

# Annual Report 2017-18



Judicial Appointments & Conduct Ombudsman  
**Annual Report 2017-18**

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

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# The Judicial Appointments and Conduct Ombudsman

The Judicial Appointments and Conduct Ombudsman (JACO) is Paul Kernaghan CBE QPM. He was selected following an open competition and appointed in January 2016 by Her Majesty the Queen on the Lord Chancellor's recommendation.

## **The JACO Statutory Remit**

The JACO is a Corporation Sole who acts independently of Government, the Ministry of Justice (MoJ) and the Judiciary. The Constitutional Reform Act 2005 empowers him to consider:

### **Judicial Appointments**

- complaints from candidates for judicial office who claim to have been adversely affected by maladministration in the way in which their application for appointment, and/or subsequent complaint, was handled; and

### **Judicial Conduct and Discipline**

- concerns raised by a complainant, or a judicial office holder whose actions have been the subject of an investigation, about how the matter was handled under the regulated disciplinary function. Such matters are considered by the Judicial Conduct Investigations Office (JCIO), a Tribunal President or a Magistrates' Advisory Committee in the first instance although the Lord Chancellor and the Lord Chief Justice (or a Designated Judge acting on his behalf) may be involved later in the process as only they can impose a sanction on a Judicial Office Holder.

The JACO remit is often referred to as a "Second-Tier" investigation function, reviewing steps taken by "First-Tier" Bodies, listed above.

### **In judicial appointment complaints the JACO can:**

- uphold 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).

**In judicial conduct and discipline complaints the JACO can:**

- review how a complaint against a judicial office holder has been handled, to ascertain whether there was a failure to follow prescribed procedures or some other maladministration; and
- make recommendations for redress. In cases where maladministration led to the original decision being unreliable, he can set aside that decision and direct that a new investigation or review be undertaken (in whole or in part). He can also recommend payment of compensation for loss suffered as a result of maladministration.



## Foreword

This is my third Annual Report, and the second covering a full year in which I have held the Judicial Appointments and Conduct Ombudsman's post. I said in the foreword to my 2016/17 Annual Report that my goal, and that of my Officials, is to provide a Second-Tier investigation function that is rigorous, whilst taking due regard of the realities of every situation, and which seeks to be both proportionate and humane.

2017/18 was a busy year for my Office. It is pleasing to report that an increased number of complaints were determined within budget at a time when, in common with the rest of the public service, it is subject to resource constraints. My Office also moved on 3 occasions, contributing to the Ministry of Justice's plans to reduce its Whitehall "footprint", without unduly affecting the service provided. I recognise that continuity of staffing within the Office has been a key factor in delivering the service.

My role is to consider complaints alleging maladministration in the process for considering concerns about Judicial Office Holders' personal conduct and from applicants for Judicial Office. I remain of the view that it would be difficult to totally eradicate maladministration as these are processes run by human beings, often under great pressure and subject to resource constraints, and that things can go wrong. I am also committed to assisting "First-Tier" Bodies in improving their processes, based on learning derived from my investigations. We were therefore pleased to be invited, along with JCIO Officials, to attend and address Complaints workshops run for Investigating Judicial Office Holders by the Presidents of the Social Entitlement and the Immigration and Asylum Chambers. I trust that the discussions were very useful for those tasked with investigating First-Tier complaints; they were certainly beneficial for me in understanding the pressures faced by those considering complaints.

This was particularly relevant as the question of maladministration needs to take account of the wider picture and the fact that a process may not have operated as planned does not necessarily amount to maladministration. For example, there was 1 appointments case during 2017/18 which followed on from a failure in the IT supporting a qualifying test run by the Judicial Appointments Commission (JAC). This was clearly unfortunate but I did not find maladministration as I was content that the JAC had no reason to believe that the IT would fail and that the measures put in place following the failure prevented the complainant from being disadvantaged. I am similarly aware that resource constraints may mean that those considering Judicial Conduct complaints take longer than they would like. Delay can constitute maladministration but I am less likely to make such a finding if the parties are informed in advance that delay is likely and appropriate apologies provided.

During 2017/18 my Office received more than 2,000 pieces of correspondence and considered 935 enquiries and complaints, a slight increase on 2016/17. Most related to matters that I cannot consider and, where appropriate, we have looked to highlight alternative means by which people can pursue complaints which fall outside my remit. There has also been an increase in the number of cases which I have determined, encompassing both those in which there is clearly no prospect of my finding maladministration and the comparatively small number of those which are referred for further investigation as I cannot rule out such a finding. However, it is pleasing to be able to report that the outcome of these investigations has not demonstrated an increase in maladministration:

- I determined 79 complaints following a full investigation (an increase from 63 in 2017/18) but the number upheld fell from 18 to 8;
- there have been no instances of the specific problem regarding Advisory Committee investigations that I identified in my previous Annual Report; and
- it remains the case that very few complainants contact me about the Judicial Appointments process. This supports my previous view that the JAC's processes are perceived as fair and robust and that it has been able to respond appropriately when a significant problem occurred.

I am concerned that the length of time taken to conduct investigations in my Office increased during 2017/18. This was partially due to the increased number of cases referred for detailed and time consuming further investigations, a significant proportion of which appeared to be particularly complex. We will need to keep our own working practices under review to ensure that my investigations are efficient and continue to highlight concerns about matters which fall within my remit, even if they do not amount to maladministration.

A further factor contributing to the overall length of time to conduct full investigations has been an increase in the length of time to obtain responses to draft reports in respect of Judicial Conduct matters referred to the Lord Chancellor and Lord Chief Justice. The Constitutional Reform Act 2005 requires me to refer draft reports in this way and to take account of comments received. As an independent Office Holder, I am not bound to accept representations made but I do value input at this stage of the process and there was 1 case during 2017/18 in which I changed my mind regarding redress after having re-considered matters in the light of comments received at this stage of the process. However, I am concerned that the amount of time taken to receive responses to draft reports increased significantly during 2017/18 and that responses to a number of cases were considerably overdue at the end of March 2018. This has created additional work for my Office in both chasing responses and sending updates to complainants which do little more than repeat what was previously said. I also appreciate that this is hugely frustrating for complainants and it is not unusual for my staff to receive correspondence comparing the time taken at this stage of the process with the statutory deadlines for complainants and

suggesting that the time taken casts doubt on the credibility of my investigations; I can understand these observations. I hope that steps can be taken to ensure timely responses in respect of my draft reports, a task which undoubtedly makes up a very small proportion of the workload faced by the Lord Chancellor and Lord Chief Justice, but which has significant implications for some complainants and their perception of my role in respect of matters intended to uphold public confidence in the Justice system. I fully recognise that referral to these offices is both constitutionally appropriate and yet may create delay given the numerous responsibilities of the office holders in question.

A handwritten signature in black ink, consisting of a large, stylized initial 'P' followed by a horizontal line that extends to the right and then curves back under the line.

**Paul Kernaghan CBE QPM**

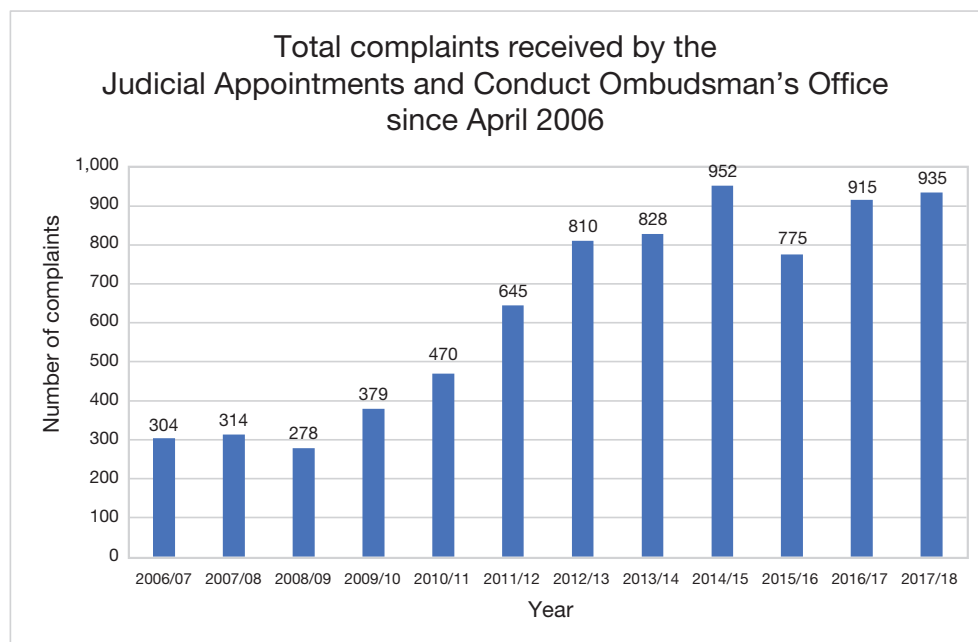
## Performance

### Targets

The JACO Office has, with 1 exception, achieved all its targets in the 2017/18 Business Plan (see Annex C). The exception was that the JACO Office acknowledged receipt of all new complaints and correspondence from complainants, within 5 working days of receipt in 98% of cases whereas the target is 100%. The JACO Office remains committed to providing a high level of customer service. All correspondence and complaints are checked to assess whether they are within remit.

