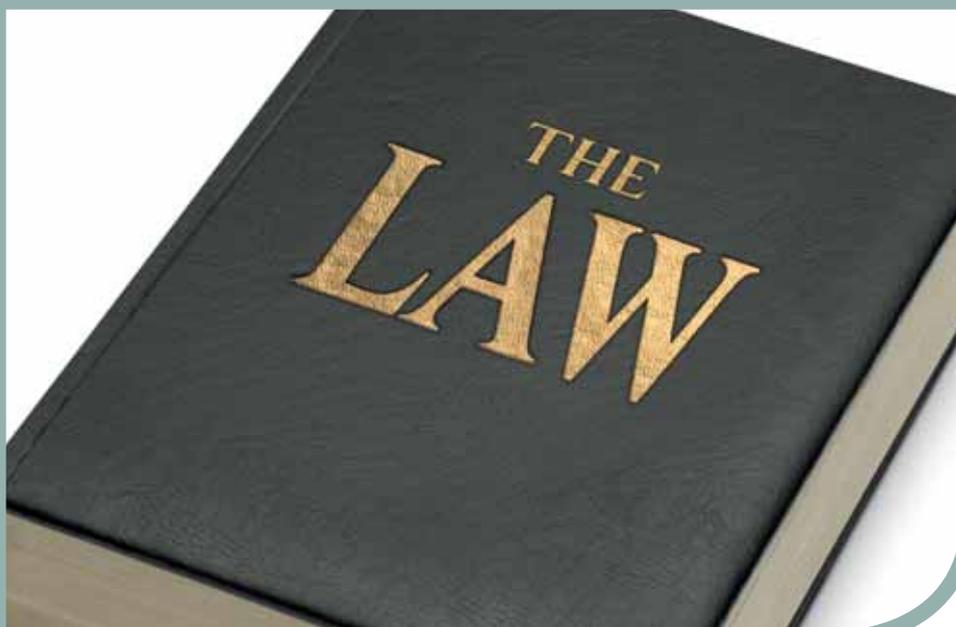
The OJC handled around 1,337 complaints concerning judicial conduct. In addition, Tribunal Presidents and Magistrates' Advisory Committees also deal with conduct complaints. Whilst at first sight this number may look high, the conduct complaints I upheld (totally or in part) were solely related, by my remit, to the way the cases had been *handled* by the first tier organisations; thus they give no guide to the number of valid conduct complaints against the judiciary.

I believe that my investigative work has been a catalyst for improved "first tier" complaint handling by identifying and highlighting areas of concern as well as providing a degree of reassurance and redress in some cases where the investigation process has fallen short of what could reasonably be expected.

Finally, I would like to thank my team for their support. They continue to provide a very high level of service to me, to complainants and to those complained about.

A handwritten signature in black ink, appearing to read "John Brigstocke", written over a horizontal line.

**Sir John Brigstocke KCB**



## The Ombudsman's Statutory Remit

I am independent of Government, the Ministry of Justice (the sponsor Department for the Ombudsman) and the judiciary.

The Constitutional Reform Act 2005 empowers me to consider:

### **Judicial Appointments**

- complaints from candidates for judicial office who claim to have been adversely affected by the way in which their applications were handled<sup>1</sup>; and
- matters referred to me by the Lord Chancellor relating to the procedures of the Judicial Appointments Commission (JAC).

### **Judicial Conduct and Discipline**

- concerns raised by a complainant, or a judicial office holder who is the subject of a complaint, about how a complaint was handled by the Office for Judicial Complaints (OJC), a Tribunal President or a Magistrates' Advisory Committee; and

<sup>1</sup> Section 99 (3), Constitutional Reform Act 2005.

- matters referred to me by the Lord Chancellor or the Lord Chief Justice relating to the handling of judicial conduct issues.

**In *judicial appointment* complaints, I can:**

- uphold or dismiss a complaint (in whole or in part); and
- make recommendations for redress (including a recommendation for payment of compensation for loss suffered as a result of maladministration)<sup>2</sup>.

