

Judicial Complaints Reviewer

Second Annual Report

2012/2013

1st September 2012 to 31st August 2013



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Introduction

Now into my third and final year as Judicial Complaints Reviewer (JCR), I look back on a second year in which I hope I have contributed constructively to key issues in the field of judicial complaints and conduct. Whether my contribution came in the form of: conducting reviews and making suggestions for improving the complaints handling process; raising matters of concern with the Cabinet Secretary for Justice or the Lord President; giving evidence to the Scottish Parliament's Petitions Committee on the review process; or speaking to the media about my work, I have been busy addressing complaints handling issues with a view to improving the system for those who use it.

The role of JCR is independent of the judiciary and government, and the role-holder must be able to report honestly on the complaints process – based on the reviews that have been carried out – without fear or favour. In contributing to the debate others have initiated on the effectiveness or otherwise of the judicial complaints process, my aim is to highlight issues that will result in subsequent post-holders having a fuller part to play in the complaints process.

Appointed Scotland's first Judicial Complaints Reviewer in 2011, I published my first annual report in January 2013 for the period to August 31st 2012. The JCR has no independent power to publish reports¹ and may do so only if directed by Scottish Ministers. This year I asked the Cabinet Secretary for Justice for an open-ended direction to publish an annual report, which he issued. Now, successive JCRs will have a clear requirement to report annually. Stakeholders have a right to know about the work of public appointees: the publishing of an annual report is an important form of public accountability.

In my first report, the small number of reviews completed meant that I was unable to give a flavour of the cases I had reviewed. In this report you can read about recent reviews and the issues that have arisen as a result. I have also included quotes from individuals who have used my service, by way of giving a voice to real people who have first-hand experience of the judicial complaints process. I would have liked to reflect the voice of judicial office holders too, but I have not been asked to conduct any reviews on their behalf. Possible reasons for this are outlined later in this report.

¹ The Judiciary and Courts (Scotland) Act 2008 is ambiguous about the publication of annual reports. Scottish Ministers have clarified that the policy intention was that I would produce an annual report, although the JCR requires a Ministerial direction in order to do so.

I hope that you find this report informative, but I am happy to receive comments and feedback on what you would like to see next year to aid your understanding of the JCR's work.

Meantime, if you would like to know more about the JCR's remit, please take a look at my website:

www.judicialcomplaintsreviewer.org.uk or follow me on Twitter @JudicialScot.

Moi Ali
Judicial Complaints Reviewer
November 2013

An Overview of the Role and Remit of the Judicial Complaints Reviewer

Created by *The Judiciary and Courts (Scotland) Act 2008*, the role² of JCR involves reviewing the handling of complaints investigations into members of the judiciary – judges, sheriffs and justices of the peace – to ensure that they have been dealt with in accordance with the Rules³.

“I just wanted to say thank you for your efforts in taking forward our complaints ... [I] was very impressed at the time you have given it. It's refreshing to see someone with a voice to make a difference doing what they can to make that necessary change to the system. Keep up the good work and thanks again. We need more like you.”

I provide a free, impartial service to anyone who has made a complaint about a judicial office holder (JOH), who wishes its handling to be reviewed. My services are equally available to any JOH who has been the subject of an investigation. They may seek a review of the investigation process to ensure that it was conducted in accordance with the Rules. To date I have not provided

services to any JOHs, for reasons that are outlined in the Statistics section of this report.

The JCR must not be, among other things, a current or former judicial office holder, solicitor, advocate or barrister. You can read my biographical details in Appendix 1 of this report.

Time Commitment and Resources

It was originally envisaged that the JCR would work for 96 days a year on approximately 50 reviews, but the number of review requests received is less than this (I carried out 29 reviews and 13 substantive enquiries this year and carried over 4 reviews to 2013/14). Although fewer review requests have been received than was first envisaged, the resource allocation of 36 days per year is insufficient to cope with the demands on the service. During my first year I worked for approximately 44 days, claiming fees (of £209 per day) for 36 of those days. The rest of my input was unremunerated. This year I worked for 50 days and was remunerated for 41 (at £211 per day from July 1st 2013). There is an element of public service to this role, and the role-holder cannot expect to be recompensed for every hour spent undertaking this work. Equally, there is a need to ensure that the JCR's work is adequately resourced so that

“I compliment your office on the excellent and fair way my complaints [reviews] have been handled.”

² Although I am completely independent of the Lord President, Scottish Government and Scottish Ministers, I was appointed by Scottish Ministers with the Lord President's consent following a publicly advertised and open process.

³ Complaints about the Judiciary (Scotland) Rules 2011 and 2013

complainers can receive a prompt and thorough review of their cases, with no reviews carried over to the next year due to lack of resources. I recommend that Scottish Government consider resourcing the role according to demand, rather than limiting it by capping the number of days.

Budget

Concerns from the judiciary that my role was “likely to generate significant public expenditure” and “might

“Your videoed interview with the parliamentary committee was very revealing and I share the palpable shock displayed by the MSPs when they discovered your annual budget to be £2000. This is the value placed upon true access to justice in a country that has been described by the EU as having both the most expensive yet inefficient system in the Union..”

not be cost effective” have again proved unfounded this year. Despite a spike in the number of reviews completed, my annual budget remains at £2,000 to cover all of the running costs of my service bar any legal advice. I work from home but use the Scottish Legal Complaints Commission in Edinburgh as a postal address for correspondence. I have no staff and no administrative support.

My Remit

My remit is twofold: I may review investigations administered by the Judicial Office for Scotland to check that they have been carried out in accordance with the Lord President’s Rules; and I may “make written representations to the Lord President about procedures for handling the investigation of matters concerning the conduct of judicial office holders.” The Lord President, the head of the judiciary in Scotland, must have regard to my representations.

I have been criticised for expressing the limits of my powers in a negative way, but I maintain that people need to understand what I *cannot* do as well as what I can – because the expectation is sometimes that

“The office of the Judicial Complaints Reviewer should be given the power to intervene in any complaint as he/she sees fit - if they [the judiciary] have nothing to hide they have nothing to fear from such an arrangement.”

the JCR is a quasi-ombudsman who can obtain compensation, apologies or other redress for complainers, but I cannot. Nor can the JCR require a complaint to be reinvestigated or overturn a decision. The remit is limited to checking that the

Rules were followed, and making wider representations to the Lord President. That in itself is a valuable role, which I hope helps to improve the complaints process for others, but it is also a much smaller role than the public realises. I can make referrals to the Lord President where the Rules have been breached, and have done so, but it is for the Lord President to decide what to do with such referrals.

While some think that the role is wider than it is, others have questioned the purpose of a position with such limited powers. When the Bill to create the role was discussed at the Justice Committee, the Cabinet Secretary for Justice said that the proposal to have a JCR was “*beneficial and will protect us against the*

“I would also suggest that if there is an adverse finding by yourself [the JCR] while investigating a complaint then the Judiciary must abide by any recommendations you make... I see no point in an investigator with no teeth to follow through or make decisions... In this day and age I think a person looking at complaints and how the complainer was dealt with must be able to consider the original complaint and this is one change I would push for. It is not satisfactory for an investigator not to be able to consider the actual original complaints.

accusation that the system is simply about judges reviewing themselves to protect themselves” and that “the appointment of a judicial complaints reviewer is the appropriate way of ensuring public protection...we have to be able to satisfy the public that there is an element of independent scrutiny...that the public’s legitimate interest is protected...the role of the reviewer is to ensure that not only is justice being done but that it is seen to be done. They are not there to do anything other than ensure that the public interest is protected...they are

able to act as a check, on the public’s behalf”. Given the restrictions of the role as outlined in

this report, I have difficulty in providing the public with the necessary reassurance that the Cabinet Secretary envisaged when he made those comments. Is that being negative, or being honest?

The Wider Context: Conduct Complaints Reviews in the Rest of the United Kingdom

Scotland is ahead of Northern Ireland in that there, there is no mechanism for independent review. There is an ombudsman for judicial appointments but conduct complaints are handled by the Lord Chief Justice of Northern Ireland, who is the head of the judiciary and the equivalent of Scotland’s Lord President.