### Enquiries and complaints received

The JACO Office received more than 2,000 pieces of correspondence during 2017/18. This included 935 enquiries and complaints. Most of these enquiries and complaints came within the JACO conduct remit rather than the Judicial Appointments remit. In this context the JACO's conduct remit requires him to consider the process by which concerns about Judicial Office Holders' actions have been considered under the regulated disciplinary function, regardless of whether the concerns about the Judicial Office Holders' actions raise a question of misconduct. It is not unusual for the JACO to review the process by which concerns about Judicial Office Holders' actions were rejected or dismissed on the basis that they do not raise a question of misconduct.



## Initial Checks

There were 322 cases which, after consideration by a caseworker, were found to fall clearly outside the JACO remit or were otherwise not taken forward (in this context a “case” might comprise a number of pieces of correspondence from the same person that are considered at the same time). These include:

- a significant proportion of correspondence from people (including some who have previously had complaints determined by the JACO) who had been advised of the limits of the JACO remit but who frequently e-mail the JACO Office (possibly along with a number of other recipients) in respect of concerns which clearly raise no issues that the JACO remit covers or which might form the basis of a complaint to a First-Tier Body coming within the JACO remit. Considering this correspondence is a time consuming task;
- correspondence from people who are not in a position to complain to the Ombudsman (e.g. because they have not yet submitted a complaint to the relevant First-Tier Body or because a complaint made had yet to be determined); and
- cases in which the correspondent either fails to articulate any matters relating to a First-Tier investigation process or does not provide the required permission to disclose the concerns that they have expressed about the First-Tier investigation process to the relevant body and for that body to provide the relevant papers to the JACO Office.

Where appropriate, complainants were signposted to organisations which might be able to help, or given information about who to approach for assistance.

## Preliminary investigations

### *The Preliminary Investigation process*

Complaints that appear to come within the JACO’s remit and which are taken forward require a more detailed initial evaluation and are fast-tracked to enable the Ombudsman to determine whether or not the complaint requires a “full investigation”. In most cases, this entails the JACO forming a view as to whether he can rule out the possibility of his finding maladministration, although the JACO will also consider at this stage whether to accept complaints that have been made outside the time limits in the Constitutional Reform Act 2005.<sup>1</sup>

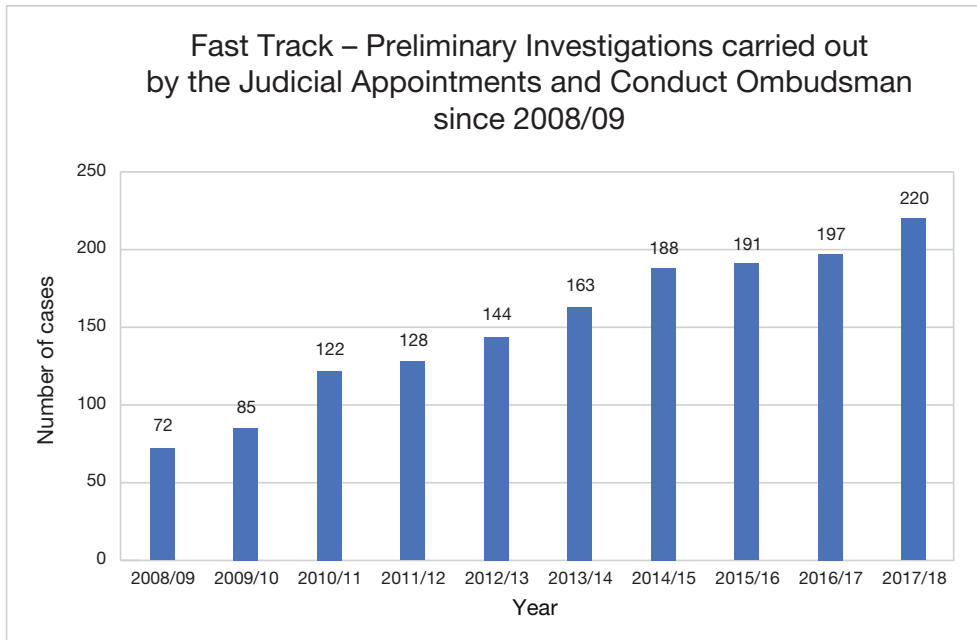
This is an important process which ensures that the Office’s resources are concentrated on the cases which most require detailed consideration, and that complainants are advised within a reasonable timescale if there is no possibility

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<sup>1</sup> For example, sections 110(4) and (9) of the Constitutional Reform Act 2005 provide that complaints to the JACO about matters arising from the Judicial Conduct process must be made within 28 days of the complainant being notified of the outcome of their First-Tier complaint with the proviso that the JACO can accept complaints made outside that timeframe if it is reasonable to do so in all the circumstances.

of the JACO finding maladministration. 310 cases (compared to 266 in 2016/17) were considered in this way, including 220 which the JACO did not refer for further investigation. The number of cases determined at this stage has increased steadily since 2008/09.

The JACO Office has a target to complete 90% of preliminary investigations within 6 weeks of receipt of a completed complaint form or other information which is sufficient to enable the JACO to consider the complaint. The Office met this target in 99% of cases.



*Outcome of Preliminary Investigations*

The JACO decided that a full investigation was unnecessary in 220 cases (of which 127 were about the JCIO, 86 were about Tribunals and 7 were about Advisory Committees), compared to 197 cases in 2016/17 (an increase of 11%). The JACO wrote personally to all of them and most accepted the explanation. The JACO does consider correspondence from people who are dissatisfied with the outcome of a Preliminary Investigation. A previous Annual Report referred to instances in which the Ombudsman decided after considering such representations that a full investigation was appropriate. There were no such cases in 2017/18 and there were no instances in which a decision to conclude an investigation following a preliminary investigation was successfully challenged at Judicial Review.

The JACO accepted 90 of the cases in which issues appeared to come within his remit for further investigation. This was an increase from 69 in 2016/17.

## Full Reviews

### *The full review process*

The JACO and his Office conduct thorough investigations into complaints which require a full review. These are cases which require detailed and in-depth consideration as the JACO could not be confident, based on a Preliminary Investigation, that he would not find maladministration. Consequently, they often require detailed consideration of large volumes of complex documentation and discussions to achieve a thorough, fair and balanced review. In this context it is important that First-Tier Bodies provide the JACO Office with records that fully document their investigation processes as well as all the evidence considered.

The JACO Office therefore does not have a target for completing full investigations. It does, however, aim to ensure that people whose complaints have been passed for a full investigation are informed each month about the position in the Ombudsman's investigation.<sup>2</sup> It did so in 98% of the occasions when an update was due.

The investigation process includes the JACO passing draft reports in respect of cases in which a full investigation is conducted to either the Lord Chancellor and the JAC (in respect of full investigations under the JACO appointments remit) or to the Lord Chancellor and Lord Chief Justice (in respect of the JACO Judicial Conduct remit) and taking account of comments received in finalising his views<sup>3</sup>. The JACO did not alter his views as to whether complaints should be upheld as a result of comments made at this stage of the process. However, there was 1 case in which the JACO changed his mind regarding redress in respect of a case in which he found maladministration. In this case the JACO was initially minded to set aside the original determination but concluded, in the light of representations received, that this would not be the appropriate redress.

It has taken longer than in previous years to conclude full investigations. For example, of the investigations concluded in 2017/18 approximately 40% of investigations had taken more than 6 months to conclude and 5 had taken more than a year; this was longer than the previous year when approximately 80% of the concluded investigations had taken less than 6 months and 2 cases had taken more than a year to conclude<sup>4</sup>. Contributory factors include:

- an increased caseload (the number of cases referred for further investigation rose from 69 to 90);
- that more cases were complex involving the consideration of large volumes of material (for example the most complex cases are often those from Judicial

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<sup>2</sup> The target is to ensure that complainants are aware of the position in the JACO investigation and so the target is to inform people during each month rather than once every four weeks or on the same date each month.

<sup>3</sup> This is required by sections 103 and 112 of the Constitutional Reform Act 2005.

