



2017/2018

Review

1st September 2017 to 31st August 2018

© Judicial Complaints Reviewer (2018)

The text of this document may be reproduced free of charge in any format or medium provided that it is reproduced accurately and is not misleading in context. Please acknowledge the material as Judicial Complaints Reviewer copyright.

If you have any enquiries about this publication, please write to:
Judicial Complaints Reviewer, PO Box 6651, Blairgowrie, PH10 9AS
Email ian.gordon@judicialcomplaintsreviewer.org.uk

This publication can be downloaded free of charge from:
www.judicialcomplaintsreviewer.org.uk

CONTENTS

- 1. Foreword**
- 2. The current Judicial Complaints Reviewer**
- 3. The Role and Remit of the Judicial Complaints Reviewer**
- 4. Resources**
- 5. Overview of the year**
- 6. Observations**
- 7. Conclusions**
- 8. Recommendation**

Annex A: Register of Interests

1. FOREWORD

I am pleased to publish the review of my first year in office, from 1 September 2017 to 31 August 2018, as the Judicial Complaints Reviewer (JCR) for Scotland. During that time, I received 18 new cases for review and I inherited four cases from my predecessor, Gillian Thompson, which she had been unable to complete before leaving.

At the start of my term of office I met with members of the Scottish Government Justice Directorate to discuss the role and what support it would receive. It was a positive meeting where I found a recognition of the independence of the Judicial Complaints Reviewer with a willingness to provide support and resources, when I thought it appropriate.

Throughout my first year in office, I have not encountered any issue in relation to inadequate resourcing and I have found that I was able to manage the caseload and any ancillary matters within my hours of work and budget.

I met with members of the Judicial Office for Scotland (JOS) to discuss my access to their complaints case files when reviewing a complaint against a judicial office holder. I was assured that I would have access to their case files and I have not encountered any issue concerning that access. I continue to meet with members of the JOS on a regular basis throughout the year to discuss individual cases, relevant developments in complaints and any issues which may arise during reviews.

Later in the year, I had a useful meeting with the Lord President, Lord Carloway, to discuss my role and share my views on its fitness for purpose.

To date, there has not been an opportunity for me to meet with the Justice Minister.

I am aware that previous post holders have raised issues in their annual review reports about the role and its relevance in a modern complaints system. I will return to this matter later in my review report.

2. THE CURRENT JUDICIAL COMPLAINTS REVIEWER

My name is Ian Gordon and I have been in post since 1 September 2017. I was appointed as the Judicial Complaints Reviewer by Scottish Ministers, with the agreement of the Lord President, following a publicly advertised and open process.

I operate independently of the Scottish Government and the Judiciary.

My background is in public service: as a senior police officer in both England and Scotland then, latterly, a member of the Scottish Legal Complaints Commission, the Convener of the Standards Commission for Scotland and a member on the Scottish Social Services Council Recruitment and Conduct Sub Committees. I have also worked abroad as a consultant on professional standards and complaints systems.

I am experienced in complaint investigations, managing complaints systems and as the Chair of Hearings, addressing breaches of codes of conduct by elected councillors, board members of public bodies and care service workers.

3. THE ROLE AND REMIT OF THE JUDICIAL COMPLAINTS REVIEWER

The role of the JCR was created by the Judiciary and Courts (Scotland) Act 2008 which introduced the Complaints About the Judiciary (Scotland) Rules 2017¹ (the Rules). The role is twofold:

1. To review investigations into complaints against judicial office holders (JOH)² which are undertaken by the JOS to check that they have been carried out in accordance with the Rules.
2. To make written representations to the Lord President about procedures for handling the investigation of matters concerning the conduct of JOH. The Lord President who is the head of the judiciary in Scotland must have regard to my representations.

The role was extended in 2018 with the implementation of the Complaints About the Scottish Tribunals Rules 2018, which authorises the JCR to review the handling of investigations into complaints against members of certain Scottish Tribunals³.