However, England and Wales set the standard for independent oversight. Since 2006 there has been a combined judicial conduct/appointments ombudsman, Sir John Brigstocke KCB, appointed to 2016. Part of his remit is to investigate concerns raised by a complainer, or a judicial office holder who has been the subject of a complaint, about how the complaint was handled by the Judicial Conduct Investigations Office⁴ (JCIO) (formerly the Office for Judicial Complaints). That element of his role is similar to my own, although

⁴ The JCIO is the body which deals with complaints about the judiciary in England and Wales and supports the Lord Chancellor and the Lord Chief Justice (the head of the judiciary) in their joint responsibility for judicial discipline. It seeks to ensure that all judicial disciplinary issues are dealt with consistently, fairly and efficiently. The JCIO can only deal with complaints about a judicial office-holder’s personal conduct and cannot consider complaints about judicial decisions or about case management.

as an ombudsman, he has much wider powers to look at maladministration and to make recommendations for redress, including compensation. He may also set aside the original decision and direct a new review to be undertaken, but in Scotland that power lies with the Lord President.

The Ombudsman may also investigate 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 their subsequent complaint to the Judicial Appointments Commission, was handled. In Scotland that part of his role is handled by the Scottish Public Services Ombudsman.

What Happens to a Review Request?

Review requests can be made by post, email or via the Judicial Complaints Reviewer's website. Once a request has been acknowledged and I have established that it falls within my remit, I assign it a reference number, set up a case file and inform the Judicial Office. When I am ready to begin my review, I ask the Judicial Office for Scotland to send me their complaint file.

Taking into account all of the information that I have before me, I carefully review the case file⁵ and compare what happened against what the Rules require in those circumstances. The Rules, which were drawn up for the Lord President, are a numbered instructions setting out what happens when a complaint arrives, what tests it must meet in order to be accepted, and what happens during an investigation and afterwards. My review is a retrospective review of the documentation relating to a complaint, but sometimes I need to correspond with or to meet with the Judicial Office to gain a better understanding of the case or to discuss some of the wider issues arising from it.

My review report sets out the numbered Rules, what should have happened, and what did happen, in an attempt to walk the complainer through the correct procedure. Once my review is complete, my draft report is sent to the Judicial Office for comments as to factual accuracy. My final report goes to the complainer and is copied to the Judicial Office for information. Where I find that the Rules were not followed, I also send a copy of my report to the Lord President, drawing his attention to any breaches and wider recommendations.

Even where I find that the Rules were followed, there may be issues around how the case was handled which need to be addressed. You can read more about some of these wider issues in the Case Histories

⁵ I regard the case file provided to me as incomplete. It contains correspondence between the complainer and Judicial Office, but correspondence between the Judicial Office, Disciplinary Judge, Nominated Judge or Lord President about the case is not included.

section of this report. In such cases I bring these the attention of either the Judicial Office – if they are straightforward operational matters – or, if the issues are more fundamental, I write to the Lord President. I also bring to the Lord President’s attention any issues relating to the Rules. In this way, the service for others can be improved.

Between October and December 2013 the Lord President consulted on a revised set of complaints Rules. I undertook my own mini-consultation to inform my formal response to that consultation. You can read about that in next year’s report.

Testing the Rules: A Summary of Year 2

During my first year the focus was on establishing my office; understanding the legislation and establishing the limits of my remit; drawing up policies, procedures and protocols; setting up systems; drafting standard letters; creating a website and a review request proforma; and meeting stakeholders – including Scottish judicial office holders, officials in my English counterpart's office, and the Scottish Public Services Ombudsman – as well as undertaking reviews, of course, and producing my first annual report.

This year everything was in place, allowing me time to tackle the backlog of reviews which built up very quickly, and trying to balance the demands of a growing case load with the other requirements of the role. It has been a challenge fitting it into the allocated number of days. My aim this year was to reduce the time between receiving a review request and completing the review: this was achieved in some cases. However, the reality remains that the tight resource allocation makes backlogs an inevitability.

Stakeholder Meetings

As in my first year, I continued to meet with Scottish Government officials as necessary, and my regular quarterly meetings with the Judicial Office for Scotland continued, as well as any case meetings as required. It is always better to discuss complex or disputed cases face-to-face than through an exchange of written correspondence. I also had a meeting with the Lord President.

"I just wanted to email you in order to say a massive well done... You said you would continue to investigate the matter in our last correspondence and you are very much a woman of your word... I actually felt as if my complaint had been taken seriously and this is what I aimed to achieve, for that I would like to thank you. I hope and pray there is a positive outcome to your investigation, one that will ensure these people held in high esteem by the public in general, are made aware that their negative behaviour is not acceptable and will not be tolerated. Once again many thanks."

Regrettably my hopes of having networking meetings with a wide range of stakeholders did not materialise due to time pressures. I would have liked to have spent time again this year explaining my work to the judiciary, and to consumer organisations.

I have begun using social media in an attempt to keep people informed of my work, and to create a two-way mechanism for the public to

comment on relevant issues. For example, I used

Twitter to seek people's views on a register of interests for the judiciary, and to encourage people to respond directly to the Lord President's consultation on the proposed new complaints Rules.

It is vital that the JCR is able to engage with other independent reviewers across the UK to discuss key issues in complaints handling, to ensure that the citizens of Scotland benefit from the very best practice in complaints handling and review. I have been unable to undertake any dialogue with others in the field, or to attend any training or development due to lack of time. This is unlikely to change in the coming year and remains a concern, because the JCR must be able to speak with the authority that comes from an awareness of and involvement in contemporary complaints handling practice in other spheres of public life.

Memorandum of Understanding

During the year the Judicial Office and I signed a Memorandum of Understanding (MoU), a helpful document which sets out our respective roles, responsibilities and agreed undertakings. I had hoped to get this agreed during my first year but an *impasse* around the contents of complaints files prevented agreement. (The Judicial Office file I receive is in my view incomplete. It contains correspondence between themselves and the complainer, but I do not see any correspondence or advice about the case between the Judicial Office and the disciplinary judge, nominated judge and Lord President). To enable the signing of the MoU, we agreed a form of words acceptable to both sides although the situation regarding the contents of files has not been resolved to my satisfaction.

In order to fulfil my remit – both of conducting reviews and of making wider recommendations on complaints handling – I need to see complete complaints files. There have been occasions when my reviews have been hindered by incomplete files (such as the case of Mr A – see the Case Histories section). Without access to all the documentation, I may not pick up on key complaints handling issues, thus hampering my ability to “make written representations to the Lord President about procedures for the investigation of matters concerning the conduct of judicial office holders” as required by the Act. I have no power to demand complete files, and have to undertake reviews without all of the paperwork relating to the complaint. I inform complainers of the situation, but there is nothing more that I can do.

The Lord President’s Rules govern how complaints are handled. A review of the Rules due in summer 2012 was delayed until October 2013 to allow a better understanding of how the Rules operate in practice. I will provide a summary of my response⁶ to this consultation in my next annual report, when I will also report on my own mini consultation with those who have used the complaints Rules. I wrote to everyone who sought a complaints review, seeking first-hand user feedback.

⁶ My full response was published on my website in December 2013

Register of Interests

I was invited to submit written evidence to the Scottish Parliament's Petitions Committee on a register of interests for the judiciary and I did so in May. I supported the view of the petitioner, Peter Cherbi, that a

"I just wanted to say that I thought your appearance before the petitions committee was a job well done. Conduct issues relating to the judiciary are sensitive and difficult to discuss in a balanced way. I thought your evidence was both forceful and fair... I think you have taken on a very difficult role – one which the judiciary of course didn't want which perhaps explains some of the resistance you are encountering."

register of interests would increase the transparency of the judiciary and ensure public confidence in the judiciary's actions and decisions. Responses from the Lord President, the Law Society of Scotland and the Scottish Government suggested that a register of interests is unnecessary because, among other things, the complaints process is a

safeguard. As Judicial Complaints Reviewer, I believe that some of the necessary independent safeguards are missing from the complaints process. In any event, registers of interest are now a normal part of public life. We are fortunate to have an independent judiciary, whose independence must never be undermined. However, independence must not be confused with lack of accountability. Better transparency would enhance the judiciary's standing and bring parity between judicial office holders and other holders of important roles in public life. Although not required to do so, I prepared my own register of interests in May 2013, which was publicised using social media, is published on my website and also reproduced in this report. I believe that the JCR should be required to publish their interests, either by legislation or as a requirement set out in their letter of appointment from the Minister. Their independent oversight role makes the publication of their interests all the more important.

