

Judicial Appointments & Conduct Ombudsman

**Annual Report 2007-08**



# Judicial Appointments & Conduct Ombudsman

## Annual Report 2007-08

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

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# Contents

Introduction	4
The Ombudsman's Statutory Remit	6
Emerging Themes	8
Complainants and Stakeholders	11
The Status of the Ombudsman and Provision of Support	13
Annexes	15
Annex A: 2007/08 Statistics	16
Annex B: Case Studies	17
Annex C: Summary of Performance Against Business Plan Targets	25
Annex D: Forecast and Actual Expenditure	27
Annex E: Judicial Appointments & Conduct Ombudsman Organogram	28



## Introduction

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

The number of complaints I have received shows a 3% increase from last year (314 against 304 in 2006/07). I have determined and finalised many more cases (101 against 37 in 2006/07) and a number of themes have emerged which I have outlined in this report. In addition, my office and I have been able to refine our processes and improve the information we provide to complainants.

In my first Annual Report, I said that proportionality and fairness were paramount in my consideration of complaints. I make no apology for continuing to emphasise these essential features of my work. My determinations are without bias, and balance the interests of both those complaining and those complained about.

The appointment, by the Lord Chancellor, of the Northern Ireland Judicial Appointments Ombudsman, to deal with cases where I have a conflict of interest continues to work well. I am grateful to Karamjit Singh CBE for dealing with two cases this year.

I would once again like to pay tribute to the excellent team who support me. They provide a very high level of service to complainants and to those complained about. I am very grateful to them for all their efforts.

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**Sir John Brigstocke KCB**



## The Ombudsman's Statutory Remit

I am independent of Government, the Ministry of Justice<sup>1</sup> (the sponsor Department for the Ombudsman) and the judiciary.

The Constitutional Reform Act 2005 empowers me to consider:

### **Judicial Appointments**

- complaints from candidates for judicial office about the way in which their applications were handled;
- matters referred to me by the Lord Chancellor relating to the procedures of the Judicial Appointments Commission (JAC);

### **Judicial Conduct and Discipline**

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

<sup>1</sup> the Department for Constitutional Affairs until 9 May 2007. The words Ministry of Justice will be abbreviated to MoJ for the purposes of this report.

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

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

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

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

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

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

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



## Emerging Themes

### **The system as a whole**

As the chart at Annex A shows, in 2007/08 I received 314 complaints (21 concerning appointments and 293 concerning judicial conduct). Of these, many did not warrant formal investigation, mostly due to the absence, even after repeated prompting, of any specific, evidenced or substantiated examples of maladministration which could be investigated. Of those complaints which could be investigated, I determined and finalised 101 and upheld or partially upheld 11 (1 appointment case and 10 conduct cases).

During 2007/08, the JAC handled applications from around 2,500 candidates for judicial office. The OJC handled around 1,700 complaints from complainants with concerns about judicial conduct. In this context, the very small number of complaints I have upheld would suggest that the first tier complaint processes are working efficiently and fairly. However, I have no means of judging how many unsatisfied complainants, after first tier investigations, decide not to refer their concerns to me, and how many of these might be valid.

The case studies at Annex B are typical of the complaints I investigated during the year.

### **The judicial appointments process**

I have dealt with a relatively small number of appointments cases, but many of those who do write to me find it hard to accept that the new independent procedures are fairer and more transparent, but are also competitive. Thus, unsuccessful applications are nearly always due to the strength of the competition, and are not a result of unfairness in the process. I know that the JAC goes to a great deal of trouble to try to set out in as much detail as possible how the process will work for each selection exercise and the standards against which candidates will be measured. However, I have suggested that it would be reasonable and acceptable for the JAC to operate processes which are slightly more flexible; this would have the advantage of moving candidates away from an expectation that matters will proceed to the letter of the guidance, something which may often be impossible, particularly in the larger competitions.

An example of this relates to the type of questions asked at interview. See ‘Case Study 1’ (Annex B). In a system based on the assessment of “qualities and abilities”, it is of course right that the majority of questions should be designed to establish the extent to which a candidate’s skills and experience match these requirements for the post in question. However, particularly for the more senior judicial posts, there may be other questions which are not necessarily directly linked to the “qualities and abilities” being tested, but which can nevertheless elicit information which is relevant for the purposes of assessing an individual’s suitability for appointment. I consider that it would be entirely appropriate for the JAC to amend its processes, if it so wishes, to allow for some broader questions to be asked.