<sup>4</sup> This is the length of time that elapsed between the point at which the JACO decided that the case warranted a full investigation and the point at which he concluded that investigation.

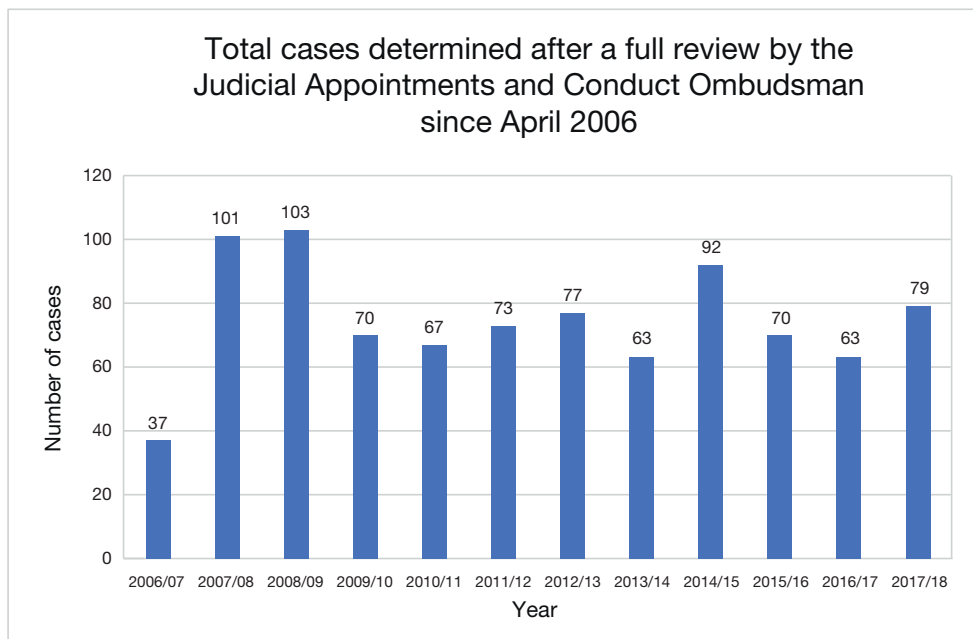
Office Holders, or former Judicial Office Holders, whose actions have been considered under the regulated disciplinary function – the JACO determined 7 such cases, compared to 5 in 2016/17); and

- an increase in the time taken to obtain a response to draft reports in respect of Judicial Conduct matters referred to the Lord Chancellor and Lord Chief Justice. The JACO normally requests a response within 3 weeks and in 2016/17 one was received within 2 months in more than 90% of cases whereas in 2017/18 approximately 70% of responses took more than 2 months and 40% more than 3 months. At the end of March 2018 there were 4 cases in which the Ombudsman was awaiting responses to draft reports referred more than 3 months previously. The JACO Office has kept complainants informed each month whilst responses to draft reports are outstanding, even if there is very little additional information that can be provided. It has also responded to correspondence expressing concern about the time taken in respect of what is usually the final stage in the JACO investigation process and comparing it with the deadlines imposed for people to complain to the JACO and set out in the regulated disciplinary function.

**Outcome of cases referred for a full review**

*Numbers of complaints determined*

The JACO determined 79 cases during 2017/18 (including cases carried forward from 2016/17). This was an increase from 63 in 2016/17 but is not dissimilar to the number determined in previous years.





Of the cases which the JACO determined following a full review:

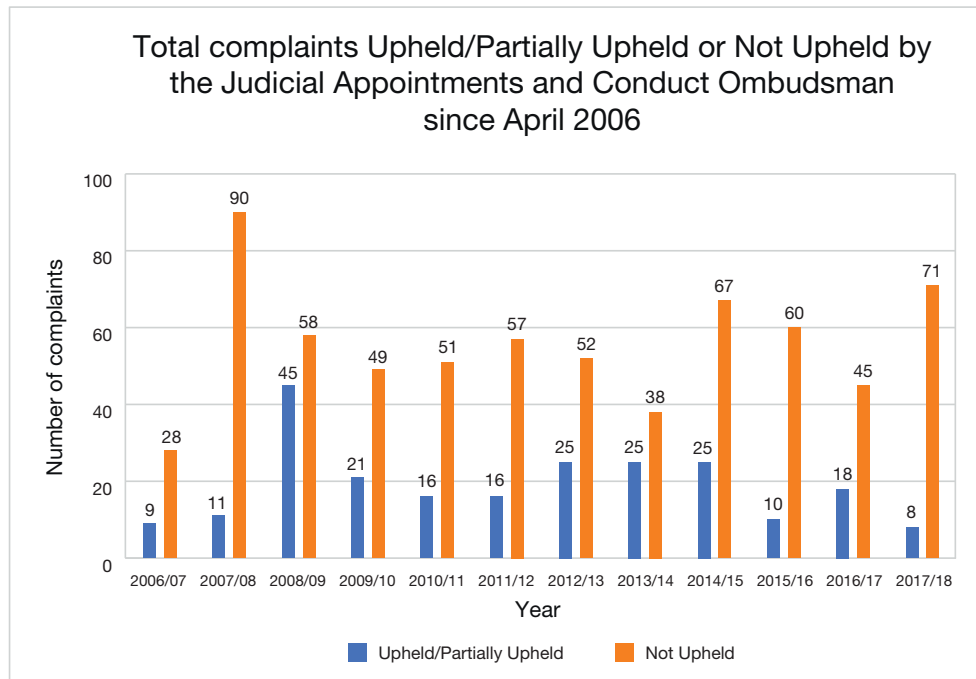
- 6 fell within the JACO appointments remit;
- 46 concerned Judicial Conduct matters considered by the JCIO. This included 6 cases in which the JCIO had considered Judicial Conduct matters referred by a Tribunal President or an Advisory Committee and 5 cases in which the JCIO had considered concerns about a Coroner's actions;
- 27 concerned Judicial Conduct matters considered by Tribunals;
- 6 concerned Judicial Conduct matters considered by Advisory Committees; and
- 7 were from Judicial Office Holders who complained about the process by which concerns about actions had been considered under the regulated disciplinary function.

In addition:

- there were 3 cases that had been referred for further investigation in which the Ombudsman subsequently decided, after enquiries had been made, either that there had been no more than minor errors that could not constitute maladministration or that the matters he was being asked to consider did not relate to the regulated disciplinary function and therefore fell outside his remit. The JACO did not conduct a full investigation into those cases; and
- at the end of March 2018 there were 13 cases in which the JACO was awaiting a response to reports that had been referred to the Lord Chancellor and Lord Chief Justice under section 112 of the Constitutional Reform Act 2005 (the equivalent figure at the end of March 2017 was 11). This is usually the final stage in the investigation process.

#### *Complaints upheld*

The JACO upheld, or partially upheld 8 cases. This is lower than the number upheld in every year since 2006/7.



It is relevant to this that, following a full review, the JACO:

- determined 71 complaints which he did not uphold. This includes all 6 complaints that he determined regarding the JAC's actions;
- upheld, or partially upheld 5 cases in respect of the processes which the JCIO followed;
- upheld, or partially upheld 2 cases in respect of the processes followed when considering concerns about the actions of Tribunal members; and
- upheld, or partially upheld 1 case in respect of the processes followed by Advisory Committees.

Issues which caused the JACO to find maladministration and uphold cases included:

- concerns in some cases about the differentiation between judicial decisions and judicial case management on one hand and personal conduct on the other. The JACO upheld 3 cases that explored links between judicial case management and conduct. The JACO found that the JCIO had not followed an adequate investigation process before rejecting complaints about the way in which Judges had managed investigations on the basis that their actions did not amount to misconduct. In 2 of these cases the complainant had expressed concern about aspects of the Judges' manner and in the third the complainant had expressed concerns about delay on the Judges' part. While the JCIO

agreed to re-open these cases to make further enquires the JACO formally set aside the JCIO's original decision;

- the First-Tier Body had failed to adequately grasp the facts of the case and the basis for the complaint and had therefore not followed an appropriate process before determining that the complaint related to the judicial office holder's decision making and case management;
- rejecting a complaint on the basis that it was not adequately particularised when, in fact, the complainant had provided sufficient particularisation to support the complaint;
- excessive delay in taking a deferred complaint forward once the proceedings had concluded;
- inadequate attempts to independently verify what had happened; and
- failure to keep the judicial office holder subject to a complaint updated and adequately respond to correspondence.