**In *judicial conduct and discipline* complaints, I can:**

- review how a complaint about the conduct of a judicial office holder has been handled; and
- make recommendations for redress. In cases where I have concluded that maladministration led to the original decision being unreliable, I can set aside that decision and direct that a new investigation or review be undertaken (in whole or in part)<sup>3</sup>.

<sup>2</sup> Section 102, Constitutional Reform Act 2005.

<sup>3</sup> Section 111, Constitutional Reform Act 2005.



## Performance

### Targets

My office has achieved all the targets set out in our 2008/09 Business Plan (see Annex C). However we have continued, over the last year, to work at ways of speeding up our own processes and have introduced a “3 track” system:

**First level – “initial check”.** We have checked all new complaints within 5 days of receipt to assess whether they fall within my remit. After careful consideration by an experienced caseworker, 67 cases were found to fall outside of my remit, often because no complaint had been made to the first tier organisation, or that it was not JACO business. The complainants were all given a full written explanation detailing the reasons for the decision.

**Second level – “fast track”.** Some cases required a more detailed initial evaluation of validity to determine whether or not the complaint came within my remit; this was handled on a “Fast Track” approach where my staff considered the points made by each complainant most carefully, liaising closely with them to see whether they could be more specific in their concerns, and obtaining the complaint file from the first tier organisation. Based on these assessments, I deemed a full CRA investigation to be unnecessary in a further 72 cases. I wrote

to the complainants accordingly, and in considerable detail; most accepted the decision with good grace, and several expressed appreciation of the care that had been taken.

**Third level – “full investigation”.** In 83 of the 278 cases received, a full investigation was required. These were thoroughly investigated, involving liaison with the complainant and the first tier organisation, and the review of a considerable volume of correspondence. Formal investigations can often take a long time in order to ensure a fair, thorough and balanced investigation. My staff keep complainants regularly informed of progress throughout.

### Overall Outcome

This new approach has achieved encouraging results. By notifying quickly those who we are not able to assist, we can often advise them of an alternative route for seeking redress. It also enables us to concentrate our resources on those cases that do fall within my remit, and which may indicate some failings of the process at the first tier. In broad terms, under our new system, cases dealt with at 1st and 2nd level account for around 70% of our work, the majority of which was completed within 6 weeks of receipt.

### Data throughout my term as Ombudsman

Financial year	2006/07	2007/08	2008/09
Cases received	304	314	278
Cases determined	37	101	103
Conduct (OJC, Tribunal, Advisory Committee)	4 upheld or partial 10 not upheld	10 upheld or partial 63 not upheld	44 upheld or partial 47 not upheld
Appointments (JAC)	5 upheld or partial upheld 18 not upheld	1 upheld or partial upheld 27 not upheld	1 upheld or partial 11 not upheld

This shows that:

- the number of cases received in 2008/09 showed a decrease against 2007/08 of 13% but, at 278, is still 130% above the Department's estimate of "120 cases a year" when JACO was established;
- a slightly higher number of cases have required full investigation and determination; and
- the vast majority concern judicial conduct.

### **Common Themes in cases Upheld**

#### **Appointments:**

- the majority of complaints stem from competitions where there are a high number of applicants for a small number of vacancies; there will always be those who are disappointed and surprised that they were not recommended for appointment, and some people still seem to have difficulty in accepting the competitive nature of the JAC processes;
- one complaint was partially upheld on account of shortcomings in the audit trail of the decision, but I found no evidence that the decision itself was inappropriate; and
- whilst the JAC look to explain as much as they can about the process in their Guidance, there have been issues over Qualifying Tests; the JAC has agreed to look again at the wording for those future competitions where such a test is used.

#### **Conduct:**

##### **The Office for Judicial Complaints:**

- failure to seek 3rd party verification or to ensure, whenever possible, that those approached are demonstrably independent;
- unnecessary delay;
- failing to address all the issues;
- not responding to correspondence;
- not keeping complainants informed of the progress of their complaint;
- poor recording of telephone conversations;
- inadequate arrangements for dealing with a large volume of similar or identical complaints arising from a common issue;

- insufficient care with dismissal letters to ensure that the investigation process is clearly explained, and that letters are appropriate and unambiguous; and
- failure to ensure that complainants are made aware of my role and remit.