### **Independent verification in conduct cases**

The most common theme in conduct complaints to me is that the first-tier body was biased in favour of the judge originally complained about. I have investigated 32 cases where this has been an issue and, although I am pleased to say that I found no instances of actual bias, I can see why complainants sometimes get that impression.

There will always be instances where a complainant’s recollection of events is different from that of the judge complained about. My general principle, where there are conflicting recollections of matters that do raise issues of personal conduct and which may have a bearing on the outcome of the complaint, is that those investigating complaints should not simply prefer the version of

events recalled by the judicial office holder in coming to a view that a complaint is 'untrue, mistaken, or misconceived'<sup>4</sup> but should instead seek independent corroboration. I suggested to the OJC as part of this year's review of the Regulations and Rules covering judicial discipline and conduct that the legislation should include clear guidance on this important principle.

### **Improvements**

I am also pleased that complaints to me often result in tangible improvements in procedures and processes, even following cases where I have not upheld the complaint but where I found that it could have been better handled, or where the procedure complained about itself needs revision. For example, based on my determinations, the OJC launched a training initiative to highlight, inter alia, the importance of ensuring that letters to complainants fully address all parts of their complaint and explain clearly the effects of the regulations. 'Case Study 3' (Annex B) is an example of where the JAC made significant changes to their systems based on a case which I did not uphold. This element of our work should, over time, reduce the number of complaints I receive.

4 Regulation 14(1)(f), Judicial Disciplinary (Prescribed Procedures) Regulations 2006



## Complainants and Stakeholders

### Listening to complainants

We are committed to listening to our customers so that we can improve our performance, and I am pleased that we have not received any formal complaints about our service this year. However, we have not been complacent. We have streamlined the way in which we deal with new cases to establish more quickly whether we can investigate a complaint. In the majority of cases we now let customers know if we can investigate their case within 2 weeks of receipt of their completed complaint form.

It was also clear from the correspondence and telephone calls we had from our conduct customers that our information leaflets and our website could be even clearer about the precise nature, and limitations, of our remit. We have therefore produced a new conduct leaflet to help prospective complainants decide if I am likely to be in a position to assist them.

We have also improved our website to make it easier for people to access information about either my appointment or my conduct remit. Customer comments on our former website were very useful in helping us with the new layout and content. To ensure that we can continue to collect feedback about our service, we have included on the site a form which customers can complete and send to us at any time.

We are mindful of the need to ensure that our processes and services are accessible to everyone. We have therefore conducted an initial assessment of our new leaflet, the website and our processes using the MoJ's Equality Impact Assessment process to identify any problems which need addressing. This work will be continued in 2008/09.

During the year we also concluded our 'complexity assessment pilot'. The aim of the pilot was to establish whether we could categorise investigations according to their complexity to make better use of our investigative resources than would otherwise be the case if we treated all cases the same (for example by taking cases in strict date order). The result was that a significant amount of resource was needed to get close to an accurate prediction about the likely complexity of a case; in effect the assessment was duplicating the investigation. However, the pilot demonstrated the benefit of finding out as much as possible about a case early on so that, for example, questions can be raised with the complainant or the first-tier body as early as possible in the process. We have incorporated this and other lessons learned into our investigative practices. The Investigating Team review their caseload regularly to ensure that resources are being used to maximum effect.

### **Maintaining constructive relationships with stakeholders**

We have continued to maintain constructive working relationships with the organisations about which people can complain.

I have regular meetings with the Lord Chancellor and the Lord Chief Justice. I have had meetings with the Chairman of the JAC and have briefed the Commissioners on my work and impressions. I have also met senior officials responsible for the OJC and had meetings with other key stakeholders. We continue to work closely with the JAC, the OJC, Tribunal Presidents and Magistrates' Advisory Committees to ensure that complaints are dealt with as quickly as possible.



## The Status of the Ombudsman and Provision of Support

The Constitutional Reform Act 2005 specifies that the person holding the office of the Ombudsman is a 'corporation sole'.

The Act also specifies that the Lord Chancellor may make arrangements for the Ombudsman to be provided with assistance in the discharge of his functions<sup>5</sup>. My relationship with the MoJ is formalised in a Memorandum of Understanding which, inter alia, sets out the assistance to be provided to me by the Head of Office and her team. I am supported by a team of 10; the office structure is at Annex E.