#### *Other themes and issues emerging from investigations*

##### The JACO's Judicial Appointments remit – the JAC

The JACO only determined 6 cases involving the JAC. The issues which the JACO considered included:

- whether the JAC's selection process was biased against solicitors;
- the adequacy of the paper sift stage; including:
  - concerns from a candidate that had been rejected at the paper sift stage when he had progressed to the next stage in another Selection Exercise;
  - whether it was appropriate for a retired judicial office holder to have been involved in the sifting process;
  - concerns that the JAC was not carrying out checks to ensure that candidates were completing their own self assessments;
  - whether it was appropriate to conduct a sift based on information included in candidate's self-assessments rather than by an online test or references from independent assessors;
- concerns that a selection exercise had not included an online test;
- concerns about the adequacy of competency based selection process and whether there was unconscious bias;
- questions as to whether a selection exercise process which is open to candidates without judicial experience was biased against candidates with judicial experience; and
- concerns that a candidate had been disadvantaged by an IT failure resulting in an online test having to be administered by an email sent to groups of candidates at allocated times.

The number of complaints that the JACO has determined regarding the JAC's actions, and the instance of maladministration in those investigations, has remained low for a number of years. The JACO did not uphold any complaints about the JAC and he did not express any concerns which fell short of maladministration.

#### The JACO Judicial Conduct remit

There were 20 instances in which the JACO expressed concerns about correspondence but concluded that his concerns did not amount to maladministration. These included concerns about correspondence that:

- did not address all the specific points of the complaint or explain why the matters complained about did not raise a question of misconduct;
- included minor typographical errors including the wrong name of the Judge, which could give impression that JCIO had not properly read and considered complaints made to it;
- could have better explained the scope of the conduct investigation process, why it could not investigate allegations of bias, the process being followed and what evidence had been obtained and considered or the decision reached;
- was issued without the correct postage, as discussed in case study 2; and
- did not refer to the JACO remit.

There was 1 Tribunal case in which the JACO commented that an investigation that lasted almost 2 years had taken too long and he identified some periods where matters could have been taken forward more expeditiously. However, he acknowledged that the process included three separate investigation phases, all of which must be thorough and follow a proper process. He also noted that it would take some time for recommendations made to be considered by the Lord Chancellor and the Lord Chief Justice, particularly when judicial and parliamentary recesses and a parliamentary election occur.

Other areas of concern and issues that emerged during the JACO's investigations but which did not lead to a finding of maladministration included:

#### The JCIO

- that the ability of a Judicial Office Holder to make representations to a Disciplinary Panel might have been affected by the fact that he was asked to provide written representations in slightly over a week at a time when there was no guarantee that he would be able to make further representations (the JACO did not find maladministration as he found there was no suggestion, overall, that the complainant was not given the opportunity to make representations and that he provided oral evidence to the Disciplinary Panel);
- that the JCIO had made a basic error when it rejected a complaint about a Judge's manner on the basis that it did not raise a question of misconduct.

The JACO did not find maladministration as the JCIO was able to rectify the position and apologise after the receipt of further correspondence;

- that the JCIO had rejected complaints under rule 8 of the Judicial Conduct (Judicial and other office holders) Rules 2014 rather than dismissing it under parts of rule 21;<sup>5</sup>
- problems with the JCIO's online complaints system resulting in a delay in processing the complaint;
- a complainant being referred to JACO before the complaint had been rejected by the JCIO;
- delays in carrying out its investigations that did not amount to maladministration; and
- delays in responding to post complaint correspondence. In this context the JACO said he understood the JCIO's need to prioritise live cases and did not find that the JCIO's handling of post complaint correspondence amounted to maladministration in the cases in question.

#### Tribunals

- that Investigating Judicial Office Holders could have better explained the scope and origin of the investigation, the investigation process followed, what evidence has been obtained and considered and the decision;
- that it would have been better to have explicitly informed a complainant why it was disproportionate to have sought third party comments;
- that an Investigating Judicial Office Holder had given a complainant the required 15 days to provide further information in respect of their complaint and then dismissed the matter before the date in question. The JACO did not find maladministration as the complainant had already responded to the request and the Investigating Judicial Office Holder considered further correspondence received after the complaint had been dismissed;
- there was 1 case during 2017/18 in which the evidence initially provided on a complaint file appeared inconsistent with the Tribunal's decision to determine that a complaint was vexatious. The JACO was concerned about the length of time taken to respond to queries and provide any further evidence to support the Tribunal's determination. However, the evidence, when provided, included the Tribunal's case file which included evidence of previous correspondence to support the determination;

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<sup>5</sup> Rule 8 requires the JCIO to reject complaints that do not contain an allegation of misconduct whereas rule 21 requires the JCIO to dismiss complaints that fall into a number of categories, including those that are about judicial decisions or judicial case management and do not raise a question of misconduct (rule 21(b)) or which raise matters that would not warrant a disciplinary sanction even if substantiated (rule 21(f)). There are equivalent provisions in the rules setting out complaint investigation process to be followed by Tribunal Presidents and Advisory Committees.

- that correspondence had not been issued by a promised date; and
- delays which did not amount to maladministration. This included difficulties in HMCTS administrative processes which delayed the referral of complaints to Investigating Judicial Officer Holders.

#### Advisory Committees

- an Advisory Committee had made a clerical error when it inadvertently issued the wrong letter dismissing a complaint. In the case in question the AC was previously minded to dismiss a complaint as vexatious but subsequently concluded that there was little evidence for such a conclusion and that the complaint should be dismissed on other grounds. Unfortunately, the AC issued the wrong letter and the complainant was advised that the complaint had been dismissed as it was vexatious. The AC subsequently apologised for its error; and
- delay, including a delay in commencing an investigation as a complainant had written to the JCIO in the first instance. The JCIO appropriately advised the complainant to contact his local Advisory Committee but the information on its database was out of date and so it provided the wrong contact details for the Advisory Committee.

#### Other issues considered

The JACO determined a number of cases which concerned the interface between judicial decisions and case management on one hand and personal conduct on the other. These can be divided into 2 broad categories:

- the handling of allegations that Judicial Office Holders' decisions and case management were so inconsistent with what was expected as to amount to misconduct. This included allegations that Coroners had acted inappropriately in sanctioning a lawyer for a party to an Inquest or had breached the requirements of the Coroners Rules; that Judicial Office Holders' decisions were so unfair and inconsistent with the evidence as to raise a question of misconduct, in some instances breaching the terms of the "Guide to Judicial Conduct" or could only have been made because the Tribunal were corrupt; and questions as to whether a series of "robust" case management decisions might become misconduct. The JACO found that in such instances the complainants were essentially arguing that judicial decisions or judicial case management were incorrect, which is not something that can be done under the regulated disciplinary function. He also noted that the "Guide to Judicial Conduct" is issued by the Judges Council and does not form a part of the regulated disciplinary function and so there was no requirement on First-Tier Bodies to assess allegations that judicial decisions and judicial case management ran contrary to the requirements of the Guide and that JCIO guidance required that allegations of corruption should be made to the Police; and

- the handling of complaints in which First-Tier Bodies had found that allegations described in such a way as to appear to question a Judicial Office Holders' behaviour did not raise a question of misconduct. This included allegations of aggressive, humiliating or bullying behaviour; hostility or rudeness; and shouting. The JACO did not find maladministration if it was clear from information provided, either with the initial complaint or in response to a request for further particularisation, that the detail of allegations actually related to judicial decisions or judicial case management.

The JACO also considered complaints and other correspondence which raised issues regarding:

- the process in assessing a complaint that a Judicial Office Holder had made disparaging comments about a lawyer involved in a case;
- whether the JCIO should consider a number of minor points in totality rather than individually;
- how the JCIO considers recusal issues, including whether the onus was on the complainant to provide evidence to support an allegation of a conflict of interest or on the JCIO to conduct an investigation on the basis of supposition;
- whether a JCIO caseworker was rude during a telephone conversation with a complainant;
- the process by which complaints and other correspondence which raised issues of criminal behaviour (including corruption in a Tribunal's decision); and whether a transcript had been fraudulently amended. In this context the JACO noted that the JCIO's website stated that allegations of criminal behaviour should be referred to the Police and agrees that First-Tier Judicial Bodies are not equipped to consider such matters;
- concerns about the process involved in considering new evidence submitted after the original event; and
- the problems faced by Investigating Judicial Office Holders handling complaints in which complainants submit large volumes of material, of which a significant amount is assessed as relating to a Judicial decisions or case management.

### *Redress*

The JACO did not uphold any complaints regarding the appointments process. Nor did he identify any issues in the JAC's processes that might warrant an apology or other redress.