The JOS undertakes investigations into complaints against JOH on behalf of the Lord President. In the first instance, a complaint has to be accepted as a complaint under the Rules. If a complaint is not accepted by the JOS I cannot consider it and I would have no information available to me to question such a decision.

The Complaints About Judiciary (Scotland) Rules 2017 and the Complaints About the Scottish Tribunals Rules 2018, can be found under publications at www.scotland-judiciary.org.uk

Once the investigation process has finished the JCR then provides a free, impartial service to:

- Any person who has made a complaint about a judicial office holder (JOH), who requests its handling to be reviewed.
- Any JOH who has been the subject of an investigation and seeks a review of the investigation process to ensure that it was conducted in accordance with the Rules.

A request for a review of a complaint investigation must be made within four months of the date of the determination by the JOS otherwise, unless there is a very good reason for the delay, it will not be accepted for review.

¹ www.scotland-judiciary.org.uk/ Complaints About Court Judiciary

² JOH are - judges, sheriffs and justices of the peace.

³ The Judicial Office for Scotland will consider complaints about the personal conduct of legal and ordinary members of Housing and Property Chamber, Tax Chamber, Health and Education Chamber, General Regulatory Chamber and the Upper Tribunal for Scotland,

Review requests can be made by post, email or via the JCR website. Once a request has been acknowledged and I have established that it falls within my remit, I ask the JOS to send me their complaint file.

My remit is very narrow. I am able to review the handling of the complaint but only as a paper-based exercise using papers received from a complainant and case papers provided to me by the JOS. I cannot look at the merits of a complaint and I cannot require a complaint to be reinvestigated or overturn a decision. Nor can I obtain compensation, apologies or other redress. I can, however, make referrals to the Lord President where I find the Rules have been breached, so that he can consider what action may be required, for example he may re-open an investigation if appropriate.

4 RESOURCES

The following figures are based on my work year – 01.09.17 to 31.08.18 and not a financial year:

I am authorised to work up to four days per month (48 days per year), but the work is demand led so I do not always work four days. I have no office or administrative staff; I have a PO Box for mail and I work from home. I am supplied with a Scottish Government Lap Top, a Blackberry mobile phone, a printer (purchased through my budget). I have secure storage for JCR files and equipment. Stationery is supplied by the Justice Department and postage is an expense drawn on my budget.

- My daily fee is £217.00
- In 2017/18: I claimed £9548.00 (44 days)
- My office budget is £2000.00 per year for all facilities/equipment costs and expenses.
- In 2017/18: Costs were £1086.25, Expenses were £466.84 a Total of: £1553.09
- My office budget had an underspend: £2000.00 - £1553.09 = £446.91

5 OVERVIEW OF THE YEAR

In my first year, of the twenty-two cases I received, I completed the review of twenty cases by the 31 August 2018, with two cases (received in August 2018) being carried over into year two (2018/19). In reviewing the handling of complaints by the JOS, based on the information available to me, I found no substantive breaches of the Rules. There were no other issues which required me to make any written representations to the Lord President about procedures for handling the investigation of matters concerning the conduct of judicial office holders.

I received a few telephone enquiries relating to information about the process and these were dealt with immediately.

Statistics:

Between 1 September 2017 and 31 August 2018, the 22 requests for review came mainly by post with some by email. A breakdown of origin shows:

- 15 in relation to JOH
- 2 in relation to Scottish Tribunal Members (STM)
- 1 in relation to an Employment Tribunal member which is outside my remit⁴
- 4 reviews carried over from my predecessor.

There has been no request for review by a judicial officer holder who has been the subject of a complaint.

There has been no request on Freedom of Information (FOI).

During the year, the JOS handled 97 complaints against JOH; the number reviewed by the JCR (15 of 97) is 15.5% of the total complaints. I have excluded the four reviews from my predecessor as they were not handled by the JOS in the year 2017/18.

During the year, the JOS handled 6 complaints against STM; the number reviewed by the JCR (2 of 6) is 33.33% of the total complaints. The low number may reflect the very recent introduction of complaints against Tribunal Members into the JCR's remit

The JOS publishes statistics about complaints⁵, including those where action has been taken against a judge.