I suggested in my evidence that any judicial register of interests should not be limited to pecuniary interests, but should also encompass non-financial interests such as memberships, unpaid trusteeships, and any relevant close family/friendship links that may be perceived as a potential conflict of interest. I based my comments on the cases that I have reviewed and the nature of the original complaints raised. I followed up in September with oral evidence and further written evidence, an account of which will be given next year.

Media Interest

To date I have had no time to engage in any proactive media work, and have not initiated any media coverage, but I have responded to media enquiries. There has been ongoing interest in my work from the Sunday Mail and the Sunday Herald, and although coverage is sometimes inevitably sensationalised,

media exposure is helpful in promoting the complaints process more widely and the need for powerful, independent oversight of it.

Follow up and “Third Parties”

During the year I carried out a review and referred the case to the Lord President, as I determined that the dismissed complaint should not have been thrown out without investigation. This resulted in an investigation (see Case Histories section, Mrs L, Case 27), but the Lord President informed me that “third parties” such as the JCR could not be given information relating to outcomes for reasons of confidentiality.

As my role is an integral part of the complaints process, it is reasonable to expect to be informed of the outcome of my referrals, especially as I have already seen the full details of each complaint. While the Act does not require that follow-up information *must* be shared with me, it does not preclude it. The Rules drawn up by the Lord President state that “the Lord President may publish or disclose to any person such information concerning the whole matter [of the complaints investigation]... as he or she considers appropriate”.

In the past I have been told the outcome of my referrals. For example, I reported a case last year in which I made a referral to the Lord President, who revoked part of the original complaint determination and referred it to the disciplinary judge, who then dismissed the complaint. This year the case of Mr A (see Case Histories section, Case 1) and Mr B (Case 5) are further examples of where I have been informed of the outcome of my referral. I am unclear as to why there is now less transparency and have received no explanation as yet.

In England and Wales, the outcomes of investigations, when upheld, are published on the Judicial Conduct and Investigations Office’s (JCIO) website, yet it manages to do so while complying with the requirements of Data Protection legislation.

Complaints about the Lord President

During the year I received correspondence from three individuals regarding complaints about the Lord President (see Case Histories section). One wrote to inform me that the Rules appear not to allow complaints about the Lord President. While I was looking into the matter, two individuals unconnected with that enquiry wrote to me with complaints about the conduct of the Lord President when sitting in the Court of Session as a judge (they were not aware that the judge in question was the Lord President, nor that complaints about the Lord President could not be made under the Rules).

Normally I refer complaints to the Judicial Office (as I only review their handling). However, there was little point in referring complaints that I knew could not be considered under the Rules. I wrote explaining the situation to the individuals. They felt that they had been denied redress through the complaints system and expressed the view that the head of the judiciary should be subject to the same rules as those beneath him, and that the public should not be denied access to the complaints process just because their judge happened to be the most senior one.

I share their concerns. A fair, independent and proportionate procedure for investigating complaints about the Lord President would enhance public trust and confidence in the judiciary among the public, and would be in the interests of natural justice.

I discussed this with the Judicial Office and officials at Scottish Government. I also took Senior Counsel's advice and I raised the issue both with the Lord President and the Cabinet Secretary for Justice. Regrettably the view is that this matter does not need to be addressed, as the Act⁷ allows for consideration of matters concerning *fitness for office* of the Lord President. However, there is no procedure for members of the public to make complaints about matters that are not of a removal-from-office magnitude. I originally considered asking the Lord President to amend the Rules to allow for conduct complaints about the Lord President to be considered, but my legal advice pointed out that Section 29 of the Act on the imposition of sanctions means that even if the Rules were amended to allow for the independent investigation of complaints about the Lord President (as happens in Northern Ireland), only the Lord President may impose sanctions (in this case, on himself).

⁷ Judiciary and Courts (Scotland) Act 2008, at Section 35

Statistics: September 1st 2012 to August 31st 2013

During the year I received 30 new review request letters⁸ and I undertook 29 reviews, including those carried over from my first year.

Not all review requests that came in during the year were completed by the end of August 2013, my year-end. By the end of the second year, 4 reviews remained outstanding and were carried over to be completed in 2013/14. I will report more fully in my next annual report on these reviews.

Of the 29 reviews completed during the second year, I found 20 breaches of the Rules and one possible breach. Most of the breaches were minor in nature, but not all. You can read more detail in the Case Histories section.

Table 1: Enquiries, Review Requests and Completions Year 1: 2011/12

Review requests received 2011/12	Reviews completed 2011/12	Enquiries received 2011/12	Reviews carried over from 2011/12 completed 2012/13
9 letters involving 20 reviews	4 letters involving 4 reviews	3 – all completed in-year	5 letters involving 16 reviews

Table 2: Enquiries, Review Requests and Completions Year 2: 2012/13

Carried over reviews completed 2012/13	Review requests received 2012/13	Total reviews completed in 2012/13	Enquiries received 2012/13	Reviews received 2012/13 carried over to 2013/14
5 letters involving 16 reviews.	30 letters made up as follows: 13 later withdrawn 7 not in my remit. Dealt with as enquiries	29 made up as follows: 5 letters/16 reviews carried over from 2011/12: 10 breaches 10 letters/13 reviews from 2012/13: 10 definite breaches and one possible breach	13 made up as follows: 6 (enquiries) 7 review requests dealt with as enquiries due to not being within my remit	4

⁸ One letter may involve reviews of several different complaints made at different dates against different judicial office holders by one person. For this reason, I have recorded both the number of reviews undertaken and the number of letters seeking a review.

All review requests received during 2011/12 and 2012/13 came from members of the public. I received no requests from judicial office holders.

During this period I also received 13 enquiries, all of which were dealt with during the year. As in the first year, there continues to be a high level of often time-consuming post-review correspondence (correspondence from complainers who wish to follow-up on my final determination, to ask questions, or to raise new points).

I have not been able to accept all review requests, as 7 were outwith my remit. For example, in one case a complainer asked me to review his complaint because he had heard nothing from the Judicial Office. I wrote to the Judicial Office, and it transpired that his complaint has gone to the wrong department. His complaint was subsequently dealt with. In another case, I was asked to review a complaint that had not yet completed the complaints process, so I was unable to accept it and classified it as an enquiry.

When a complainer writes to me, by way of managing expectations and in accordance with best practice, I make clear which parts of their request I can take further and which bits are beyond my remit.

Statistics in Context

To place the JCR's statistics in a wider context it is helpful to look at judicial conduct complaints reviews in England and Wales, and at the Judicial Office for Scotland's complaints handling statistics for the last two years, since this new system came into force.

Compared with England and Wales, the number of review requests appears small. My counterpart in England and Wales, the Ombudsman Sir John Brigstocke KCB, received 466 complaints in 2011/12 (up 38% on the previous year) and 482 conduct complaints and enquiries this year. However, given that the population size of England and Wales is some ten times the size of Scotland's, *pro rata* this is roughly in line with the number of review requests and enquiries I received this year (42) – and Sir John's service is a long-established one which has been running for seven years now, whereas the Scottish JCR role is still relatively new.

Judicial Office for Scotland Statistics

For the first year in which the Rules were in operation (a 13-month period to 31st March 2012), 107 conduct complaints were made to the Judicial Office for Scotland about judicial office holders. 98 of the 107 complaints were completed during that year. With one exception, all of them were dismissed for various reasons before they reached the investigation stage (they were deemed to be out of time, to be primarily about judicial decisions, to be insubstantial and so on). Only one complaints investigation was carried out, following which the complaint was dismissed as "unsubstantiated".

