



Northern Ireland  
Assembly

# Research and Information Service Briefing Paper

Paper 131/13

1 November 2013

NIAR 775-13

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## Relationship between the Northern Ireland Judicial Appointments Commission and Northern Ireland Judicial Appointments Ombudsman

### 1 Introduction

This briefing paper has been prepared in response to a request from the Committee for Justice. Section 2 of this paper covers the following areas: the remit of the Northern Ireland Judicial Appointments Commission (NIJAC); the NIJAC judicial appointments process; a breakdown of judicial appointments from 2005-2012; and NIJAC's complaints procedure. Section 3 of this paper covers the remit and powers of the Northern Ireland Judicial Appointments Ombudsman (NIJAO); and the number of complaints made to the NIJAO. The key points are:

- The NIJAO has a statutory remit to investigate complaints made in relation to alleged maladministration in the judicial appointments processes;
- In considering whether maladministration has occurred, the Ombudsman has to assess whether the process for assessing the complainant's application ensured he or she was treated fairly;
- There is no definition of maladministration in the relevant legislation, however the Ombudsman may investigate the following issues:

- provision of inaccurate or misleading information;
  - prejudice against a complainant;
  - failure to recognise the seriousness of a complaint;
  - failure to respond in a reasonable timescale; and
  - not responding to a complaint in accordance with laid down procedures;
- The NIJAO can make recommendations, including payment of compensation;
  - There is no statutory requirement for NIJAC to implement the NIJAO recommendations;
  - The NIJAO has said that recommendations arising from complaints “are intended to provide the Commission with an additional dimension for learning”;
  - There is no right of appeal against the Ombudsman’s recommendations;
  - There does not appear to be anything that prohibits a complainant from taking a judicial review, but applications for judicial review focus on the process rather than the substance or merits of a decision.

## 2 Northern Ireland Judicial Appointments Commission

### ***Remit***

The Northern Ireland Judicial Appointments Commission (NIJAC) was established in June 2005 under the Justice (NI) Acts 2002 and 2004.<sup>1</sup> NIJAC’s statutory responsibilities are to:<sup>2</sup>

- Conduct the appointments process and select and appoint, or select and make recommendations for appointment, in respect of all listed judicial appointments up to, and including, High Court Judge. Make appointments and recommendations for appointment solely on the basis of merit;
- Engage in a programme of action which is designed to secure, so far as it is reasonably practicable to do so, that appointments to judicial offices are such that those holding such offices are reflective of the community in Northern Ireland;
- Engage in a programme of action that requires the Commission so far as it is reasonable practicable to do so, to secure that a range of persons reflective of the community in Northern Ireland is available for consideration by the Commission whenever it is required to select a person to be appointed, or recommend a person to be appointed to a listed judicial office;

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<sup>1</sup> Section 3 and Schedule 2 of the Justice (NI) Act 2002

<sup>2</sup> Schedule 3 of the Justice (NI) Act 2002.

- Publish an annual report on how it has exercised its functions in the financial year and must include information about the persons who have applied to be or have been selected or recommended for appointment. Information to be included must include information about gender, age ethnic origins, community background and the part of Northern Ireland they regard themselves as being most closely associated. The information must not identify any person or include information from which the identity of the person could be readily ascertained.<sup>3</sup>

### ***Judicial Appointments Process***

NIJAC establishes a Selection Committee representative of the Commission for each competition. The Selection Committee is comprised of 3 Commissioners and a co-opted expert. Each selection Committee is chaired by a NIJAC Commissioner.<sup>4</sup>The Committee agree the shortlisting criteria, assessment methods and interview questions. NIJAC uses a Judicial Selection Framework for assessment and selection across all competitions. The Framework consists of knowledge requirements and four areas of competence including analysis/decision making, leadership/management, communication and understanding people and society.<sup>5</sup>

### ***Breakdown of Judicial Appointments***

The table below provides information on recommendations for judicial appointments made by the NIJAC from 2005-2013.<sup>6</sup>

<b>Reporting period</b>	<b>Number of recommendations for appointment</b>	<b>Breakdown of Judges recommended for appointment<sup>7</sup></b>
2012-13	23 Recommendations (5 Courts;18 Tribunals)	1 High Court Judge, 1 Temporary High Court Judge,1 County Court Judge, 1 Deputy County Court Judge, 1 Coroner