#### **Tribunal Presidents<sup>4</sup>:**

- failing to obtain independent verification. This need not be time consuming or onerous; a written note of a discussion or telephone call will usually suffice;
- the inadequacy of correspondence, when rejecting complaints, including the failure to explain clearly the role, remit and process for investigations by Regional Tribunal Chairmen; and
- The lack of clarity in rejection letters when, although some aspects had been rejected, other concerns about the Tribunal had been upheld.

#### **Magistrates' Advisory Committees:**

- failing to obtain independent verification;
- Advisory Committee Secretaries making decisions without reference to the Committee Chairman;
- inadequacies in the Advisory Committee decision letters, which lead complainants to believe that their complaint had not been fully considered;
- failure to notify complainants of my second tier function; and
- lack of updates sent to complainants resulting from confusion as to whether this is an OJC or Advisory Committee function.

These process shortcomings, which have been brought to light from my investigations, have been passed to the first tier organisations. I hope they will take note and improve their services accordingly. For other examples, see Case Studies at Annex A.

<sup>4</sup> or a judicial office holder designated by the President under rule 4 (1) of 'The Judicial Complaints (Tribunals) (No.2) Rules 2008'.

### **Audit of the Office for Judicial Complaints**

In my last Annual Report I stated that, *'I have no means of judging how many unsatisfied complainants, after first tier investigations, decide not to refer their concerns to me, and how many of these might be amongst the most valid.'*

Pursuant to this, I undertook an audit of the Office for Judicial Complaints, at the request of the Lord Chancellor and the Lord Chief Justice, in accordance with CRA Section 113.

In conducting the audit, the JACO Audit Team looked at a sample of cases considered by the OJC, both before and after its recent reorganisation. The main question for the investigating officers who reviewed the individual cases was whether there might be issues about the OJC's process, which *might* have caused me to reach a finding of maladministration if a complaint had been made to me. It was made clear that this is not the same as saying that I would have upheld a complaint or found maladministration; that said, I believe the data collected to have been valid for its purpose.

The audit presents a positive picture for the OJC. It does not indicate that there is a significant body of people with valid complaints about the OJC's processes who do not pursue matters with me, or that people who do not pursue matters might have more valid concerns about the process followed than those who do submit a second tier complaint; in particular there was little evidence (and none in the more recent cases considered) of the OJC simply preferring the view of the judicial office holder complained about in respect of a judicial conduct matter without seeking appropriate independent verification. It also shows that, whereas there were problems with the OJC's management and administration of cases, the recent OJC reorganisation is delivering significant improvement.

It was clear from the audit that the areas that currently fall within my remit are broadly right, and that there is no need to change the formal scope of my remit.

I am grateful to my investigating officers for undertaking this very useful piece of work, and for the cooperation of the OJC's staff. I was pleased to be able to give this additional level of assurance to the Lord Chancellor and the Lord Chief Justice.



# Complainants and Stakeholders

## Our Communications

The JACO team have continued to improve communications with our Customers.

Following our 2007/08 survey on how we could make our service easier to understand and access, this year, we have:

- improved our website, including the layout and publishing more corporate information;
- revised our Information Booklets and Complaint forms;
- developed web pages for “on line” completion of our Complaint form, whilst safeguarding privacy; and
- conducted an “Accessibility” review of all our publications.

### **Working with Stakeholders**

We have maintained constructive relationships with all of our stakeholders, including the Lord Chancellor and the Lord Chief Justice. During the course of the year I have met regularly with senior officials within the MoJ, the Head of the OJC and the Chairman of the JAC.

My Head of Office and Senior Investigation Officer were invited by HHJ Meeran, the former President of Employment Tribunals (England & Wales), to attend the Regional Employment Judges Conference, and were able to give an overview of the Ombudsman's function, remit and our complaint handling experiences.