The latest statistics published by the Judicial Office (for Year 2, to March 31st 2013) show that 114 complaints were made (plus the 9 carried over from year 1). Of the 114 complaints, 3 were still under consideration and 4 under investigation at the year end. In other words, 116 were concluded during the year (the 9 carried over plus 107 from Year 2). Of these 116, only 11 were investigated. Four of the 11 were still underway, meaning that 7 investigations were completed in Year 2. Of the 7, one was withdrawn; 2 resolved informally; and 4 were reported to the Lord President. Of the 4 reported to the Lord President, 3 were deemed to be without substance, unsubstantiated or vexatious. For the one remaining complaint, an apology was offered by the judicial office holder and the Lord President deemed that no further action was required.

In summary, in the first 25 months of the new complaints regime, the Judicial Office's published statistics show that of 221 complaints there were 12 investigations, one judicial office holder apologised for his or her conduct and no judicial office holders were disciplined. This possibly explains why no JOH has sought to have their case reviewed by the JCR: only a finding *against* the JOH would be likely to result in their making a review request. My previous experience of being a member of the review process in England and Wales bears this out: JOHs challenged when the finding is against them; not when it is in their favour.

Case Histories

I have summarised below all of the review requests received during the year, along with the outcomes and any issues that were highlighted. Many were legitimate complaints or raised important issues. However, a small number were petty or vexatious. Quite a few were complaints about judicial decisions, and as such cannot be considered under the Rules.

I have included details of the original complaint where this was relevant. I have also provided the Judicial Office with an opportunity to respond and where provided, I have included it. The cases are presented in chronological order.

- I have used the male gender to refer to all judicial office holders, given the relatively small number of female JOHs and thus the possibility of identifying them in these anonymised case studies.
- Where the same identifying letter appears in separate cases, it is a reference to the same individual – either judicial office holder or complainer. For example, Case No. 2 refers to Mr B, as do cases 3-6 and various others. This means that the same individual requested several reviews.

CASE No. 1

Mr A: Received in Year 1/Completed Year 2

9 reviews. 4 breaches (Rules 9(4)(c) – twice; 9(4)(d) and 9(4)(b))

Mr A made various complaints on different dates about a range of issues concerning a number of judicial office holders (JOHs). The Judicial Office (JO) handled these as one complaint but I found 9 separate complaints. I 'upheld' four of them (found that the Rules had not been followed). However, this made no material difference to outcome because the errors were of a minor technical nature: a complaint that should have been dismissed under one rule was actually dismissed under another. Although it is concerning that the correct rules were not followed, the Judicial Office was right to dismiss these complaints.

This review highlighted various issues:

- Because these separate complaints were handled as a whole, one complaint was overlooked and never investigated. I discussed with the Judicial Office the need for a robust system to track complaints so none gets missed.
- There were occasions when the JO failed to meet its own timescales for acknowledging Mr A's complaints. I asked that systems are put in place to ensure that responses are issued in a timely manner. I have also asked that timescales form part of any revised Rules. I also raised the importance of date-stamping all correspondence and reporting correspondence receipt dates accurately, as this did not always happen in this case.

This case demonstrates the importance of receiving the entire case file – something that does not happen at present. It was very difficult for me to work out what decisions had been taken, or how and why decisions had been reached, without being able to see the complete file. At times I was relying on guesswork in trying to understand the thought process of the JO and the Disciplinary Judge.

As the Rules were breached, I made a referral to the Lord President (LP) under Section 30(2)(b) of the Act. In respect of the four breaches, the LP: let the original determination stand in two of the complaints;

revoked the determination in one complaint and substituted it with dismissal under a different rule; and in the case of the complaint that was overlooked, he asked that this be investigated. An investigation was undertaken, the complaint was referred to the Disciplinary Judge, and he dismissed it as without substance.

CASE No. 2

Mr B: Received in Year 1/Completed Year 2

1 review. No breaches

Mr C wanted to make a complaint about JOH (judicial office holder) R1 but was outwith the time limits. He sought an extension but this was not granted. Mr C asked me to review this, and expressed his concern that as I have no powers to consider the merits of any complaint, this effectively meant that the Rules could be flouted with impunity and that “such sterile procedures make Scottish justice a laughing stock”. I have quoted Mr C’s comments because they reflect the views of some others who have both sought a review while also questioning the value of a review given the limitations of my powers. In Mr C’s case, I concluded that the Rules had been followed: his request had been put before the Disciplinary Judge, who deemed that Mr C had not made a case for exceptional circumstances.

CASE No. 3

Mr B: Received in Year 1/Completed Year 2

1 review. 1 breach (Rule 8)

Mr B complained to the Judicial Office about JOH (judicial office holder) A1. His complaint was dismissed as being about a judicial decision. However, the JO did not inform the judicial office holder who was the subject of the complaint, as required by Rule 8. Therefore I found that the Rules had been breached, although this had no material effect on the outcome. It could be regarded as a small technical breach, but in my view JOHs have a right to know that they have been the subject of a complaint, even when that complaint has been dismissed.⁹

CASE No. 4

Mr B: Received in Year 1/Completed Year 2

1 review. 1 breach (Rule 8)

Mr B complained about JOH (judicial office holder) B1. His complaint was dismissed as being about a judicial decision. The JO did not inform the subject of the complaint, nor did it follow its own deadlines regarding timescales for replying to correspondence.

⁹ In a number of reviews, there was a failure to notify the judicial office holder (JOH) that a complaint had been made. As far as the complainer is concerned, this is a minor administrative error. However, JOHs have the right to know that a complaint about them has been accepted. This spate of breaches, all of which were belatedly corrected, have not since reoccurred in any subsequent complaints.

CASE No. 5

Mr B: Received in Year 1/Completed Year 2

1 review. 2 breaches (Rule 6.3 and Rule 8)

Mr B complained about JOH (judicial office holder) C1's conduct, but he did not include a date upon which the alleged misconduct occurred. The Rules neither require a date in order for a complaint to be accepted as valid, nor explain what should happen in cases where no date is provided. I drew this gap in the Rules to the attention of the JO and Lord President and asked that it be considered when the Rules were reviewed.

The JO sent Mr B a letter of indeterminate status. It was unclear whether they were: seeking further information (such as a date for the alleged misconduct, or a case for exceptional circumstances should the complaint be outwith the timescales); or dismissing the complaint altogether. As my contact details were provided – usual practice for the JO's final letter – I took it to be a dismissal letter. Concerned about the lack of clarity, I made enquiries of the JO, who said that their letter was not a dismissal one and that my details had been provided in error. However, the JO's case file tabbed the letter as "reply dismissing complaint" and it was logged by the JO as dismissed under Rule 9(4)(b).

I remained unable to work out whether the complaint had been dismissed, and if so, when and on what grounds. Following discussions with the JO I received further documents, but not the correspondence between the JO and the Disciplinary Judge. I was still unable to understand what had happened or why. Mr B was asked to supply a date for the alleged misconduct and, if necessary, to explain why he did not make his complaint within the time limit. He was given no deadline for replying, as required by Rule (6)(3). The JO also breached Rule 8 in not informing the subject of the complaint.

As a result of concerns about the handling of this case, including the lack of clarity about whether the complaint had been dismissed, when and why, I made a referral to the Lord President. He agreed that the complaint had not been handled properly and asked for a fresh investigation. The JO assessed the complaint and dismissed it as being about a judicial decision.

Mr B wrote to me about where the dividing line lies between judicial decision and issues of judicial ethics – such as bias – which can influence judicial decisions. The complainer argued in follow-up correspondence that while it is true that judicial decisions can be appealed through the court system, ethical issues such as bias and the failure to provide reasons for decisions come under the judicial conduct banner and should be considered under the complaints process. He subsequently raised a number complaints and review requests where this was the theme (see cases 13, 14, 16-25, 27-29 and 31 to 33).

CASE No. 6

Mr B: Received in Year 1/Completed Year 2

1 review. 1 breach (Rule 8)

Mr B complained about JOH (judicial office holder) D1. His complaint was dismissed as being a judicial decision. The JO did not inform the judicial office holder. Furthermore, they did not follow their own deadlines regarding timescales for replying to correspondence.

CASE No. 7

Ms C: Received in Year 1/Completed Year 2

1 review. No breaches

Ms C made a number of complaints about JOH (judicial office holder) E1 concerning how her court case was managed, what evidence she was allowed to give and when her witnesses were allowed to give evidence. The Judicial Office deemed that these were matters of judicial decision. I agreed.