Section 111 of the Constitutional Reform Act 2005 enables the JACO to set aside a determination in respect of a Judicial Conduct matter if he finds that there was maladministration that renders the original decision unreliable. In 2017/18:

- the JACO exercised that power in 3 cases. In each of these the First-Tier Body had agreed before the conclusion of the JACO investigation to reconsider the complaint against the Judicial Office Holder in question;
- in 1 case the First-Tier Body accepted that it had dismissed the complaint under the wrong Rule and explained what Rule the complaint should have been dismissed under. It also offered to write to the complainant to apologise and better explain its decision. The JACO accepted that the ultimate decision to dismiss the complaint was not unsafe and accepted that the complaint could not have been taken forward in any event;
- in 1 case the First-Tier Body conducted further investigations during the JACO complaint and found that there was no evidence of misconduct. This concerned a case in which the JACO raised enquiries as to what would constitute an acceptable comment as part of a judicial decision. The JACO subsequently listened to the recording of the hearing. The JACO was content that, in looking at the matter again, the First-Tier Body made took appropriate and proportionate steps to show that the judicial office holder had not laughed about the details of the case but rather expressed a view on the matter. The JACO accepted that it is an important part of the judicial function is to form and express an opinion of the case and parties before them in court and that the JACO's subsequent investigation in listening to the recording shows that this is what the judge did.
- the JACO partially upheld 1 case because there was excessive delay in concluding the matter, but he did not consider any redress was required because the First-Tier Body already provided the complainant with an explanation and an apology;
- there was 1 case in which the JACO identified maladministration in that a First-Tier Body failed to take adequate steps to verify information. He found, on balance, that the complainant (who had been a Judicial Office Holder at the time) had not received a fair hearing but that, taking account of the length of time that had passed, it would not be possible to conduct a rigorous and demonstrably fair re-investigation, which might ultimately impact negatively on the complainant. He therefore found that it would be disproportionate to require that matters be reconsidered. The JACO recommended that the First-Tier Body apologise; and
- there was a further case the JACO partially upheld on the basis that the complainant, who was a Judicial Office Holder whose actions had been considered under the regulated disciplinary function, was not kept properly informed of the position of the investigation and several pieces of correspondence from him went unanswered for months. The JACO did not recommend any redress as the maladministration he identified did not render the decision reached unreliable.

The JACO did not recommend payment of any monetary compensation during 2017/18.



The JACO does not have powers to require redress in respect of cases in which he does not find maladministration. However, he may suggest an apology or other form of redress if there have been minor problems during an investigation process. There were 8 cases in which the relevant First-Tier Body had already apologised for minor issues with correspondence or delay that did not cause the JACO to find maladministration. The JACO found that the apologies already provided were sufficient.

#### *Preventing a recurrence of concerns identified during JACO investigations*

The JACO will consider making recommendations for systemic change in respect of concerns identified during his investigations, regardless of whether he found maladministration. Recommendations made during 2017/18 included:

- the JACO did not uphold concerns about JCIO delays, however, he recommended that the JCIO considers how to best to manage expectations of parties to a complaint regarding the likely time to respond to complaints, and post complaint correspondence, in busy periods; he further recommended that it should alert parties to instances where it will not meet a deadline or anticipated target response date;
- a recommendation that First-Tier Bodies routinely refer complainants to JACO's role and remit at the conclusion of First-Tier investigations;
- a recommendation that Investigating Judicial Office Holders provide email addresses and encourage use of email when corresponding with complainants overseas; otherwise deadlines are very difficult to adhere to; and
- there was 1 case that the JACO observed that the subject of disciplinary proceedings was only given just over a week to provide written representations to a disciplinary panel. While the JACO found that the short timescale did not amount to maladministration and that it did not make the decision unreliable he recommended that Rules should specify the length of time allowed for Judicial Office Holders whose position is to be considered by a Disciplinary Panel to provide written representations. He also recommended that the time allowed should be at least 10 working days.

#### *Post investigation correspondence and challenges to JACO decisions*

During 2017/18 the JACO responded to 16 pieces of correspondence sent in response to reports that were finalised following a full review. There were no instances in which he altered his findings or reopened an investigation in the light of this correspondence. There have been no successful legal challenges to the Ombudsman's decisions, either in 2017/18 or in previous years.

## **Analysis**

The number of complaints and enquiries made to the JACO Office during 2017/18 was slightly higher than the figure in 2016/17 and the JACO Office noticed that it received an increasing volume of correspondence from a small number of people

submitting multiple pieces of correspondence, often relating to their litigation and other issues, much of which clearly falls outside the JACO remit. The JCIO's 2016/17 Annual Report records that it received more than 2,100 complaints in that year, plus about 500 enquiries (there are no published figures in respect of complaints made to Advisory Committees and Tribunals).

The number of complaints and enquiries made to the JCIO and to the JACO Office (as well as the multiple pieces of correspondence received) indicates that there is a considerable number of people who are dissatisfied with aspects of the legal and judicial process and may turn to the conduct process, and subsequently the JACO, often as a last resort. This does not mean that such matters can be considered. Indeed, the JCIO's 2016/17 Annual Report recorded that about 60% of its complaints were either rejected on the basis that they did not contain an allegation of misconduct or dismissed on the basis that there were about judicial decisions or judicial case management and did not raise a question of misconduct. It is similarly the case that most of the complaints and enquiries made to the JACO Office either fall outside the JACO remit or did not result in a complaint that the JACO can consider.

The number of complaints that the JACO determined following a preliminary investigation or a full review increased. However, the number of complaints upheld or partially upheld during 2017/18 decreased by 10 from the previous year to 8. The most significant decrease was in respect of matters handled by Advisory Committees.

It is inevitable that the focus of this chapter (and the case studies at Annex B) is largely on the small proportion of cases in which the JACO had concerns. The overall incidence of maladministration remains very low:

- the JACO did not identify any instances of maladministration in respect of the JAC's actions; and
- the JACO determined approximately 300 conduct cases at either preliminary or full investigation. Less than 3% of these were upheld.

At the end of March 2018, the JACO was awaiting a response to draft reports which he had referred to the Lord Chancellor and Lord Chief Justice under section 112 of the Constitutional Reform Act 2005. He was minded to find maladministration in 9 of these cases. It is possible that the number of upheld complaints would be higher if a response had been received and the cases determined. Even if the JACO had upheld these cases the incidence of JCIO maladministration would, in broad terms equate to approximately 0.5% of the JCIO's complaint caseload. It is not possible to provide an equivalent figure for cases handled by Tribunals or Advisory Committees.

# Complainants and stakeholders

The JACO and his Office have maintained good working relationships with stakeholders, including the MoJ and the First Tier Bodies whose processes the JACO reviews.

In November 2017 the JACO provided the Lord Chancellor and Lord Chief Justice with a report covering his work in the six months from April to September 2017. This was in accordance with the Memorandum of Understanding between the JACO Office and the MoJ.

The JACO has discussed issues arising from his remit and individual cases with senior MoJ Officials. It was not possible to arrange the usual annual “trilateral” discussion between the JACO, the Lord Chancellor and the Lord Chief Justice.

The JACO, and officials in his Office have:

- presented at an MoJ event to encourage more applications for public appointments with particular emphasis on increasing the diversity of applicants;
- responded to an MoJ consultation on proposed changes to Advisory Committees’ organisation, management and functions. This included issues regarding the most appropriate structure for handling concerns about Magistrates’ actions under the Judicial Conduct arrangements;
- met and discussed issues of mutual interest with the Vice Chairwoman of the Judicial Commission of the Republic of Indonesia, accompanied by representatives of the Indonesian Embassy in London, as well as officials from the Office of the Ombudsman of Botswana; and
- participated in training for Tribunal Investigating Judicial Office Holders on the Judicial Conduct arrangements. These sessions were run by the Presidents of the Immigration and Asylum Chamber and the Social Entitlement Chamber.

## **Assistance with the complaints process**

The JACO Office receives many telephone and other enquiries, including from people who have yet to submit a First-Tier complaint and/or whose concerns may well fall to be classed as not raising a question of misconduct. Wherever appropriate JACO Office staff will both explain the JACO remit and either provide information about the scope of the First-Tier Bodies’ investigation function or direct people to where such information might be found.

The JACO and the JACO Office require that complaints are submitted in writing and that complainants provide permission to disclose their complaint to the relevant First Tier Body and for that Body to provide the appropriate papers to the

Ombudsman's Office. The JACO Office is aware of its responsibilities under the Equality Act 2010 and is keen to ensure that this requirement does not prevent people who may have difficulties in writing from accessing the JACO service. The JACO Office developed an "Easy Read" conduct complaint form in 2016/17 which is proving successful and it takes reasonable steps to enable people who are unable to submit a complaint in writing to set out concerns orally and ask them to indicate whether a note recorded during the conversation is complete and accurate.

The JACO Office will consider any other requests for reasonable adjustments that would enable people to access the JACO service.