I met with the Swedish Chief Parliamentary Ombudsman, Mats Melin, as part of his visit to the UK; it was interesting to hear the perspective of the current senior Ombudsman from the country that initiated the concept.

Lord Justice Carnwath, Senior President of Tribunals, invited me to attend his meeting of the Tribunal Presidents' Group and to speak to them about the key issues that have come to light in my term of office to date.

I was privileged to be invited by the Lord Chief Justice to be a delegate at his Judicial Diversity Conference, 'A Judiciary for the 21st Century'. The discussions were very relevant to my work.

### **Complaints against my Office**

Three complaints were received this year about the administrative service provided by my office:

- a member of staff failing to put enough postage on an envelope when sending a complainant a final copy of the Ombudsman's Report; an apology was made and the cost incurred was reimbursed; and
- complaints from two people who had sent recorded delivery post to Millbank Tower (our old address), which was refused and returned to sender, following the Office's relocation to 102 Petty France in October 2008. Although redirection procedures were in place, recorded deliveries were unfortunately declined by staff at Millbank Tower. My staff have taken all reasonable steps to avoid this occurring again, and have apologised for the inconvenience caused.

### **Compliments**

A number of complainants, including some whose complaints I did not uphold, have thanked us for our fair, thorough and balanced investigations.

- “Thank you for clarifying the basis of your decision in such detail and with quite uncommon courtesy. While not being content with aspects of this matter, I am deeply impressed by the care you and your office have taken.”
- “Whilst I am disappointed with your conclusion I am grateful to you and your officer for the great trouble he must have taken to prepare such a detailed report, and I thank you for that effort.”
- “May I take this opportunity to thank JACO for such a detailed, thorough and excellent investigation and report. It was a delight to find, at last, a civil service department that actually knows what it is doing..... please pass on my compliments to the JACO for a fully professional investigation.”



## Corporate Governance

### Resources

We are committed to managing our resources effectively and to having in place sound and appropriate financial and governance arrangements so that our key business targets and achievements are met.

The table at Annex D summarises our expenditure against budget. This year we again underspent but were close to our year-end forecast; funds no longer required were surrendered to the MoJ in accordance with our Memorandum of Understanding.

Our workload, however, is unpredictable and, with a significant increase in the number of candidates for judicial appointments, an increased number of cases is anticipated.

A key priority for us has been the protection of the information that we hold about complainants and those complained about. There has been an increased awareness of Information Assurance in the public arena, and my team are fully aware of, and responsible for, the safeguarding of the information we hold.

### **Sick Absence**

The MoJ target for sick absence is 7.5 days per person. My office's overall average is 3.35, which is significantly lower than the MoJ target. All sick absence is managed in accordance with the MoJ's sickness absence policies.

### **Other Statutory and Departmental Requirements**

In accordance with our Memorandum of Understanding with the Ministry of Justice, we have local procedures in place to ensure that we are fulfilling our commitment for compliance with health and safety legislation, staff security, IT security and Information Assurance policies, as well as our own local financial and risk management systems. In addition, we have procedures in place to ensure compliance with the Freedom of Information Act and the Data Protection Act.



# Annexes

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## Annex A

## 2008/2009 Statistics

## Breakdown of cases received

	Total number of cases received	Appointment-related cases received	Conduct-related cases received	Total of other enquiries received
April	28	2	25	1
May	29	2	20	7
June	21	2	18	1
July	33	1	27	5
August	25	0	21	4
September	24	1	18	5
October	21	0	21	0
November	17	1	15	1
December	19	0	19	0
January	20	0	20	0
February	22	2	20	0
March	19	1	17	1
<b>Total</b>	<b>278</b>	<b>12</b>	<b>241</b>	<b>25</b>

## Summary

Total number of cases	Total Appointment related cases	Total Conduct related cases	Total of other enquiries received
278	12	241	25

Conduct cases relating to the OJC	Conduct cases relating to Tribunals	Conduct cases relating to Advisory Committees
155	71	15