To comply with the principles of the Data Protection Act 2018, I prepared the JCR Privacy Notice which is published on my website⁶.

6 OBSERVATIONS

The Annual Reports published by my predecessors show their requests for some changes to complaints/review procedures have been made, e.g. access to JOS investigation file papers, increase in number of days for JCR to review cases, complaints against Scottish Tribunal Members are now within the remit of the JCR. The Reports also show that my predecessors questioned the 'relevance' of the present JCR system and recommended that a review of the JCR process be conducted by Scottish Ministers.

A recurring feature in reviews is that the majority of complainants do so because they are unhappy with the outcome of the court process; in essence, they do not agree with the decision reached by the JOH. This demonstrates a misunderstanding of what the JCR can do in relation to their complaint. It is a fundamental point; the legal system in the United Kingdom is based on ensuring the independence of a JOH to make a judicial decision from the evidence presented to the JOH in the Court/Hearing process, without influence from government, private or any other partisan interest. That judicial decision is only challengeable by appeal or, in some administrative matters, by judicial review - which is dealt with by the Court of Session in Scotland.

⁴ Employment Tribunals are reserved tribunals administered by [HM Courts and Tribunal Service](#)

⁵ www.scotland-judiciary.org.uk Complaints About Court Judiciary - Publications

⁶ www.judicialcomplaintsreviewer.org.uk/ Data Protection

I share the view of my predecessors that many complainants do not understand that:

- a review can only be made on the personal conduct of a JOH,
- the JCR cannot change the decision made by the JOH
- the JCR cannot reinvestigate the complaint.

Primarily, this matter relates to ‘raising awareness’ of the role of the JCR which is already set out in relevant web sites, in guidance and in correspondence with the complainant by both the JOS and the JCR.

The current Guidance Leaflet published by the JOS sets out examples of what conduct can be investigated under the Rules:

- The use of racist, sexist or offensive language
- Falling asleep in court
- Misusing judicial status for personal gain or advantage
- Conflict of interest

For completeness, the following are examples of what cannot be investigated under the Rules.

- A judgement, verdict or order
- Sentencing decisions
- What evidence should be, or has been considered
- The award of costs and damages
- Whose attendance is required in a hearing
- Who should be allowed to participate in a hearing
- Allegations of criminal activity (criminal allegations should be directed to the police)

With the exception of the last issue, all are related to the decisions taken by the JOH during their determination and/or management of the case.

What is considered ‘misconduct’ by a complainant, however, may be a grey area when reviewing the handling of a complaint where the complaint has been dismissed as being about a ‘judicial decision’. A ‘judicial decision’ has a wider meaning than just the finding in the case. It is defined in the Rules⁷:

“judicial decision” includes: a judgment in a case; a decision in relation to the conduct of proceedings; a decision in relation to case management; and, a decision in relation to court programming.

Complainants regularly describe the behaviour of the JOH, when managing/conducting their case, as being inappropriate or even biased towards the other party in the proceedings. The previous JCR made this relevant comment in her Annual Report,⁸ in relation to evidence of such behaviour:

“In each case evidence must be provided. Some complainants have told me they felt the judge was rude to them or treated them without respect either by speaking harshly or seeming not to be interested in what the complainants had to say. If no evidence is provided to substantiate the allegation, JOS take the view that whatever behaviour is alleged is simply part of the judge’s handling of the case or his/her decision on the case”.

⁷ www.scotland-judiciary.org.uk/ Complaints About Court Judiciary

⁸ www.judicialcomplaintsreviewer.org.uk/ JCR Annual Report 2015/16 at page 8 -

A reasonable person may consider that taking such a view could be perceived as an assumption on the part of the JOS. It remains a contentious issue; for complainants that their complaints are not subject to further investigation, whilst the JOS considers it to be an appropriate decision, in the absence of supporting evidence. If the complainant alleges the JOH was biased that is for an appeal process not the JOS or the JCR.