CASE No. 8

Mr D: Received in Year 1/Completed Year 2

1 review. 1 breach (Rule 6(3))

Mr D complained about judicial decisions taken by JOH (judicial office holders) F1 and G1. The JO determined that the complaint was out of time and informed Mr D that he could make a case for exceptional circumstances, but they failed to provide a deadline for the provision of this information, thus breaching Rule 6(3). This administrative breach did not materially affect the outcome of his complaint. He did not provide sufficient reasons to make a case for exceptional circumstances and his complaint was dismissed. The Lord President agreed with me about the rule breach, but as this was a minor technical breach, the original decision remained.

Mr D felt that he had not been provided with an explanation of judicial decision that he could understand. Having read what had been provided, I agreed that it was not clear to a lay person what constitutes a judicial decision. He also complained that he was given insufficient reasons for his complaint being time barred and I agreed that it would have been helpful if more detailed reasons had been provided.

According to the Rules, complaints must be made within three months of the alleged misconduct occurring. In Mr D's case, he first raised his concerns locally and thus there was a delay in his making a formal complaint to the Judicial Office (by which time he had exceeded the time limits). I raised this matter with the JO, highlighting the fact that the way the Rules are constructed, complainers are encouraged to go straight to the Judicial Office in order to meet the deadline, rather than first seek to resolve matters locally on a more informal basis. They replied that "if trying to resolve an issue locally led to a delay in making a formal complaint under the rules then this could be put before the disciplinary judge as part of a case that exceptional circumstances exist."

CASE No. 9

Mr E: Received in Year 2/Completed Year 2

2 reviews. 4 breaches (Rules 6(1), 6(3) and Rule 8 twice (different JOHs))

A Member of Parliament referred this long and complex case. With the consent of his constituent, I conducted two reviews. Mr E had complained about a number of matters, including the fact that during the proceedings of his court case, JOH (judicial office holder) H1a accepted an invitation to a function organised by the defender; and that there was a close relationship between JOH H1a and JOH H1b which created a conflict of interest. The MP also raised concerns about the three-month deadline for lodging complaints, and concerns that ordinary people would be unaware of this.

During my review, I found that a number of breaches *may* have occurred. I could not provide a definitive view because clear reasons were not always set out in the paperwork and I was not in any case given all of the documentation. While it can be debated as to whether a breach occurred or did not occur, the lack of

clarity and poor recording of reasons/explanations is concerning. I was hampered in my understanding of the process by the fact that I did not have access to the complete file. I was able to work out, from reviewing what correspondence was provided, that the complaint about JOH H1a was referred to the Disciplinary Judge under Rule 6.4 and the one about JOH H1b was considered under Rule 9. However, this took considerable time and required an in-depth understanding of the Rules. Few lay people could have done this, and therefore could not have challenged the Judicial Office if necessary.

Mr E's complaints related to two different JOHs. At times these complaints were handled as separate complaints; at others they were treated as one complaint.

This complaint highlighted the need for a consistent procedure for complaints escalations. Mr E asked for decisions to be reconsidered and this happened, but as there is no escalation policy there is scope for inconsistency.

Another issue raised was that of the three-month deadline, also raised by other complainers. Three-months is standard across many organisations (I allow four months, with extensions if reasonable grounds for delay are provided), and the JO's provision for making a case for exceptional circumstances does allow for complaints outwith that timeframe. Mr E's case raised the issue from a different angle. He was complaining about a series of alleged misconduct actions spanning a long period of time. Mr E believed that as long as the last of those actions was within the timeframe, the rest should be considered as part of that ongoing pattern of behaviour. The Rules see it differently, requiring that each time there is any alleged misconduct, it should be complained about within a three-month period. Therefore Mr E would have been required to make a series of complaints during the course of his court case.

It is reasonable, where there has been a one-off incident, that a complaint be lodged in a timely fashion, but there may be an argument for taking a different approach where there is ongoing unacceptable behaviour. It might be that a potential complainer is concerned about judicial conduct but lets it pass as a one-off. It then happens again, but the three-month deadline following the first incident has passed. The two incidents taken alone may seem insignificant, but taken together could show a concerning pattern. Or it may be that someone who is involved in an ongoing court case is afraid to report concerns about misconduct for fear – real or misplaced – of adversely influencing the outcome of their court case. Complainers may wish to wait until after legal proceedings have concluded before filing a complaint.

I discussed this with the Judicial Office. They explained that where there is an ongoing pattern of concerning behaviour which is complained about, when only one of the incidents remains 'in time', they would consider that 'in time' incident in the context of the previous 'out of time' pattern. In circumstances where a complainer puts off complaining until after legal proceedings have been concluded, this would be considered under exceptional circumstances. I would prefer to see the Rules amended to allow for such scenarios.

Following my referral to the Lord President, he disagreed that Rule 6.1 had been breached, accepted that Rules 6.3 and 8 were breached, and took no action.

CASE No. 10

Mr F: Received in Year 2/Completed Year 2

2 reviews. No breaches

Mr F made a number of telephone calls to the Judicial Office to discuss specific complaints and the complaints process generally. He then submitted what he termed “draft” complaints. Unfortunately the JO made no note of any of the telephone calls and treated his contact as “general correspondence/enquiry” rather than “complaint.” I suggested to the JO that when a potential complainer makes contact by telephone – even if it is just an enquiry as to how to make a complaint – if details of the complaint are provided, including the enquirer’s details, a note should be taken and an enquiry file opened. This can become a complaint file if a complaint is subsequently made.

Whether Mr F had made a complaint or just an enquiry, he believed that he *had* entered into the complaints process. If it was the JO’s view that he was merely an enquirer, this should have been explained to him.

There were discussions about a late complaint due to exceptional circumstances, but the Judicial Office did not write to Mr F about this or specify in writing any date for him to make his case. However, as his complaints were technically enquiries, I could not find that Rule 6.3 had been breached. That does not mean that I am uncritical of the JO. As this was discussed on the telephone, it would have been sensible to back it up in writing, to ensure that there was a clear record of the next steps.

The debatable status of Mr F’s complaint made it difficult for me to conduct my review. The JO took the view that until some weeks after the first contact, no formal complaint had been made and he was merely an enquirer. Strictly speaking, that could be so. However, looking at it from the complainer’s perspective, he was actively corresponding by email and telephone about his “complaints” and “draft complaints” and “exceptional circumstances” so it would have been wise to treat him as a complainer from an earlier stage, or to explain to him that his correspondence was being treated as an enquiry. In the absence of anything setting out what had been discussed, Mr F was understandably confused.

Mr F later asked that his correspondence be accepted as formal complaints and he provided reasons for complaining outwith the deadline but his reasons were rejected and his complaints dismissed.

CASE No. 11: Enquiry

Received in Year 2/Completed Year 2

Mr G complained that his father suffered from various health problems and was having difficulty hearing the JOH at his trial and that his disability was not taken into account. As this complaint was ongoing, I was unable to become involved and it was treated as an enquiry, in which I set out the extent and limitations of my role and invited him to contact me after the completion of his complaint through the JO’s process if he believed that the Rules had not been followed. I heard nothing more and closed the file.

CASE No. 12

Mr H: Received in Year 2/Completed Year 2

1 review. 2 breaches (Rule 9.6 and Rule 8)

Mr H and his wife were in dispute over access to and custody over their daughter. Mr H was also involved in a criminal case. He felt that JOH J1 was biased against him, took his decisions based on his dislike of Mr H, and had “a personal vendetta”. He complained to the Judicial Office and they referred the matter to the

Disciplinary Judge (DJ), who deemed that the complaints primarily concerned judicial decisions or case management matters. The DJ set out his reasons for reaching this view and for rejecting the allegation of there being a personal vendetta.

When JOH J1 was informed of the complaint, he questioned why it was being referred to the DJ under Rule 10 when Rule 9(6) requires in the case of ongoing proceedings (which these were) that the DJ take a view on whether to put the complaint on hold until the conclusion of the proceedings. The error was corrected, but technically a breach was committed. A similar administrative breach occurred with a failure to inform the JOH at the correct stage that there was a complaint about him. Neither of these affected the eventual outcome.