**Breakdown of cases finalised<sup>5</sup>**

	Cases finalised at 1st level – ‘initial check’	Cases finalised at 2nd level – ‘fast track’	Cases finalised following a 3rd level ‘full investigation’ <sup>6</sup>
Appointment	3	0	10
Conduct – relating to OJC	46	48	60
Conduct – relating to Tribunals	14	22	21
Conduct – relating to Advisory Committees	4	2	12
<b>Total</b>	<b>67</b>	<b>72</b>	<b>103</b>

**Cases investigated, determined and finalised<sup>7</sup>**

	Not upheld	Upheld and partially upheld	Total
Appointment	11 (92%)	1 (8%)	12
Conduct – relating to OJC	25 (42%)	35 (58%)	60
Conduct – relating to Tribunals	18 (85%)	3 (15%)	21
Conduct – relating to Advisory Committees	4 (40%)	6 (60%)	10

5 The number of cases received will not correlate with the number of cases finalised because cases will have been received in the previous year and finalised this year, and similarly ongoing cases as at 31/3/08 have been carried into the next year, and will be finalised in the next year.

6 Of cases received in 2008/09, 83 required full CRA investigation.

7 The statistics have been broken down by each of the first tier organisations to make a more valid and accurate summary. It is accepted that the OJC may have had varying degrees of involvement in conduct complaints in relation to Advisory Committees.

## Annex B

# Case Studies

To ensure anonymity, 'he' has been used throughout the case studies, in lieu of he/she

### Appointment case studies

#### Case study one

The complainant contacted my office after being unsuccessful in a Qualifying Test run as part of a judicial appointment competition which looked to fill a number of posts in the same jurisdiction. He told me that he had been placed on the Reserve List created following a previous competition, run before the establishment of the Judicial Appointments Commission (JAC), and had reason to believe that he would be offered a particular appointment from that List. He also raised concerns about the use of an examination as a unique selection tool for selecting candidates for a number of different posts, and about his position on the Reserve List following the previous competition.

I noted, with regard to the Qualifying Test, that it is inevitable that there will be competitions in which the number of applications exceeds the number of candidates who, realistically, can be offered an interview. It is therefore necessary to run an initial selection process to narrow the list of suitable applicants. There are clearly a number of ways in which this might be done and the Constitutional Reform Act 2005 provides the JAC with broad scope to decide how to run its selection exercises. I was content that a written test, addressing the Qualities and Abilities required for the post, was a fair way of conducting an initial selection process and that such tests are an accurate means of identifying effective candidates and avoiding many of the problems inherent in a paper-based sift. I also noted that the test in this competition was developed in accordance with JAC procedures by a senior judicial office holder within the Tribunal.

I took account of the complainant's observations that the duties of the different types of post that the JAC were looking to fill varied and that the test did not cover the managerial functions that made up a significant part of the duties in one of the posts. It was, however, clear that the duties of all the posts included considering and reviewing cases. Anyone appointed as a result of this exercise would, therefore, need to work at this. I therefore considered that it was not unreasonable for the JAC to set a single test for all posts which examined candidates' legal knowledge.

It was appropriate, once the JAC had decided that candidates would initially be assessed by reference to a written test, for its decisions on who would be invited to attend the next stage of the competition to be based solely on the basis of the results of that test; the decision to reject the complainant's application was wholly consistent with his scores and those of other candidates.

The complainant also clearly believed that he would be appointed to a particular post from the Reserve List created following the previous competition. There was, indeed, evidence that the jurisdiction had approached the JAC seeking the complainant's appointment but had been told that the list was "time expired". The evidence clearly showed that the JAC had followed its own legitimate procedures.

I cannot comment on whether someone indicated to the complainant that he was in line for the post, but I saw no evidence to suggest that the JAC had either made a promise that the complainant would be appointed or implied that this would happen and subsequently reneged on that promise. I saw no evidence to contradict the JAC's comment that no formal vacancy request was received in respect of the post to which the complainant believed he would be appointed. It would have been inappropriate for the JAC to have taken such a matter forward in the absence of a notice.