The table at Annex C summarises our performance against the targets in our Business Plan for 2007/08.

### Corporate Governance

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

<sup>5</sup> Schedule 13, paragraphs 8 and 10, Constitutional Reform Act 2005

The table at Annex D summarises our expenditure compared with our forecast budget. As for last year, it was once again difficult to forecast our annual cost with certainty as we are still a relatively new office. The table shows expenditure considerably lower than anticipated, as we originally planned to recruit fee-paid investigating officers to cover unexpectedly high volumes of work. In the event, this was unnecessary and funds were surrendered to the MoJ in accordance with our Memorandum of Understanding.

**Sick Absence**

The MoJ target for sick absence is 7.5 days per person. My office's overall average is 7.67. However, this is not a true reflection of the office's exceptionally good sick record, as one member went on a long period of sick leave which amounted to 49 days. This was managed by my office in accordance with the MoJ's sick absence policies. The average for the remaining members of staff was 3.67, well below the MoJ average.

# **Annexes**

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## Annex A

## Monthly breakdown of cases received

	Total number of cases received	Conduct-related cases received	Appointment-related cases received	Other correspondence received
April	28	26	2	4
May	28	26	2	3
June	20	18	2	2
July	25	21	4	2
August	23	22	1	3
September	14	13	1	2
October	29	28	1	3
November	42	39	3	2
December	21	19	2	7
January	25	24	1	1
February	36	34	2	5
March	23	23	0	1
<b>Total</b>	<b>314</b>	<b>293</b>	<b>21</b>	<b>35</b>

## Cases determined and finalised

	Not upheld	Upheld and partially upheld
Conduct cases	63	10
Appointment cases	27	1

## Annex B

# Case Studies<sup>6</sup>

## Appointment case studies

### Case study one

The complainant considered that the JAC had not properly handled his complaint to them about perceived unfairness in relation to his interview. He had been asked whether he held another particular judicial office as a means of widening his experience and, when he replied in the negative, was asked why not, he replied that he had been unsuccessful in applying in the past. Following the interview, the complainant challenged this question on the basis that it was not relevant to the competences for the post he had applied for. The JAC accepted that the question about why he did not hold that other office had been inappropriate, but did not accept that it had been wrong to ask whether he had held the office. They apologised, but confirmed that the panel had not been influenced by his answer to the second question in reaching their decision not to recommend him for appointment.

I did not uphold this complaint. I appreciated the complainant's concern that he was asked a technically inappropriate question during the interview, and why this had caused him to question the fairness of the selection process. I also noted that the JAC's guidance for interviewers emphasised the need to question applicants only on relevant competences. In this case, the complainant had been asked one inappropriate question which he challenged. He subsequently received an apology. I considered the response to his complaint to be reasonable and was satisfied that the JAC had taken appropriate steps to assure themselves that the complainant's response to the inappropriate question had not been taken into account by the interview panel in reaching their conclusions about his suitability for appointment.

<sup>6</sup> When discussing specific complaints made to me, anonymity has been assured and for additional privacy, 'he' has been used throughout this report, in lieu of he/she.

**Case study two**

The complainant was concerned that he had been rejected at the shortlisting stage and complained that disproportionate weight had been placed on the self-assessment; candidates who had attended training on the application process were at an advantage; there should have been concern about the gender divide in applicants and interviewees; the ratio of interviewee to post was too low; feedback was deficient; and the JAC had not contacted a different referee as they had been requested.

I did not uphold the complaint as I found that the JAC's decision took account of references and relevant evidence contained in the self-assessment. I also found no evidence to indicate that selection was not entirely on merit. I agreed with the complainant that candidates who had arranged private training for themselves may well have been at an advantage, but there was nothing to have prevented the complainant from doing the same. I took the view that it was for the JAC to decide what ratio of interviewees to posts available was appropriate and was content that the JAC used its discretion appropriately in selecting the number of applicants to interview in this selection exercise. I found that the feedback given to the complainant was sufficient and that, although there was an administrative error in connection with one of his referees brought about by a request for a change by the complainant at the very last minute, the JAC had apologised. I concluded that this did not constitute maladministration.

### Case study three

The complainant was concerned that the JAC had given inaccurate information about the eligibility criteria for appointment in a particular selection exercise. The JAC had subsequently corrected the error, but this had reduced the time available to the complainant for the submission of his application. In addition, the complainant had not been invited for interview and, on receipt of feedback, felt that the information he was given suggested that weight had been given to factors not in the advertised competencies.