CASE No. 13

Mr I: Received in Year 2/Completed Year 2

3 reviews. 2 breaches (Rule 8 twice)

Mr I was in a custody dispute with his wife and was unhappy about how the case had been handled. His initial letter to the Judicial Office was treated as an enquiry, as he was merely posing questions and relating experiences. The reply from the JO advised that his issues, if they were to be made into a complaint, would most likely be dismissed. Mr I then raised an out-of-time complaint about JOH K1, which was dismissed. He was invited to make a case for exceptional circumstances by a deadline. The DJ deemed that exceptional circumstances had not been provided and the complaint was dismissed.

Mr I then made a second complaint, which was also dismissed. The JO forgot to inform the JOH of the complaint, breaching Rule 8.

A third complaint was made and rejected. Again Rule 8 was breached.

These breaches made no material difference to the outcome of the complaint.

CASE No. 14

Mr B: Received in Year 2/Completed Year 2

1 review. 2 breaches (Rules 8 and 9)

Mr B complained that JOH L1 was biased against him, and he provided some information. This was a difficult case to review, as the dividing line between what is a judicial decision and what is an ethical issue which has a bearing on a judicial decision, is not always clear. To support his contention that his complaint was about an ethical matter rather than a judicial decision, Mr B quoted from Lord Hamilton's *Statement of Principles of Judicial Ethics for the Scottish Judiciary*. He also stated that he wanted to "raise a formal complaint about unethical conduct" and he set out his case.

The Judicial Office rightly say that they cannot look behind a judicial decision and the complaints process is not an alternative to court process. However, this complaint was that the judicial *decision* was influenced by unethical *conduct*; it was the conduct that formed the complaint, not the decision. It was not for the Judicial Office to dismiss this complaint at the initial assessment stage (Rule 9). Mr B had set out sufficient information at least to raise a question mark and his complaint should have been referred to the Disciplinary Judge for consideration under Rule 10 rather than being dismissed under Rule 9.

I met the JO to discuss this and to understand their thinking on how/why it was handled in the way that it was. They said that Mr B did not offer any evidence of JOH L1's alleged misconduct other than his decisions. I took a different view. Mr B could have strengthened his case by providing more detailed

evidence, but he nevertheless raised a possible conduct issue that should have been considered further, either by the JO asking for further specific information from him or by referring the matter to the Disciplinary Judge.

Rule 9 is a mechanism to allow rough sifting: cases that are very obviously outwith the Rules can be dismissed at this initial stage. However, where something falls within that grey area, it should be given further consideration. For this reason, I found that Rule 9 was breached.

The JO also breached Rule 8 by only belatedly informing the judicial office holder, at a later much date. Although the Judicial Office did remedy this of their own accord, there was a breach.

I referred the case to the Lord President. He disagreed with my determination that Rule 9 had been breached and noted my comments regarding the breach of Rule 8.

CASE No. 15: Enquiry

Mr J: Received in Year 2/Completed Year 2

Mr J wrote with a variety of complaints about JOH M1 and asked me to investigate. He appeared to be confusing my office with that of the JO, so I referred him to the correct office. He wrote again, addressed to me but at the JO's postal address. His letter made its way to me. I again explained the differences between the roles of the JO and the JCR. Hearing nothing further I closed the file.

CASES 16-22, 24-26 and 28-30: Withdrawn

Mr B made 13 complaints in a similar vein to Case 13 above, but due to ill health he later asked that they be withdrawn.

CASE No. 23

Mr K: Received in Year 2/Completed Year 2

1 review. No breaches

Mr K wrote to the JO complaining that he suffered a nose bleed in court and JOH N1 would not allow him to visit the bathroom. The JO replied that as he had not included his address and telephone number, his complaint was not validly made. Rule 5 requires an address and telephone number before a complaint can be accepted, but I was critical of the JO for their unfriendly tone when they wrote: "It is the view of the Judicial Office that you have failed to comply with one of these requirements, namely you have failed to provide your address and telephone number. Your complaint is, therefore, not validly made and cannot be considered at this time."

As an office that deals with the public, they should use a more accessible style and tone in correspondence. It would have been better had they simply asked Mr K to supply his address and telephone number so that they could consider his complaint. This would have conveyed a more positive impression. The JO's letter was likely to give the recipient the impression that they were attempting to deter complaints. I had discussed this issue with the JO previously and had seen an improvement in their letters. They apologised for the tone of this letter and explained that one of their old letter templates was used in error.

A wider issue is whether it is necessary to provide an address *and* telephone number. The JO will need a complainer's postal address, and *may* sometimes need a telephone number, but it is unreasonable to reject a complaint because in the first contact these are not provided. However, that is what the Rules say.

Some time ago I informed the Judicial Office of my concerns and I am pleased that the proposed new Rules address this.

This is the first review where a complaint was investigated. I was surprised to see that the complainer was not given a copy of the Nominated Judge's investigation report, or even a summary, or even an indication of the investigation that was carried out. The Rules do not require this (a matter that I raised as part of my Rules consultation submission), but natural justice and best practice require that a complainer be given more than simply the outcome – in this case, that the complaint was vexatious. Complainers need to have confidence in investigations: faith is likely to be undermined if they are given no indication of what the investigation involved, who was interviewed and the basis upon which conclusions were reached. I raised this with the Lord President in May and hope to receive a response before the end of the year.

Mr K feared that the Nominated Judge (NJ) investigating would cover for/protect his judicial colleague, a concern compounded when the NJ failed to interview Mr K or his witness. Had the NJ's report been shared with Mr K, he would have understood the rationale for this. This lack of transparency turned an otherwise fair and well-run investigation into one that gave the impression of a cover-up. Sharing reports with the complainer can only be a good thing.

I am not critical of the JO in this case, as the Rules (Rule 16 parts 2a and b) only require the outcome and any action the Lord President has taken to be conveyed to the complainer. My criticism is of the Rules, which say: "The Judicial Office's letter is to contain or be accompanied by such information as the Lord President considers to be appropriate for the purpose of giving the person complaining a fair understanding of the matters mentioned in paragraphs (2)(a) and (b)." The Rule does not require that the complainer be given an explanation of how that outcome was reached. However, even as worded, there is nothing to prevent this from being given to a complainer. I have addressed this point in my formal response to the Rules consultation.

CASE No. 27

Mrs L: Received in Year 2/Completed Year 2

1 review. Breach of Rule 10

Mrs L was walking her dog in woods when she was asked by a stranger to put it on a lead. She complied, but was upset about the attitude of the stranger (who turned out to be a JOH), saying that he had a "stern and hostile expression"; talked in "overbearing and dogmatic terms"; and had a "dictatorial and high-handed manner" in which he "continued to berate me, to the point where I began to feel very uncomfortable" and "very intimidated" such that by the time she got home she was "shaking with nerves" having never been spoken to "in such a humiliating and derogatory way". She summarised the situation as that of being "accosted in the isolation of the woods, with no other person in the vicinity, and subjected to a tyrannical rant by a complete stranger".

Without *any* further enquiry or investigation, the Disciplinary Judge (DJ) concluded that the complaint was "without substance."

Mrs L wrote to me: "Whether or not Mr [O1] was acting as a [JOH] is not the point. The point is that he *is* a [JOH] and as such may be expected to adhere to a certain standard of personal conduct and behaviour towards all members of the public..." I agree. The conduct of JOHs in their private life *can* have a bearing on their role in public life. To support her contention that conduct both inside and outside of court is relevant, Mrs L quoted passages from the *Statement of Principles of Judicial Ethics for the Scottish Judiciary* and pointed out that the Judicial Office's own guidance leaflet maintains that complaints may be made about conduct inside and outside of court.

The Statement of Principles document highlights the “constraints on their [JOHs]’ behaviour, which other people may not experience. Thus judges should avoid situations which might reasonably be expected to lower respect for their judicial office. They should avoid situations which might expose them to charges of hypocrisy by reason of things done in their private life. Behaviour which might be regarded as merely unfortunate, if engaged in by someone who is not a judge, might be seen as unacceptable if engaged in by a person who is a judge and who, by reason of that office, has to pass judgment on the behaviour of others.”