The Complaint Guidance⁹ leaflet produced by the JOS does stress the importance of evidencing the allegation:

“It is important that you provide enough information for us to consider your complaint. For example, it is not enough to simply say that ‘The judge was rude to me’. You will need to explain what was said or done by the judge that you felt was rude; providing examples of the language used or behaviour shown”.

The courts process is formal and requires firm management to progress cases with a recognition that it can be intimidating for the parties involved. It also requires that both sides are able to fairly present their evidence within the rules of the court. The ‘Bangalore Principles’, at number five, (see page 10 of the Statement of Principles of Judicial Ethics for the Scottish Judiciary¹⁰) refers to:

“equality of treatment to all before the courts is essential to the due performance of the judicial office”.

In some complaints systems, if supporting evidence of the allegation is not in the complaint form, the complainant may be asked if any exists.

For any complaint investigator, the development of public CCTV and audio recording has given potential access to the actual circumstances of the allegation; but CCTV is not available during Hearings in the Scottish Courts.

7 CONCLUSIONS

The above are my observations after a year in office, having had the opportunity to consider twenty-two review requests and revisit some historical case files. To develop and improve a complaints system requires a balance to be drawn between the needs of the complainant and the person subject of the complaint, against a realistic and proportionate assessment of what meaningful improvement is likely to be achieved.

The number of cases for review has fallen:

2017/18 – 17

2016/17 – not published¹¹

2015/16 – 37

2014/15 – 40

2013/14 – 29

⁹ www.scotland-judiciary.org.uk/ You and the Judiciary - Complaints About Court Judiciary

¹⁰ www.scotland-judiciary.org.uk/ You and the Judiciary - Complaints About Court Judiciary – Guidance

¹¹The previous JCR has not published a report for that year of office

2012/13 – 23

2011/12 – 20

I believe the positive work of the previous two JCR, to improve the process, has contributed to that fall; the basis being that complaints and their proper handling should lead to improvement in the service provided. It may also be argued that awareness, among users/potential users of the review process, that the JCR cannot resolve their complaint to their satisfaction leads them to avoid the process altogether. That said, the small number of requests for review by the JCR and where no substantial breaches have been identified, does show the JOS is proficient in handling complaints, in accordance with the Rules.

The recurring issue for complainants is where their complaint involves the conduct of the JOH, towards them, when conducting/managing their Hearing. At what point does ‘firm handling’ by the JOH move from being part of the ‘judicial decision’ to become a ‘personal conduct’ issue? It is a difficult issue for the JOS to manage where evidence to support the allegation is sparse in the initial complaint form. Successive JCR post holders, including myself have concerns on:

- The lack of understanding by users of the JCR process that it will not provide a different outcome to their case;
- Whether the existing JCR process is sufficient to meet the expectations of users (and the wider public) for an independent assessment of how their complaints against judicial office holders are handled.

The JCR review process is conducted in line with the statutory requirements¹². The JCR role and process has been in existence for seven years; I believe it is time to review the role to ascertain its relevance and efficacy in the Judicial Complaints process.

8 RECOMMENDATIONS

I recommend that Scottish Ministers should consider conducting a review of the role and process of the Judicial Complaints Reviewer to determine its relevance and efficacy in the Judicial Complaints process.

Ian A Gordon
Judicial Complaints Reviewer for Scotland
23 October 2018

¹² www.legislation.gov.uk/asp/2008/6/contents - see Chapter 4 Judicial Conduct

ANNEX A – Register of Interests

1. Appointments held during the Report period - 2017/18:

- Acting Local Government Commissioner for Standards (Northern Ireland)
From August 2016 to August 2019 - Remunerated @ daily rate of £312.00
- Chair of a Development Trust (Charitable status)
Not remunerated

2. Financial interests:

- Home owner in Scotland
- No relevant share holdings
- No gifts or hospitality received in relation to my role

3. Relationships:

I do not have any friendships, relationships or business dealings with any judicial office holder, Judicial Office for Scotland or Scottish Court Service employee.

4. Political activity

None