### Case study two

The complainant applied for a judicial appointment in a jurisdiction in which he does not usually practise. The application was rejected after he had sat a qualifying test. His complaint to me included the allegation that the JAC had failed to follow its stated procedures as the Qualifying Test examined candidates' knowledge of Magistrates Court procedures, and did not test whether candidates whose current area of expertise is elsewhere have the ability to acquire it. This was relevant as the Qualities and Abilities for the post included Intellectual Capacity which required candidates to demonstrate "appropriate knowledge of the law and its underlying principles, or the ability to acquire this knowledge where necessary".

It did not appear to me unreasonable that the JAC should set a test which considered matters relating to the specific jurisdiction, provided the candidates were aware of the process, and had adequate notice. In this instance:

- I was content that knowledge of the scope of the test, combined with adequate notice, would enable candidates who do not currently have knowledge of the specific jurisdiction to prepare for the test, thereby demonstrating their ability to acquire the knowledge;
- it was therefore reasonable for the JAC to assume that candidates whose performance in the test did not warrant an invitation to attend the next stage of the process had not demonstrated either the appropriate knowledge of the jurisdiction or the ability to acquire it; and
- whilst I appreciated that this might put those whose expertise was in a different area of law to that which was tested at some disadvantage compared to other candidates, I did not consider this to be unreasonable.

I noted that the letter sent to candidates did cover the nature of the qualifying test and was content, on balance, that the explanation was sufficiently clear to enable candidates to either realise the nature of the test (and make appropriate preparation) or at least raise queries with the

JAC. I did not, therefore, uphold this aspect of the complaint, even though I felt that the guidance could have been clearer. I am therefore pleased that the JAC agreed to review the wording of future guidance to ensure that the scope of any Qualifying Test is better explained. This should also give candidates more time to prepare for the test.

The complainant also commented that giving candidates the option of using computers to complete the Qualifying Test might well place those proficient at typing at an advantage compared to those who are not, and that typing is not a judicial competency. This observation appears reasonable, although I note that the Qualities and Abilities in the particular competition included 'Efficiency'. However, use of computers is now the norm and I see nothing wrong in allowing candidates to use computers when sitting a Qualifying Test. The JAC rightly pointed out in its response to the original complaint that if handwriting were the only option, candidates who are slow at writing would be disadvantaged.

## Conduct case studies

### Case study three

The complainant alleged that a judicial office holder had been involved in criminal activity. He complained to me that his concerns had not been investigated adequately by the OJC who had relied on the findings of an inadequate police investigation<sup>8</sup>. The OJC asked the judicial office holder for his comments and subsequently dismissed the complaint against him as neither the Police nor the Social Services, to whom the same allegations had been made, had deemed it necessary to take any action following their own investigations.

It is not unexpected that the views of people who complain about judicial office holders will often be at odds with those complained about. It is important in such cases that those considering complaints should not automatically prefer the views of one party over the other, but should seek to verify independently what happened. In this instance the OJC, the Lord Chancellor and the Lord Chief Justice were all assured by the findings of the Police and the Social Service investigations.

I considered this to have been entirely appropriate as it would not have been right for the OJC to conduct an independent investigation into issues that went far beyond their Regulated Disciplinary Function. It would, however, be correct for the OJC to consider whether disciplinary action was appropriate in the light of the outcome of such investigations.

It was also not for the OJC to comment on the complainant's belief that the Police had not conducted an adequate investigation. It might have been helpful if the OJC had stated explicitly that it would reconsider the position if the complainant succeeded in getting the investigation into the allegations against the judge reopened. However, failure to do this did not amount to maladministration.

8 The complainant pursued a separate complaint about the adequacy of the investigation with the Police and, subsequently, with the Independent Police Complaints Commission.

### **Case study four**

This complaint concerned a Justice of the Peace (JP) appearing as a prosecution witness in a case brought against a member of the complainant's family. The original complaint to the Advisory Committee included allegations that the Magistrate had used his influence as a Magistrate to bring the case to Court, lied under oath and colluded with the Magistrates who heard the case. The complaint to me was that the Advisory Committee did not take the matter seriously, that concerns were ignored and that there was a long period during which he heard nothing.