I found a number of problems with the handling of this complainant's application. In particular, although the advertisement for the selection exercise was accurate, an official gave incorrect information about eligibility when a colleague of the complainant made an enquiry. Once the mistake came to light, the official issued an apology and gave the complainant an extension for the submission of his application. There were conflicting views about whether this extension was sufficient, although it was my view that the JAC should have been prepared to offer a longer extension. With regard to the provision of feedback, I was content that the sift panel did not take account of any inappropriate factors when considering whether to invite the complainant to interview, although I could see how the wording of the feedback to the complainant had led to a misunderstanding. I was nevertheless concerned that there was only limited evidence available about the processes that the JAC had followed.

In the round, it was my view that the JAC's actions did not amount to maladministration and I did not, therefore, uphold the complaint. However, I did make suggestions about where the JAC might make improvements for the future. I recommended that the JAC review the process by which sift decisions are noted to ensure that there is an adequate record to show that an application has been assessed appropriately against the given criteria. In addition, this case highlighted the obvious need for officials to be familiar with the legislative eligibility criteria for the selection exercises on which they are working.

In response, the JAC told me that they had significantly enhanced their auditing and record keeping systems, including the introduction of standard templates for use by panels. In addition, panels have received training which stresses the importance of feedback.

**Case study four**

I considered a complaint about the then Department for Constitutional Affairs (DCA). The complainant, whose application had been rejected at sift on the basis that he had not demonstrated the competency to the required level, pointed out to me that this was inconsistent with the decision of the panel for a previous competition (comprising the same members) for which the candidate had supplied identical evidence against identical competencies. In that competition the candidate had been invited for interview where he had been classed as a very good candidate but not offered appointment.

I upheld this complaint as I concluded that the difference was most readily explained by the panel placing considerable weight on a response from an automatic consultee which raised irrelevant factors and should have been disregarded. I also concluded that the panel did not take account of a statement that had been provided concerning the candidate's visibility to automatic consultees. However, there is nothing wrong, in principle, with selection panels reaching different conclusions as the overall standard of candidates in each competition is variable.

I did not uphold other aspects of this complaint, including the candidate's suggestion that, having performed well at interview in a previous competition, he should have been offered a place from the Reserve List when it became clear that none of the applicants would be invited for interview.

I recommended that the DCA write to the complainant to apologise for the panel's errors in assessing his application, and acknowledge that this may have had an impact on its outcome. I did not make any procedural recommendations, as responsibility for future competitions has passed to the JAC, which has introduced substantially different processes for the assessment of candidates for judicial appointment. I did however forward a copy of my report to Baroness Prashar, the Chairman of the JAC, in case my findings were of interest to her.

## Conduct case studies

### Case study five

The complainant was concerned, inter alia, that the OJC had failed to conduct an independent investigation into his original complaint. He considered that the OJC had appeared simply to prefer the judge's version of events to his.

I upheld this aspect of the complaint as I found that the OJC had failed to take steps independently to verify what happened before deciding between the conflicting recollections of the complainant and the judge. My statutory powers include setting aside a determination by the OJC if I believe that failings in the investigative process make the original determination unreliable. I did not need to take this action in this case because the OJC agreed to reopen its investigation into the original complaint. I did, however, recommend that the complainant be reimbursed for the costs that he had incurred in obtaining a transcript of his hearing. At the OJC's suggestion, he had taken his own steps to provide independent verification of what had happened at the hearing by obtaining the transcript at his own expense. It was my view that this was a cost he had borne as a result of the OJC's failure to conduct a demonstrably independent investigation and I was therefore pleased that it agreed to reimburse him fully.

**Case study six**

The complainant raised concerns with me about the way in which the OJC and a Magistrates' Advisory Committee had refused to investigate the issues he had raised, namely that the OJC had given him inconsistent advice and taken too long to deal with his complaint.

I partially upheld this complaint in relation to the complainant's concerns about delay. I was satisfied that the OJC and the Magistrates' Advisory Committee followed appropriate procedures in concluding that they could not deal with the matters which the complainant had raised. However, I was concerned that it took 5 months to inform him of the outcome. Investigations into the personal conduct of judicial office holders can be complex and may take many months, but this case was straightforward and there was unnecessary delay to a degree that amounted to maladministration. I was therefore pleased that the OJC agreed to apologise to the complainant and that it had taken steps to improve the management of cases.