The DJ must take “due account” of the *Statement of Principles* document. I could not see how he concluded that the JOH was acting as a “private individual” when JOHs have to take special care when acting as private individuals so as not to lower respect for their judicial office. Notwithstanding the fact that Mrs L did not know at the time that the man in question was a JOH, the fact is that he *is* a JOH.

I found that Rule 10 was breached. The complaint should not have been dismissed as it justified a referral to the Nominated Judge (NJ) under Rule 11. I referred the case to the Lord President, who believed that there *may* have been a breach of Rule 10(5) because it was not clear from the way in which the decision was expressed as to whether account was taken of parts of the *Statement of Principles* which are relevant to the behaviour of a JOH as a private individual, or, if it was, to what extent it was considered to be relevant in the circumstances. For these reasons he revoked the determination and referred the case to the NJ for investigation. The Lord President is unwilling to inform me of the final outcome of this complaint. However, without requesting it, I did receive a copy of the outcome direct from the complainer.

CASE No. 31: Enquiry

Received in Year 2/Completed Year 2

Mr M asked me to monitor the handling of some complaints as they progressed through the complaints process, but I explained that I could not do this. However, if he was of the view once the process had ended that the handling was not in accordance with the Rules, he may contact me again seeking a review.

CASES No. 32 (Enquiry) and 33 (Review Request – not in remit)

Mr N: Received in Year 2/Completed Year 2

Mr N wrote explaining that he had raised one complaint against the Lord President (LP) and two about another JOH. Neither the Judicial Office nor the First Minister were willing to look at his complaints about the LP. He sought my views on this apparent loophole in the complaints system that did not allow complaints about the Lord President to be considered under the Rules. He also asked me to review the Judicial Office’s handling of his complaints insofar as they were considered.

In respect of his enquiry about complaints concerning the Lord President, this is reported upon elsewhere in this document.

Regarding his review request for his complaints about the other JOH, I was unable to pursue this because upon requesting the file from the JO, I was informed that Mr N’s complaints were never considered at all under the Rules and were therefore outwith my remit. I checked with Mr H that this was the case and he confirmed that it was so. I therefore closed the case.

CASES No. 34 and 35 (Complaints – not in remit)

Received in Year 2/Completed Year 2

Ms O and Mrs P attended a family member's hearing for leave to appeal to the Supreme Court. They wrote separately complaining about the conduct of the Lord President when sitting as a judge, and of the conduct of another JOH. Their complaint was unconnected with Mr N's above.

I explained that I could not become involved, as they had not been through the JO's complaints procedure. I offered to forward their complaints and I explained the situation as I understood it as regards complaints about the LP (reported elsewhere in this document). They reflected that they would not make formal complaints given that those against the LP could not be considered in any case and also their perceived fear that this might make the situation worse for their family member.

I accepted this correspondence as an enquiry and undertook to update them on the definitive situation with regard to complaints about the Lord President once I had established what it was, which I did.

CASE No. 36: Enquiry

Received in Year 2/Completed Year 2

Mrs Q wrote enquiring about the complaints procedure, as she wished to complain about a retired sheriff and I was able to provide her with the necessary information.

CASE No. 37

1 review. Breach of Rule 10 (4) (b)

Ms R: Received in Year 2/Completed Year 2

Ms R made a variety of complaints about JOHG1, which were referred to the Disciplinary Judge under Rule 10. The DJ deemed the complaint to be "primarily about judicial decisions" and dismissed it under Rule 10(4) (b) ("it is about a judicial decision or judicial case management or judicial management of court programming.") I agreed that aspects of the complaint were about those matters. Parts of the complaint were dismissed under Rule 10(4) (f) as being without substance. Again I agreed.

However, Ms R was also complaining about the *conduct* of the JOH. She wrote about his alleged insensitivity regarding her disability and a lack of awareness of – or response to – the impact of her disability on her ability to present her evidence and to follow the case. She wrote about a "failure to take into account the defender's mental and physical disabilities and current aggressive medical treatment" and the fact that she was not allowed to receive "care and mobility needs" from her carer. She wrote about how her disability resulted in "lower than normal perception, lower than normal rate of mental reaction, lower than normal clarity of thought, slower than normal rate of speech and lower than normal rate of interpretation". Medical evidence was supplied confirming this.

Some of her complaints, such as JOHG1's refusal to allow more time, could be argued to be a case management or management of court programming issue. This was the DJ's view, when commenting on "the bundle of complaints which you make to the effect that [JOH G1] did not allow you free use of court time to make all the statements that you wanted to make. Those appearing in court, including party litigants, must understand that only issues relevant to the particular hearing can be heard. Due to the need to respect available court time, it is important for the judge to manage court hearings. This part of your complaint is plainly a matter of judicial case management and must be dismissed (Rule 10(4)(b))."

The circumstances Ms R described are not “plainly a matter of judicial case management”. No view may be formed about whether there was misconduct (deliberate failure to take a disabled person’s needs into account); a training need (to address an inadvertent failure to take a disabled person’s needs into account); or whether the matter was one of judicial case management. Only further investigation could allow a conclusion to be reached. However, the complaint was dismissed with no investigation.

The requirement to make “reasonable adjustments” applies not just to the Scottish Court Service (for example, by making court rooms accessible to people who use wheelchairs), but also to judicial office holders in their handling of proceedings. The Scottish Government’s *Disability Equality Scheme 2008-11: Annual Report 2010* says: “Scotland has a distinct Justice System and recognises that ensuring effective access to justice for disabled people is fundamental to independent living within communities and crucial in ensuring that disabled people can exercise their legal rights on an equal basis with others. We know, in particular, that adults with learning disabilities or mental health conditions may continue to face barriers when interacting with the complexities of the justice system, as witnesses, accused persons or other parties and that more needs to be done to address negative attitudes towards disabled people in this context... Scotland’s Judges and Sheriffs receive equalities training and guidance through the work of the Judicial Studies Committee and the Equal Treatment Bench Book, which has a dedicated chapter on disabled people’s access to justice.”

The *Equal Treatment Bench Book: Guidance for the Judiciary* (2nd edition, 2008) says: “The judge must consider the needs of each disabled person individually. Disabled persons involved in the court process must be assisted to engage fully in the process of achieving justice. Each person who appears before the court with a disability must therefore be treated as an individual, with specific needs that are particular to them.” Ms R complained specifically about comfort breaks and the *Bench Book* (in the section headed ‘*Matters to consider*’), advises “allocating sufficient court time to allow for therapeutic breaks for a party or witness, signer or interpreter” and “making extra time available for the case to be heard”.

JOH G1 may have taken Ms R’s physical disability and mental health issues into account, but without further investigation, it cannot be determined that his actions amounted to the reasonable management of court business. Therefore this aspect of her complaint should have been referred to the Nominated Judge for consideration under Rule 11.

The Lord President upheld the DJ’s decision, deeming that it was open to the DJ to assess the complaint and take a view, that he was entitled to take the view that he did. Ms R wrote again expressing her concerns with the LP’s determination but I explained that once a referral is made, there is nothing further I can do, and I suggested that she raise any concerns directly with the LP.

CASE No. 38

1 review. No breaches

Mr S: Received in Year 2/Completed Year 2

Mr S emailed various people in the Police and courts service describing events that led to his arrest and trial. His letter ended with ten questions, one relating to the Judicial Office’s remit: “Why can a [JOH] call someone I liar in an open court without knowing the facts? Are they not supposed to be just, fair and impartial?”

The JO advised Mr S to describe the allegation of misconduct and to supply the date. Later that day there was a telephone conversation in which Mr S sought clarification, the upshot of which was that he would resubmit his complaint, focusing on the allegation of misconduct.

Rule 6 says that allegations of misconduct must be dismissed if they fall outwith the three-month deadline, but that “the person complaining may make a case in writing to the Judicial Office that there are exceptional circumstances which justify allowing the allegation to proceed.” The JO asked for a date of the alleged misconduct, explaining that complaints outwith their three-month deadline could only be considered in exceptional circumstances. He was advised that if this were the case, he should explain his exceptional circumstances. He replied that he was unsure of the date and set out a case for exceptional circumstances. Enquiries were made with the sheriff clerk to establish the date of the alleged misconduct, which was eight months earlier. Mr S’s case for exceptional circumstances was not accepted and his complaint was dismissed.