I am content that the Advisory Committee followed an appropriate process in reaching its decision to reject the complaint that the JP had used his influence as a Magistrate to bring to court a case that the Police were, initially, minded to drop. The JP denied the allegation and the Advisory Committee obtained independent verification, from the Police, that the JP had played no part in the decision to bring the case to Court.

I am also content that the Advisory Committee's decision not to consider the complainant's concerns that the Magistrates who heard the case were prejudiced, because the JP was a fellow Magistrate, was consistent with legislation and guidance. The complainant was effectively challenging the Court's decision and produced no evidence on which the Advisory Committee could have based an investigation of misconduct. The Complaints (Magistrates) Rules 2006 specifically preclude investigations in such circumstances.

I found that it was appropriate for the Advisory Committee not to have formed a view as to whether the JP had lied under oath, or whether the evidence he provided in Court suggested that he was guilty of a particular offence. Whilst such allegations, if proven, might have impacted on the JP's suitability to sit as a Magistrate, it would only have been appropriate for the Advisory Committee to have considered the JP's position in the light of evidence from an appropriate investigating body or Court that he had committed such offences. It would have been inappropriate for the Advisory Committees to have taken the lead in investigating complaints about matters, such as allegations of criminal behaviour, that would, if

proven, have had implications that extended beyond someone's suitability to sit as a Magistrate. Perjury, the offence of deliberately telling an untruth in Court when under oath, is a matter for the Police.

I recognised that it took longer than envisaged in the targets set out in the Complaints (Magistrates) Rules 2006 to deal with the complaint. However, the Advisory Committee felt that evidence from the Police was necessary in order to consider one aspect of the complainant's concerns. This was not received for some weeks after the complaint was made and the investigation was concluded shortly thereafter. The Advisory Committee apologised for the time taken to deal with the complaint, and I do not believe that it was unreasonable that it took the Advisory Committee approximately nine weeks to carry out their investigation. It is possible that the complainant would have had greater confidence if he had been kept fully informed during the course of the investigation.

### Case study five

The complainant was a Magistrate who had been the subject of two complaints by members of Her Majesty's Court Service (HMCS) staff. Evidence had been gathered by the OJC and HMCS Human Resources Division under the terms of the 'Protocol for preliminary evidence gathering in complaints from staff against judicial office holders' (the Protocol); the case was then referred to the Nominated Judge, who suggested that attempts be made to reach a mediated settlement. This was ultimately successful and the complaints against the Magistrate were dropped.

The complaint to me included concerns about the fairness of the procedure, the process followed, and the time taken to investigate the complaint. I found the process to have been fair and in line with the general principle underpinning the Protocol. It is clearly appropriate to have in place arrangements designed to ensure that HMCS staff who have a genuine complaint against judicial office holders with whom they work, are not intimidated from making such complaints, and to provide an assurance that such complaints will be treated seriously.

I found that the length of time taken was significantly longer than specified in the Protocol. This primarily reflected the complexity of the process and what were inherently unrealistic timescales set out in a document which had a much narrower scope when it was agreed in the mid-1990s (it was extended to cover complaints against Magistrates in 2006). However, I did identify maladministration in that:

- the OJC failed to notify the Magistrate of the complaint when it was first made, as required by the Protocol, and did not approach him for six months after it was notified of the complaint. There appears to have been no good reason for this and it is possible, given that the Nominated Judge's advice ultimately led to the complaints being resolved, that the investigation process was, in consequence, significantly extended;
- there was a failure to be prepared for the possibility that an HMCS staff member might complain against a Magistrate as it appears

that neither the OJC nor the Advisory Committee fully appreciated, for a month, either that the Protocol existed or how its requirements interfaced with the OJC's role; and

- the OJC failed to keep the Magistrate informed of how the investigation was progressing or to respond to much of his correspondence. This was at a time when he was likely to have been under considerable pressure.