### **Complaints and compliments received**

The JACO Office received a number of complaints about the level of service provided and it is aware of instances in which the level of service provided fell below the level expected:

- there were 2 instances in which information provided in updates was either slightly inaccurate, could have been fuller or was confusing, creating an impression that the JACO's investigation was further advanced than it was;
- there was 1 instance in which the JACO Office's responses to e-mails did not include the promised information;
- there was 1 instance in which information that was sent in a correctly addressed e-mail was not received. As a result the case was not progressed until the complainant made contact to ask why he had heard nothing;
- there were 5 instances in which correspondence sent to the JACO Office was not processed, including when correspondence was simply "missed"; and
- there were 5 instances in which responses to requests for information were sent outside the timeframes set out in the Data Protection Act 1998 and the Freedom of Information Act 2000. In addition, an Information Commission's decision, in respect of a request considered during 2016/17, noted that it had taken longer than stipulated to conduct an internal review in a previous year.

The JACO Office apologised for these shortcomings and, where appropriate, took steps to expedite consideration of the concerns raised and introduce measures to prevent a recurrence.

The JACO Office also received correspondence expressing other concerns, including that complainants were not given an adequate opportunity to particularise concerns for the Ombudsman's consideration; the opportunity to respond to comments made in respect of their concerns; about the length of time taken to progress investigations, including the length of time that elapsed between the point at which the JACO referred reports in draft to the Lord Chancellor and Lord Chief Justice and the extent to which the JACO Office had chased

responses. The JACO Office acknowledged that investigations can take time and that a wait at what would normally be the final stage in the investigation process was frustrating. It did not find that the service provided by the Office was at fault in these regards.

The JACO and the JACO Office also received compliments from complainants and others during 2017/18. These included an observation that the Investigating Officer who was considering someone's case seemed to be the only person taking complaints seriously. Other comments included:

*"Thank you sincerely for that thorough explanation of your role which I enjoyed reading. You have a very heavy weight and I admire you for holding this post."*

*"Many thanks to you and to the Ombudsman for your reports and for your hard work and for keeping me in the loop. Time to move on I suppose."*

*"May I take the opportunity of thanking you for your progress bulletins over so long a period."*

*"I wish to also thank you, on behalf of [...], for being so generous with your time. We had an insightful session with you and the Ombudsman as well."*

## Corporate Governance

### **Status of JACO Office**

The JACO Office is an independent Arm's Length Body that is sponsored by the MoJ. It is funded from moneys voted to the MoJ, which also provides a range of support services, including accommodation, IT, telephony and some legal support services. This is in accordance with the requirements of schedule 13 to the Constitutional Reform Act 2005.

JACO Office Officials have regular meetings with the MoJ Sponsorship Teams to discuss budgeting issues and the Office's performance. Officials also participate in MoJ groups discussing matters such as Information Assurance (including preparation for the May 2018 implementation of the European Union General Data Protection Regulation), security, health and safety and the provision of services and support to Arm's Length Bodies. These are useful and constructive discussions.

### **Financial resources**

The JACO Office is committed to managing its resources effectively. It has sound and appropriate financial and governance arrangements in place, including reporting regularly to the MoJ's Finance and Sponsorship Teams on how actual expenditure compares with the budget. These controls have enabled the key business targets to be met within the constraints of the budget agreed with the MoJ.

Outturn expenditure in 2017/18 amounted to approximately 403k, which was £15k less than the Office Budget. This is the twelfth year in which the JACO Office's outturn expenditure has been less than budgeted.

The JACO Office made one ex-gratia payment of £50 during 2017/18.

The JACO Office budget for 2018/19 is £423k. The extent to which the JACO Office needs Government Legal Department assistance, and therefore the extent of expenditure in this area, is extremely unpredictable. The unpredictable nature of the need for this support is the single factor most likely to mean that the JACO Office might, in future, exceed its budget.

### **Staff resources**

The Ombudsman holds a public appointment. There were no instances during 2017/18 in which the Lord Chancellor appointed a Temporary Ombudsman to consider a specific case. The JACO Office has sought assistance from the

Government Legal Department where necessary but has not engaged any other consultants or agency workers during 2017/18.

JACO Office staff are Civil Servants, engaged and appraised under MoJ terms and conditions. They are based in the MoJ headquarters at 102 Petty France. The JACO Office has encouraged flexible and remote working where this can be done without compromising the security of information held and the need to provide a “customer facing” organisation.

The JACO Office comprises a Band B Head of Office (also a Senior Investigating Officer); a Band B Office Manager; 5 Band C Investigating Officers (4.6 Full Time Equivalent) and a Band E Administrative Officer. All staff have been with the Office for at least 2 years and 4 have been with the Office since its inception in 2006.

On average the JACO Office lost less than 2 days per member of staff to sickness during 2017/18.

No compensation or exit payments were made to staff during 2017/18.

## **MoJ Corporate plans and longer-term expenditure trends**

The JACO Office provides input into the development of MoJ “broad brush” corporate plans and policies to the extent that they relate to issues within the JACO remit and to a degree that is consistent with the JACO’s status as an independent public appointee and of the JACO as an independent Arm’s Length Body.

The JACO Office has provided input to MoJ discussions about long term expenditure trends and will continue to do so.

JACO Office expenditure reduced by about £140k between 2013/14 and 2016/17 following a staffing restructure and the current Ombudsman’s appointment. Staff costs made up approximately 90% of the JACO Office expenditure during 2017/18 and it would be difficult to deliver further significant reductions in expenditure without reducing staffing levels.

## **Accommodation and IT**

The JACO Office IT was upgraded during 2017/18, as part of a wider IT upgrade across MoJ.

The JACO Office contributed to the MoJ’s plans to reduce its Whitehall footprint by moving on 3 occasions during 2017/18 to different locations within the MoJ’s Headquarters. In future the JACO Office might need to increase flexible working to make greater use of existing office space, taking account of the need to continue to provide a “customer facing” organisation.

## **Training and development**

Staff in the JACO Office are trained to carry out their responsibilities and have a high level of complaints investigation experience. All JACO Office staff hold a level 7 BTEC Advanced Professional Award in Complaints Handling and Investigations.

## **Information Assurance and preparation for the European Union General Data Protection Regulation**

The JACO Office holds a range of personal information, some of which would be classed as sensitive personal information. It includes data relating to complainants, First-Tier Body complaint investigations and Judicial Office Holders whose actions were considered by First-Tier Bodies. The need to ensure the security of this information remains a key priority. JACO Office staff participate in discussions at which Senior Information Risk Owners within Arm's Length Bodies discuss information assurance issues.

The JACO Office seeks permission from complainants to disclose their complaint to the relevant First-Tier Bodies and for those bodies to pass the relevant file to the JACO Office. It only processes personal data to enable the Ombudsman to carry out his statutory functions, as set down in the Constitutional Reform Act 2005.

As part of its preparation for the European Union General Data Protection Regulation the JACO Office has:

- reviewed its assessment of the risks faced, ensuring that they fully cover information assurance risks. All JACO Office staff are fully aware of the need to safeguard information and the processes for doing so. This is particularly the case when working remotely;
- implemented a plan to ensure the timeous destruction of paper records in accordance with its agreed Records Retention and Disposition Schedule after ensuring that material which might be relevant to the Independent Inquiry into Child Sexual Abuse is retained; and
- drawn up a plan to ensure electronic records are similarly destroyed when no longer required.

There have been 3 minor information breaches during 2017/18. These have been discussed with the relevant MoJ Officials.

## **Other Statutory and MoJ Departmental requirements**

The JACO Office has local procedures in place to ensure compliance with Health and Safety legislation, staff security, IT Security and its own financial and risk management systems. Where appropriate these follow the relevant MoJ arrangements.



The JACO Office endeavours to respond appropriately to requests for information under the Freedom of Information Act 2000 and the Data Protection Act 1998 and it remains committed to disclosing whatever it can, in line with legislation. Considering such requests can be time consuming and the need to devote resources to doing so has, on occasion, delayed complaint investigation. There have been instances in which the JACO has not met with the requirements of the access legislation. These are covered in the discussion under “Complainants and Stakeholders”.