CASE No. 39

1 review. No breaches

Ms T: Received in Year 2/Completed Year 2

Ms T alleges that her partner abused her. She left the family home with their child and is involved in ongoing child welfare hearings. She complained about the manner in which JOHQ1 spoke to her and the impact that this had had. Ms T’s complaint was referred to the DJ under Rule 10, to check that it was, among other things, not about judicial decisions or case management. The DJ decided that the complaint was “primarily about judicial decisions” and dismissed it under Rule 10(4) (b). Aspects of Ms T’s complaint were about those matters – such as the decisions the JOH took about what evidence to allow to be heard, or what reports he would take into account – and were rightly dismissed. It is up to JOHs to decide how a hearing will be conducted and who or what evidence will be heard, but it would have been helpful if the Judicial Office had explained this to Ms T more fully. The DJ dismissed some elements of the complaint under Rule 10(4) (f) as being “without substance”. Again the JO should have elaborated on what aspects they were referring to, so that Ms T could understand their decision.

I raised this with the Judicial Office in a bid to help shape the detail of future decisions. I would like them to provide sufficient detail about the reasons for decisions. The JO informed me that they relay the decision of the DJ, and would share this feedback with him. I will monitor this, as it is important that conclusions are evidenced so that complainers can understand how and why a decision was reached.

CASE No. 40

Received in Year 2/Completed Year 3

This case arrived in Year 2, but was not completed until September and will therefore be reported in next year’s annual report.

CASE No. 41: Enquiry

Mr U: Received in Year 2/Completed Year 2

Mr U wanted to know when I would be publishing case studies on my website. I replied that although it had been my intention, due to time constraints it had not yet proved possible. Unfortunately he had provided an incorrect email address and I was unable to contact him.

CASE No. 42

Mr D: Received in Year 2/Completed Year 3

Although this case arrived in Year 2, it was completed in October and will therefore be carried over to next year's annual report.

CASE No. 43: (Complaint - Not in my remit)

Mr V: Received in Year 2/Completed Year 2

Mr V wrote to me with complaints about the conduct of some JOHs and also issues about failure to recuse. His complaints dated back some time. I responded by explaining my role and by offering to pass on his complaint to the Judicial Office with his permission. I also pointed out that he would need to make a case for exceptional circumstances if his complaint was outwith the Rules' three-month deadline.

CASE No. 44: Enquiry

Mr N: Received in Year 2/Completed Year 2

Mr N wrote to me about a case that was in the process of going through the Judicial Office's complaints procedure. I explained that I was unable to become involved until it had completed that process and he was of the view that the Rules had not been followed. I then closed the file as an enquiry but it will be reopened if I hear from Mr N that he would like a review.

CASE No. 45

Mr D: Received in Year 2/to be completed Year 3

Although this case arrived in Year 2, it was completed in October and therefore it will be reported in next year's annual report.

CASE No. 46: Enquiry

Mr W: Received in Year 2/Completed Year 2

Mr W wrote to me that his complaints to the Judicial Office had been ignored. I made enquiries and found that his complaints had gone astray, had now been found and would be investigated. I wrote to Mr W to this effect and asked him to contact me again at the end of the process if he was of the view that his complaint had not been handled in accordance with the Rules. He wrote to me in Year 3 and I will report on that review in my next report.

CASE No. 47

Mrs X: Received in Year 2/to be completed Year 3

Although this case arrived in Year 2, it has not yet been completed and therefore it will be reported in next year's annual report.

APPENDIX 1

Who is the Judicial Complaints Reviewer?



The first Judicial Complaints Reviewer is Moi Ali. Moi works as a communications consultant and author and also has a number of roles in public life. She spent seven years on the Nursing and Midwifery Council, where her mission was to put public protection and involvement at the heart of healthcare regulation. She also served for six years on the Board of Postwatch, championing the interests of 'hard to reach' consumers and chairing its independent complaints review panel. She continues her role in postal complaints as a member of the Council for the Postal Redress Service in London.

Moi spent six years as a member of the Office for Judicial Complaints' review bodies in England and Wales, until April 2012. There she worked alongside judges and magistrates reviewing judicial conduct complaints on behalf of judicial office holders. Currently she is a member of the Scottish Ambulance Service Board, a member of the Scottish Police Authority Board, and a member of Education Scotland's audit committee.

In a voluntary capacity Moi is a Governor at Edinburgh Napier University and a Public Appointments Ambassador, encouraging a more diverse range of applicants for public appointments. She also undertakes voluntary work advising the Education Law Unit in Govan on governance and communications for one of its national projects.

APPENDIX 2

Register of Interests

In the interests of openness and transparency, I am publishing this register of interests. If you believe that it would be useful to include any additional sections, please contact me at complaints@judicialcomplaintsreviewer.org.uk. This declaration will be updated when any changes occur.

CURRENT/PREVIOUS MINISTERIAL APPOINTMENTS (including remuneration for current appointments)

Name of Organisation	Position held	Period of Appointment
Postwatch, London	Board Member	2001-2006
NMC, London	Board Member and latterly Vice President	2001-2008
NHS Lothian , Edinburgh	Board Member	2008
Scottish Ambulance Service, Edinburgh	Board Member. Member of Audit and Risk and Staff Governance Committees	2010-present £8,008 per annum
Scottish Police Authority, Glasgow	Board Member. Member of Audit and Risk and Complaints/Conduct Committee	2012-present £300 per day

CURRENT/PREVIOUS PUBLIC and CHARITABLE APPOINTMENTS (including remuneration for current appointments)

Centre for Health and Wellbeing (charity and social enterprise company), Edinburgh	Director and Chair	2008-2010
Review Bodies, Ministry of Justice, London	Member	2006-2012
Edinburgh Napier University	Court Member/governor. Chair of Health & Safety Committee, member of HR committee	2009 –present Unremunerated
Education Scotland	Former board member. Current Audit Committee member	2010-2015 £272 per day
Education Law Unit, Glasgow	Member of Project Delivery sub-	2013 to present

	committee	Unremunerated
Cabinet Office, London	Diversity Ambassador and mentor (Government Equalities Office)	2010 to present Unremunerated
Postal Redress Service (POSTRS), London	Independent Council Member	Daily honorarium of £275

FINANCIAL INTERESTS

- Business: I own my own business, the Pink Anglia Public Relations Company.
- Shares: I own shares in Iberdrola valued at approx. £1,150
- Property: I own a rental property in West Lothian and a property in central Edinburgh, in addition to my home.

POLITICAL ACTIVITY

During the last 5 years

I have not stood for or obtained office as local councillor, MSP, MP or MEP; or spoken on behalf of a party or candidate; or acted as a political agent; or held office such as Chair, Treasurer, or Secretary in a local branch or party; or made any donations to any political party.

I have canvassed and helped at elections. In the 2010 General Election I participated in leafleting and knocking on doors to encourage more women to vote, as part of Liz Bardell's (SNP) election campaign for the Livingston constituency. I have also helped on a small number of occasions to deliver leaflets and newsletters in West Lothian with Angela Constance MSP (SNP), Minister for Youth Employment, although not since 2012.

GIFTS AND HOSPITALITY

I have neither declined nor received any gifts.

During 2012/13, I attended court suppers with Professor Dame Joan K. Stringer DBE, BA (Hons) CertEd PhD CCMI FRSA FRSE as a member of the Court of Napier University and I received invitations for and attended a variety of Court social events in my capacity as a governor.

FRIENDSHIPS/RELATIONSHIPS

I do not have any friendships, relationships or business dealings with any judicial office holder or Scottish Court Service employee. Baroness Clark of Calton, a judge of the Court of Session, was until June 2013 a member of Napier University's Court on which I also serve but I had no contact with her other than at Court

meetings and events. She has been replaced at the University by Lord Brodie. I played no role in the appointment.

I am not aware of any conflict of interest with my appointment as Judicial Complaints Reviewer, either personally, or relating to my connections with any organisations.

I confirm that the information I have provided is, to the best of my knowledge and belief, true and complete.

Moi Ali
Judicial Complaints Reviewer
December 2013