I also understood the Magistrate's observation that he had been poorly advised in not being allowed to apologise when the first complaint was initially made. However, I could not review this issue as the discussions that occurred after the event, which led to the initial complaint, were not conducted as part of the Regulated Disciplinary Function.

I am pleased that the Protocol has now been reviewed and that HMCS HR is content that the revised version is an improvement. It is essential to ensure that those who might deal with complaints made by staff against judicial office holders are aware of and understand the Protocol. I hope that the inclusion of the new protocol as an annex to the Complaints (Magistrates) Rules 2008, which came into force in August 2008, will achieve this.

### Case study six

This case concerned the investigation of a complaint which included allegations about a Tribunal Chairman's tone and behaviour (including that he subjected a disabled member of the complainant's family to inhuman and bullying behaviour, had snapped and had machine-gunned questions at him). The Regional Tribunal Chairman had rejected the complaint under rule 7(1)(b) of the Judicial Complaints (Tribunals) Rules 2006 on the basis that the concerns raised related to a judicial decision or judicial case management and did not raise a question of misconduct. One aspect of the complaint to me was that the Regional Chairman dismissed the complaints without independently verifying what had happened.

I considered that the Regional Chairman had failed to conduct the investigations that could reasonably be expected in order to conclude that the allegations about the Tribunal Chairman's behaviour should be rejected under rule 7(1)(b). I noted the Regional Chairman's observation that the allegations, stripped of what he described as somewhat emotive language, related to the way in which the hearing was managed and questions which the Tribunal Chairman was entitled to ask. However, the question was not whether the Tribunal Chairman was entitled to ask about such matters, but the way in which he did so. The Regional Chairman's observation suggested that he had considered these allegations stripped of the somewhat emotive language, and had not made the appropriate investigations to ascertain the key issue, namely whether the somewhat emotive language was justified.

I concluded that this amounted to maladministration as it runs contrary to the principle, articulated in guidance describing the process for considering complaints against judicial office holders, that decisions should be evidence-based. This maladministration rendered the Regional Chairman's determination unreliable. It is my practice, in all such cases, to ask the Investigating Judicial Office holder to reconsider the matter. I was disappointed that he was initially unwilling to do this and I would have set his determination aside under the authority vested in me by the Constitutional Reform Act 2005; however, I was pleased that it was

subsequently agreed that another Investigating Judicial Office Holder would re-investigate concerns about the Tribunal Chairman's behaviour. I also concluded that it would be necessary, in order to properly investigate these concerns in accordance with prescribed procedures, to seek the views of the Chairman and also to seek to independently verify what happened by approaching the other Tribunal members for their recollection of the hearing. Such enquiries are provided for in the guidance explaining the process for handling complaints about Tribunal members, which has now been reinforced by legislation contained in the Judicial Complaints (Tribunals) (No2) Rules 2008, which came into force in November 2008.

## Annex C

### Summary of Performance Against Business Plan Targets

Target number	Target	Performance
PT1	answer at least 97% of enquiries, by post or by e-mail, within five working days	Achieved (100%)
PT2	in at least 97% of cases which we investigate, keep complainants fully informed on a monthly basis about the progress of our investigation	Achieved (98.5%)
PT3	operate within our budget	Achieved
PT4	effectively manage financial pressures and risks to achieving our business objectives, re-profiling expenditure plans, reviewing responses to risks, and reporting any significant consequences on a quarterly basis	Achieved
PT5	manage and monitor sickness rates to contribute to meeting the MoJ's target to reduce absences to an average of 7.5 days a year per member of staff by 2010	Achieved

## Annex D

## Forecast and Actual Expenditure

	Forecast	Actual
Staff costs and salaries	572,500	540,532.93
Office expenditure, Accommodation and IT Services	11,680	11,766.34
Service costs and Miscellaneous	1,020	3,533.74
Training	10,100	8,433.90
Travel and subsistence	1,200	440.92
<b>Total expenditure</b>	<b>596,500</b>	<b>564,707.83</b>



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