**Case study seven**

The complainant asked me to look at how a Tribunal President had handled his original complaint. He was concerned that not all the issues he had raised had been looked at; the complaint had not been taken seriously; it had taken too long to resolve; and published procedures had not been followed correctly.

I partially upheld this complaint. I found that the tribunal had failed to inform the complainant that an investigation could not be taken forward whilst his tribunal case was still open, even though it was also telling him to contact the OJC. I could therefore understand why he believed that aspects of the complaint had not been dealt with and that it had not been taken seriously. I did not recommend any redress in this case as, once the litigation finished, the President was able to conclude his investigation of the complaint. However, my investigation highlighted a degree of confusion concerning the interface between the OJC and this particular tribunal and I was pleased that the OJC agreed to clarify the position for the future. In addition, it brought to light some inconsistencies between the rules and guidance for dealing with complaints in tribunals. The OJC confirmed that it would take this issue forward as part of its review of the rules and regulations governing the judicial disciplinary functions.

**Case study eight**

The complainant raised a number of concerns about the OJC's actions, including that it was wrong for the OJC to have implied in their communication with the complainant that the caseworker had listened to the tape, when it was only the judge who had listened to the tape, when forming his response to the OJC.

I found, in this instance, that the OJC had initially dismissed the complaint on the basis that the issues raised related to a judicial decision or judicial case management and raised no question of misconduct. The OJC subsequently agreed that some of the points raised might call into question the judge's personal conduct but that the concerns, even if substantiated, would not warrant disciplinary action.

It is essential that the OJC seek to independently verify what happened in all cases where the complainants' comments about a judge's personal conduct are at odds with the recollection of a judicial office holder complained about and where the resolution of any discrepancy might have a material bearing on the outcome of the complaint. However, decisions as to whether to listen to tapes must reflect the seriousness of the concerns and I agreed with the OJC that there would be no point in seeking independent verification of comments which, even if substantiated, would not warrant disciplinary action.

I did not uphold this complaint as I was satisfied that, overall, the decision to dismiss the original complaint was based on appropriate evidence and was consistent with legislation and guidance. I did, however, have concerns about the content of the OJC's letters to the complainant as I believed they failed to convey the basis on which his complaint had been dismissed and also commented on matters outside the OJC's remit. I considered that these issues may have caused him to believe that the process by which his complaint had been considered was inappropriate. I was therefore pleased to be informed that the OJC had launched a training initiative to highlight, among other things, the need for caseworkers to provide more details about how decisions have been reached.

## Annex C

### Summary of Performance Against Business Plan Targets

Target number	Target	Performance
PT1	answer at least 95% of enquiries, by post or by e-mail, within five working days	Achieved (100%)
PT2	in at least 95% of cases which we investigate, keep complainants fully informed on a monthly basis about the progress of our investigation	Achieved (99%)
PT3	keep 95% of complainants about appointment competitions informed on a monthly basis about the progress of our investigation	Achieved (99%)
PT4	maintain a communications strategy which ensures that the Ombudsman's role is known and understood by those who may wish to complain to him, and those who may find themselves the subject of a complaint	Achieved
PT5	obtain feedback from customers when we have finished dealing with their complaint, and gather feedback from those complained against where appropriate	Achieved <sup>1</sup>
PT6	operate within our budget	Achieved
PT7	effectively manage financial pressures and risks to achieving our business objectives, re-profiling expenditure plans, reviewing responses to risks, and reporting any significant consequences on a quarterly basis	Achieved

1 Only a relatively small number of complainants consented to be contacted for a formal survey, making such an exercise statistically ambiguous. We therefore focused on improving our processes and our leaflet based on more informal feedback from complainants. In addition, we sought specific feedback on our website. We gathered feedback from those complained against as appropriate on an ongoing basis as part of our regular discussions with stakeholders.

