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Judiciary

Who is judging the judges?

We know a lot more about judicial complaints than we used to but it remains the case that judges themselves judge judges

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Tue 25 Mar 2014 22.21 AEDT



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Two senior judges who specialise in criminal law have agreed not to hear any criminal cases for the time being. Another judge, of some seniority, has resigned after a finding of serious misconduct. Who, then, is judging the judges?

The answer is, ultimately, the judges themselves - though the lord chancellor still has a formal role. Chris Grayling and the lord chief justice, Lord Thomas of Cwmgiedd, are supported by a group of officials known as the [Judicial Conduct](#)

[Investigations Office](#) (JCIO). Like the Office for Judicial Complaints, which it replaced last October, the JCIO was created under the Constitutional Reform Act 2005. Before that, complaints about judges were a matter for the lord chancellor alone.

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We know a lot more about judicial complaints than we used to. In 2009, the lord chancellor and the lord chief justice agreed to name judges who were disciplined for misconduct, adding brief details of the offence and sanction. This [roll of dishonour is freely available online](#). Among those reprimanded (and, where appropriate, sacked) have been high court judges, coroners, part-time judges, tribunal members and magistrates. There was even an [appeal judge reprimanded over a driving ban](#) but his name seems to have slipped off the bottom of the [2012 list](#).

As Shetreet and Turenne note in the [long-awaited second edition of Judges on Trial](#), "details of the allegations [against judges] are often rather elliptic". That was certainly true of the [announcement on 14 March about Steven Whitaker, who was senior master of the high court \(pdf\)](#), a type of junior judge. He also held the post of Queen's remembrancer, created 860 years ago and the oldest judicial position continuously held by a judge. A judicial investigation found that Whitaker "made misleading entries in his Outlook diary with the intent to mislead anyone who might scrutinise the record". The lord chancellor and a senior judge "had concluded that this behaviour amounted to serious misconduct and would have removed the senior master from office had he not voluntarily resigned".

Despite announcements that sometimes conceal more than they reveal, the JCIO's website tells us most of the things we might want to know about the office - except the names of the officials who run it. A particularly useful innovation is [the "news" section](#), from which we learn that the JCIO has recently started an investigation into complaints about Lord Justice Fulford. These presumably relate to the allegations in the Mail on Sunday two weeks ago and [reported here; my own analysis is at the foot of that page](#).

In response to the allegations, the appeal judge said he was sorry that a gay rights committee, which he had supported as a barrister, allowed members of the Paedophile Information Exchange (PIE) to attend the committee's meetings.

Fulford had also been concerned at the use by prosecutors of the judge-made, catch-all offence of conspiracy to corrupt public morals. The director of public prosecutions had brought that charge against Tom O'Carroll and two other PIE members in 1981 after they sent a booklet to MPs advocating acceptance of adult love for children. O'Carroll was jailed for two years.

The [Mail on Sunday returned to the story a week ago](#), pointing out that critics of the catch-all offence at the time also included [Peter Thornton - as Wikipedia had previously noted](#).

Thornton, then a barrister, now a circuit judge and chief coroner of England and Wales, was also criticised for having represented a PIE member in court.

So it should have come as no surprise [to read on the JCIO website that Thornton, like Fulford, is the subject of an investigation](#). In his case, though, it opened before any complaints were received. Regulations made under the [Constitutional Reform Act \(pdf\)](#) and [rules made under those regulations \(pdf\)](#) explain how this could happen.

All complaints received by the JCIO are sifted by caseworkers. In clear-cut cases of misconduct, the JCIO may advise the lord chancellor and the lord chief justice to sack the judge concerned.

Alternatively, the JCIO may refer the complaint to a nominated judge of at least the same rank as the judge under investigation. The nominated judge will advise the lord chancellor and lord chief justice whether there has been misconduct and, if so, what sanction is appropriate. Under rule 97, the nominated judge may refer a case without a complaint. This is what happened in Thornton's case. It was an attempt to speed up the proceedings.

If the nominated judge thinks a complaint is sufficiently serious or complicated, he or she may refer the case to an investigating judge, who must be senior in rank to the judge being investigated.

Needless to say, the judge under investigation must be given a chance to respond. If that judge is at risk of removal or suspension, he or she can demand to appear before a disciplinary panel. So all this can take a very long time.

From what I have read about the allegations against Fulford and Thornton, I would expect the nominated judge to decide reasonably swiftly that no misconduct has taken place. The allegations against them relate to their time as barristers, not judges. It is not misconduct for a barrister to support law reform. It is not

misconduct for a barrister to represent unpopular offenders. Barristers do not necessarily share the views of their clients.

What I cannot understand, though, is why Fulford and Thornton have been asked not to hear any new criminal cases pending the outcome of the JCIO's investigation. Judges do not sit while they themselves are facing criminal charges, as we have seen. But a complaint of misconduct, especially one related to a period before the judge was appointed, should not be sufficient to trigger even an informal or partial suspension.

If it is, then why allow Fulford to continue hearing civil appeals and Thornton to continue conducting inquests? Do those matters not demand as much judicial integrity as criminal appeals and trials?

Voluntary semi-suspension is illogical as well as unnecessary. Unless the nominated judge can resolve these matters without delay, the lord chief justice should let Fulford and Thornton resume their full duties while investigations continue.

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