# Annexes

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## Annex A

### 2017/18 Statistics

#### Breakdown of complaints received

	Total number of complaints & enquiries received	Conduct- related cases received	Other enquiries received
April	73	48	25
May	103	73	30
June	80	47	33
July	67	42	25
August	71	44	27
September	72	51	21
October	85	53	32
November	79	56	23
December	54	29	25
January	89	56	33
February	76	45	31
March	86	58	28
	<b>Number of complaints &amp; enquiries</b>	<b>Conduct related cases</b>	<b>Other enquiries received</b>
<b>TOTALS</b>	<b>935</b>	<b>602</b>	<b>333</b>

#### Breakdown of conduct complaints received by First Tier organisation

Total Conduct related cases	Conduct cases relating to the JCIO	Conduct cases relating to Tribunals	Conduct cases relating to Advisory Committees
602	404	161	37

**Breakdown of cases finalised**

The first table on this page summarises the outcome of JACO cases by reference to the First-Tier Body initially responsible for considering concerns about a Judicial Office Holders' actions. It is recognised that the JCIO may have varying degrees of involvement with cases initially considered by Tribunals or Advisory Committees. This is reflected in the second table which provides a breakdown of the outcome of completed full investigations by reference to all First-Tier Bodies involved.

	Cases dealt with at 1st level – 'initial check'	Cases finalised at 2nd level – 'fast track'	Cases finalised following a 3rd level 'full Investigation'
Appointment	0	0	6
Conduct – relating to JCIO	281	127	40
Conduct – relating to Tribunals	134	86	27
Conduct – relating to Advisory Committees	37	7	6
<b>Total</b>	<b>452</b>	<b>220</b>	<b>79</b>

**Cases investigated, determined and finalised**

	Not upheld	Upheld and partially upheld	Total
Appointment	6 (100%)	0	6
Conduct – relating to JCIO	35 (87%)	5 (13%)	40
Conduct – relating to Tribunals	23 (92%)	1 (8%)	24
Conduct – relating to Advisory Committees	3 (100%)	0	3
Conduct – relating to Tribunals and JCIO	2 (67%)	1 (33%)	3
Conduct – relating to Advisory Committees and JCIO	2 (67%)	1 (33%)	3

## Annex B

# Case studies

The purpose of the Case Studies is to provide a brief summary of the type of issues and complaints which the JACO has determined following a full investigation, and to illustrate his approach in determining whether there was maladministration.

The Case Studies are extracts from finalised investigations. They are intended to highlight only the points of interest. They are not necessarily reflective of all measures complained about.

To ensure anonymity “he” has been used in lieu of “he/she” in the Case Studies (and throughout the report).

## The JACO's Judicial Conduct remit:

### Case Study 1 – JCIO

A complaint was made to the JCIO that an unnamed judge had: been abrupt and belittling; failed to listen carefully; did not allow the complainant to present his case fully; made inaccurate comments; and silenced him when he questioned their validity.

The JCIO rejected the complaint under Rule 8 of the Judicial Conduct (Judicial and other office holders) Rules 2014 on the basis that it did not contain an allegation of misconduct and that it concerned judicial case management and judicial decision making. The complainant wrote setting out his disagreement with the JCIO's decision and a JCIO senior manager subsequently informed him that the decision remained unchanged. The complainant then approached the JACO with concerns that the JCIO had incorrectly dismissed his complaint.

The JACO found that the JCIO had misrepresented the complainant's allegations. This was because it had summarised the complaint as being that the judge had been abrupt and belittling because he would not listen to the complainant properly and did not allow him to present his case. If this had been the case then it would have been reasonable to have classed the matters raised as being about the judge's case management or decisions.

However, this was not how the complaint was worded and it was clear to the JACO that the judge's alleged abrupt and belittling manner towards the complainant might have been separate from how the judge had managed the case. Although the difference in wording between the complaint and the JCIO's summary is small, it meant that the JCIO had effectively made an assumption about the circumstances in which the complainant believed the judge had been abrupt and belittling. This amounted to maladministration and rendered the decision unsafe.

The JACO set the decision aside using powers under Section 111(5) of the Constitutional Reform Act 2005. The JCIO agreed to re-open its investigation to ask the complainant to particularise his concerns and consider whether they raised a question of misconduct.

### **Case Study 2 – Tribunal**

This case concerned the process by which a Tribunal Investigating Judicial Office Holder had dismissed aspects of a complainant's concerns as insufficiently particularised. The complainant was concerned that the Investigating Judicial Office Holder had requested information but provided a deadline which had already passed as the Tribunal failed to put postage on its letter and when his solicitors complained about this they did not receive a response. The complainant also raised concerns that the complaint had not been dealt with properly and that his disability needs had not been accommodated and that this made it difficult to complain.

In this case the JACO found that the Investigating Judicial Office Holder requested further information from the complainant, seeking a response within the 15 working days specified in the Rules. Unfortunately, the Tribunal did not put sufficient postage on the letter which the complainant only received (having paid the excess postage) after the date by which a response had been requested was passed. When the complainant's solicitors wrote to the Tribunal about this it did not receive a response (the Investigating Judicial Office Holder subsequently stated that there was no evidence that the solicitors had been instructed to deal with the matter and that they had not responded to a request for information contained in the delayed letter). The JACO expressed concerns that:

- the Tribunal had not put sufficient postage on the letter; and
- the Tribunal had not replied to either the complainant or to the solicitors to confirm that the complainant could have more time to particularise his concerns.

The JACO did not uphold the complaint as he found that the failure to apply the correct postage was a simple administrative error and that the complainant had telephoned the Tribunal after having finally received the request and had promised to provide the information by the end of the week. In fact, the Investigating Judicial Office Holder allowed the complainant significantly more time to particularise his concerns, and a further opportunity after the complaint had been dismissed. The JACO was content that the complainant had had adequate opportunity to particularise his concerns and that the information provided was properly considered.

The JACO also found that the Investigating Judicial Office Holder had addressed the complainant's disability needs as he had agreed to a request for additional time at every stage during the investigation, and in post dismissal correspondence.

**Case Study 3 – Tribunal**

In this case the JACO considered the process by which an Investigating Judicial Office holder had considered a wide-ranging complaint which included allegations that the Tribunal medical member had failed to disclose a connection to the Respondent's Counsel and that the Tribunal Judge was hostile and had made a sarcastic comment to him.

The Investigating Judicial Office Holder investigated the complaint by seeking comments from the Tribunal Judge, medical member and lay member. The panel members all refuted the allegations made. The Investigating Judicial Office holder wrote to the complainant and responded to each of his points in some detail. He concluded that most of the allegations concerned judicial case management or judicial decision and did not raise any issue of misconduct and were dismissed under Rule 34(b) of the Judicial Conduct (Tribunals) Rules 2014. He concluded that the other matters raised that could potentially amount to misconduct were dismissed under Rule 34(g) as the Investigating Judicial Office Holder said he was satisfied that they were untrue, mistaken or misconceived or what happened did not amount to misconduct.

The complainant wrote to the Investigating Judicial Office Holder again and questioned the basis for the dismissal. It was at this point that he provided further information about the sarcastic comment that he alleges was made. The Investigating Judicial Office holder responded to say that he had already considered and dismissed the complaint and that the matter was at an end.

The complainant complained to the JACO that the Investigating Judicial Office Holder failed to investigate all aspects of his complaint properly, including the alleged sarcastic comment. The JACO found that the Investigating Judicial Office Holder had indeed included this comment in the matters that required further investigation and the Tribunal members had provided comments either to say they did not remember the comment being made or that it was not said in a sarcastic manner.

The JACO noted that when the complainant wrote to the Investigating Judicial Office Holder after the complaint was dismissed he provided further particularisation as to the alleged sarcastic comment including the context and precisely what had allegedly been said.

This office asked the Investigating Judicial Office Holder whether he considered that the complainant's further particularisation was material new evidence providing context to the allegation and whether it needed further consideration. The Investigating Judicial Office holder confirmed that he did not consider the further allegations properly amounted to new evidence as there was no reason why the complainant could not have put them forward when he was asked at the outset for full particulars of the allegations.



Rule 34 (h) requires Investigating Judicial office holder to dismiss complaints which have already been dealt with and do not raise any material new evidence. The JACO gave this matter careful consideration but was satisfied that it was reasonable that the Investigating Judicial Office holder did not consider information about the context to the matter as “material new evidence”. The JACO considered that the matter occurred in February 2014 and the context was not provided until November 2016. Rule 111 provides for a complaint to be re-opened if additional information comes to light that relates to judicial misconduct, is credible, has not already been considered and is sufficiently serious. The JACO was not persuaded that there was evidence of misconduct relating to this matter that was sufficiently serious to justify re-opening the case. On that basis he was satisfied that the ultimate decision to dismiss the complaint was not unsafe. He was content that an appropriate process had been followed and that there had not been any maladministration.

#### **Case Study 4 – Advisory Committee**

The case concerned an Advisory Committee's re-consideration of a case following a previous JACO investigation in 2016/17.