PT8	monitor sickness and turnover rates in accordance with MoJ policies and, in doing so, contribute to the achievement of MoJ targets	Achieved
PT9	evaluate the case management database by end June 2007	Achieved

## Annex D

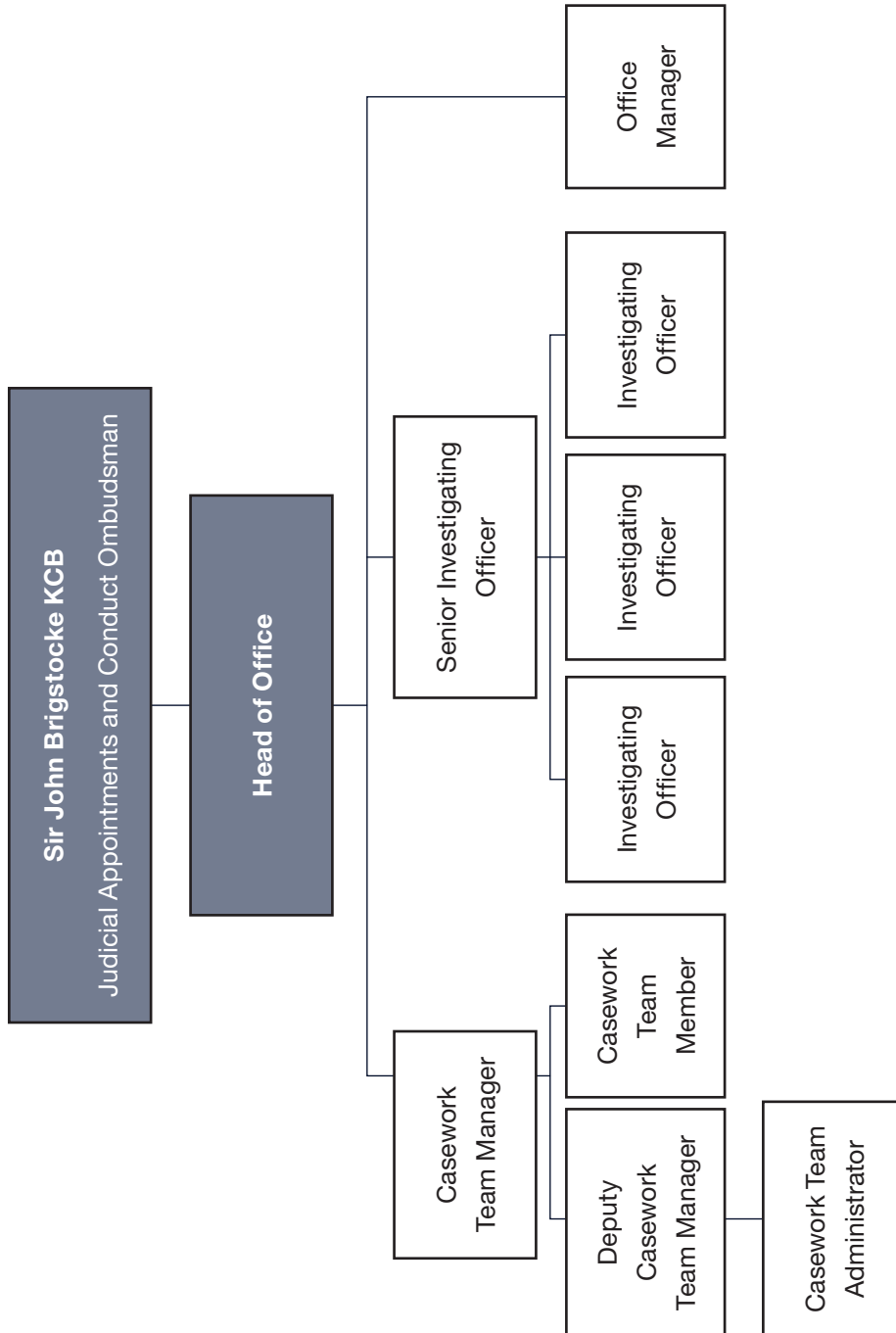
### Forecast and Actual Expenditure

1 April 2007 to 31 March 2008

	Forecast	Actual
<b>Staff costs and salaries</b>	424,200	452,862.56
<b>Agency staff</b>	72,000	10,179.38
<b>Research</b>	10,200	2,300.00
<b>Office expenditure, Accommodation and IT Services</b>	14,580	11,177.65
<b>Service costs and Miscellaneous</b>	8,200	1,617.58
<b>Consultancy</b>	40,700	2,492.77
<b>Legal Advice</b>	10,200	1,000.00
<b>Training</b>	24,525	11,410.85
<b>Travel and subsistence</b>	5,100	1,853.17
<b>Total expenditure</b>	<b>609,705.00</b>	<b>494,893.96</b>

**Annex E**

**Judicial Appointments & Conduct Ombudsman and his Office**





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