The case originated in a 2015 Magistrates' Court hearing at which the person accused of assaulting the complainant was acquitted. The complainant subsequently contacted the Advisory Committee making allegations which included that an unnamed Magistrate had accepted a bribe. The JACO found maladministration as the decision to dismiss the complaint had been made by an Advisory Committee Official rather than by the Advisory Committee Chairman or designated Deputy Chairman. He remitted the case back to the Advisory Committee which sent the complainant a letter stating that the Chairman had dismissed the complaint because it was vexatious and that it was without foundation.

The JACO noted that rule 32(d) of the Judicial Conduct (Magistrates) Rules 2014 requires Advisory Committees to dismiss complaints that are vexatious and that guidance on this provision referred to the dictionary definition of vexatious as relating to matters instituted without sufficient ground or simply to cause trouble or annoyance and that in many cases vexation is inferred from a pattern of past complaints and the absence of reasonable cause. He observed that it was necessary to take care when invoking this provision as its use calls the complainant's motives into question. He said that he was concerned that there appeared to be no specific assessment as to why the complaint fell into that category. He did not find maladministration as:

- the Advisory Committee stated in response to enquiries that the letter had been sent in error and that the Chairman had intended to dismiss the complaint on the basis that it was about a judicial decision or judicial case management and did not raise a question of misconduct. It was clear from the file that this was what had happened;
- the Advisory Committee Chairman subsequently apologised to the complainant and sent a revised letter in which the Chairman dismissed the complaint on the basis that it was about judicial decisions or judicial case management and did not raise a question of misconduct. The JACO was content that this assessment was, given the nature of concerns raised, consistent with the relevant legislation and guidance and that the Advisory Committee had correctly advised that concerns about criminal matters should be referred to the Police; and

- the letter dismissing the complaint as vexatious also stated that it was without foundation (an assessment which was consistent with Advisory Committee Chairman's second dismissal letter). He found, given the terms of the Advisory Committee Chairman's first dismissal letter, that the complainant could not have had a reasonable expectation that there was anything in the complaint that could be considered under the regulated disciplinary function.

The JACO said he appreciated that it would have been upsetting for the complainant to receive a letter describing his complaint as vexatious and found that the error in sending the wrong letter was careless. He did not find that it was maladministrative and he noted that the Advisory Committee had taken steps to prevent a recurrence.

## The JACO's Judicial Appointments remit

### Case Study 5 – the JAC

The JACO considered a complaint from an applicant in a selection exercise run by the JAC. The complainant had made a complaint to the JAC but this had not been upheld.

The applicant was an existing member of the judiciary and had received excellent markings in his annual appraisal. He had applied for a more senior post and believed that his legal and judicial experience together with his highly praised annual-assessments should have put him in a position where he proceeded to final selection. At the initial stage candidates were assessed by reference to the material provided in their application form and in a telephone assessment. The candidate was rejected at this stage and was not invited to the selection day.

The candidate was also concerned that additional information that he provided had not been taken into account. He said that it was not plausible that the JAC had found the requisite number of candidates who had provided greater evidence of meeting the competencies in a recent appraisal.

In his complaint to the JAC, the applicant provided a copy of his appraisal form and argued that the quotations in the self-assessment represented direct evidence. The JAC responded that only candidates who had been invited to selection days were asked to provide evidence from referees/ assessors and that at shortlisting stage panels have to make decisions based only on information requested. It would be disproportionate to ask all candidates to provide as much information as they would like to.

The JACO considered all the evidence on the application and the JAC complaint file. He also obtained comments from the JAC about its handling of the application. He did not uphold the complaint as:

- The JAC uses a competency based approach to selecting candidates. It provides advice on its website on the completion of the application including the need for the candidate to use examples which address the points raised in the description of the competency, and that the examples must clearly show a course of events in which the candidate successfully displays the competency. The guidance explains that this sifting system does not reward those who list an achievement without also showing how and why the candidate displayed the required competency, nor does it reward examples of routine day-to-day matters where a competency is not sufficiently demonstrated. The JACO is content that the competency based approach is fair as it opens competitions to good candidates from a variety of legal backgrounds and allows them to be assessed on a common basis, which assists in the recruitment of a diverse judiciary

- It was clear that those assessing the candidate had considered the evidence provided in the self-assessment, which included summary comments from the core qualities listed in his annual appraisal. The JAC's file indicates that the Panel which assessed the application in the light of the telephone assessment found that the applicant had demonstrated the competencies to a level that would make him suitable for appointment. However, the applications of all candidates whose applications proceeded to the selection day had been assessed as stronger overall.
- The JACO stated that it would have been unfair if 1 candidate had been able to provide additional information when this opportunity was not provided to other candidates.

The JACO concluded that the candidate had not been disadvantaged in the competition and that his complaint had been properly addressed by the JAC.

**Annex C****Summary of Performance against Business Plan targets**

Our strategic aim in undertaking independent investigations into complaints is to ensure that the processes for applying for Judicial Office and for dealing with complaints about Judicial Conduct are applied correctly and consistently. We will continue to deliver an effective, responsive and professional service in a timely, consistent and transparent manner.

Our first business objective is to provide a timely, consistent and transparent service to all our users. Our Performance Targets are:-

<b>PT 1</b> – to acknowledge receipt of all new complaints and correspondence from complainants, within 5 working days of receipt (100%).	<b>Not achieved (98%)</b>
<b>PT 2</b> – to deal with 90% of all correspondence received within 15 working days of receipt.	<b>Achieved (96%)</b>
<b>PT 3</b> – when a preliminary investigation is required to establish if the potential complaint is within the Ombudsman’s remit. We will conclude this evaluation and provide a full reply within 30 working days/6 weeks, in 90% of cases.	<b>Achieved (99%)</b>
<b>PT 4</b> – when a case is ready for investigation we will aim to keep all complainants fully informed on a monthly basis in 98% of cases.	<b>Achieved (98%)</b>
<b>PT 5</b> – we will publish our performance against these indicators in our Annual Report and on our website.	<b>Achieved</b>

**Our second business objective is to continue to improve our processes and our service delivery, to ensure we deliver an effective, responsive and professional service to all our users. Our Key Performance Indicators are:-**

to keep our working practices under review, striving for continuous improvement, in order to deliver the best possible service to our customers;

to ensure our leaflets and Website are up to date and reflective of our organisation. We welcome feedback from our customers about how we could improve our service, and will learn from any complaints that we receive about our service, doing our best to put things right;

to work creatively to build and maintain our capability to deliver a service that is efficient, responsive and professional. We will have the right people, processes and supporting infrastructure in place; value diversity and the importance of a work-life balance; identify and address any gaps in training and knowledge; and

to ensure that our staff maintain a high level of skill in Complaints Handling and Investigations.

**All Achieved**

**Our third business objective is to deliver our business in the most cost effective and efficient manner, and to operate efficiently. Our Key Performance Indicators are:-**

to operate within our budget, and in accordance with the relevant governance arrangements managing our risks and our information and to maintain constructive working relationships with all stakeholders.

**Achieved**

**Annex D****Forecast and Actual Expenditure**

	<b>Forecast</b>	<b>Actual</b>
Staff costs and salaries	397,000	394,651
Office expenditure, Accommodation, IT Services, Service costs and Miscellaneous	14,000	6,887
<b>Training</b>	<b>7,000</b>	<b>1,052</b>
<b>Total expenditure</b>	<b>418,000</b>	<b>402,590</b>



## Annex E

### Statistical Data 2011/2012 – 2017/2018

Financial year	2011/12	2012/13	2013/14	2014/15	2015/16	2016/17	2017/18
Cases determined	73	77	63	92	70	63	79
<b>Conduct</b> (JCIO, Tribunal, Advisory Committee)	14 upheld/ partial upheld 54 not upheld	23 upheld/ partial upheld 45 not upheld	23 upheld/ partial upheld 30 not upheld	25 upheld/ partial upheld 65 not upheld	10 upheld/ partial upheld 59 not upheld	18 upheld/ partially upheld 42 not upheld	8 upheld/ partially upheld 65 not upheld
<b>Appointment</b> (JAC)	2 upheld/ partial upheld 3 not upheld	2 upheld/ partial upheld 7 not upheld	2 upheld/ partial upheld 8 not upheld	2 not upheld	3 not upheld	3 not upheld	6 not upheld
<b>Ombudsman's Time</b> (Days per week)	2.5	3	3	3	3 days (until 25/01/16) 2 days ( wef 26/01/16)	2	2
<b>Staffing</b>	10 (9.4 FTE)	10 (9.4 FTE)	9 (8.4 FTE)	8 (7.5 FTE)	9 (wef 05/08/15) 8 FTE)	9 (8 FTE)	9 (8 FTE)
<b>Budget Forecast</b>	534,000	549,000	513,000	445,000	453,000	412,000	418,000
<b>Actual spend</b>	457,000	546,000	504,000	401,000	413,000	373,421	402,590