<sup>3</sup> Schedule 2 of the 2002 Act

<sup>4</sup> <http://www.nijac.gov.uk/index/what-it-takes/faqs.htm>

<sup>5</sup> Northern Ireland Judicial Appointments Commission Written Evidence to the House of Lords Constitution Committee, published 28 March 2012, available at <http://www.parliament.uk/documents/lords-committees/constitution/JAP/JAPCompiledevidence28032012.pdf>

<sup>6</sup> Information taken from NIJAC Annual Reports and Accounts, [http://www.nijac.gov.uk/index/what-we-do/publications/annual\\_report\\_and\\_accounts.htm](http://www.nijac.gov.uk/index/what-we-do/publications/annual_report_and_accounts.htm)

<sup>7</sup> This does not include appointment of tribunal members

2011-12	32 (7 Court; 25 Tribunal)	2 High Court Judges, 2 County Court Judges, 1 District Judge, 1 Deputy District Judge (Magistrates' Courts)1 Deputy County Court Judge
2010-11	16 (7 Court; 9 Tribunal)	2 County Court Judges, 5 Deputy District Judges (Magistrates' Courts)
2009-10	25 (8 Court; 17 Tribunal)	1 High Court Judge, 1 County Court Judge, 6 deputy Statutory Officers
2008-09	25 (3 Court; 22 Tribunal)	1 High Court Judge, 1 County Court Judge, 1 Coroner (fixed term)
2007-08	11 (7 Court; 4 Tribunal)	6 Deputy Resident Magistrates, 1 Deputy Social Security Commissioner
2006-07	151 (5 Court; 146 Tribunal, including 99 Ordinary Members of the NI Valuation Tribunal)	1 Master (High Court), 2 High Court Judges, 1 Presiding Coroner, 1 Master (High Court, EJO & Taxing Office)
2005-06	11 although this includes re-appointments.	Two Coroners.

### ***Timescales of recruitment schemes***

The Committee requested information on the timescales of competitions. An examination of NIJAC's annual reports indicated that this level of detail was not readily available. The annual reports outline the number of recommendations for appointments and renewals made in the year but don't provide information on the end to end timescales of recruitment schemes. The annual report for 2005-06 indicates that an advertisement for the Coroners recruitment scheme was placed in 2005 but does not specify a date that the recommendation was accepted or the appointment made. Furthermore the NIJAO reports do not contain such information as they deal with specific complaints rather than the overall process.

The predecessor body to the Ombudsman, the Commissioner for Judicial Appointments for Northern Ireland (CJANI) had responsibility for auditing appointment schemes. For example, in the CJANI annual report for 2005-06, the Commissioner reported on two schemes audited: Part Time Resident Magistrate; and President of the

Industrial Tribunals and Fair Employment Tribunal (IT/FET). The report highlighted that the competition for part-time magistrate was advertised in March 2005 and concluded with the post holders being sworn into office in October 2005. The appointment scheme for the President of IT/FET commenced in October 2004 with the successful candidate taking up post in May 2005.<sup>8</sup>

NIJAC is responsible for deciding the timing of any selection or any selection process.<sup>9</sup> The issue of delay in the appointment scheme was highlighted by the NIJAO in the Annual report of 2010-11, although it is unclear that delay was an aspect of the complaint and of a feature of the particular competition. The Ombudsman stated:

I note that Northern Ireland has a relatively small legal and judicial jurisdiction so that delay in appointments can potentially have a considerable impact on court business and confidence in the administration of justice can also be affected by the passage of time...I recommend the Commission seeks to complete competitions without undue delay and also make clear to candidates in its competition literature that any timescales should be regarded as indicative only.<sup>10</sup>

One of the members of the Justice Committee, Mr Alban Maginness MLA, asked the Lord Chief Justice, Sir Declan Morgan, whether NIJAC took this recommendation into consideration. The Lord Chief Justice responded that "Yes, we looked at the time taken to recruit under previous schemes... the total period of recruitment under the past 24 schemes from beginning to end was 241 days, under the past 13 schemes the total reduced to 227 days and over the past five schemes it had reduced to 180 days."<sup>11</sup> NIJAC's business plan for 2013/14 includes a target for the commencement of 10 new appointment schemes by 31 March 2014. The plan suggests the Business Committee will approve and monitor the timescales and progress of appointments. The Committee will achieve this target by reviewing a report from the Head of Appointments at all Committee meetings during 2013/14. The Head of Appointments will provide OFMDFM with a scheme tracker report for review at each quarterly accountability meeting.<sup>12</sup> From a perusal of the NIJAC and OFMDFM websites, these reports do not appear to be publicly available.

In England and Wales, the Judicial Appointments Commission annual reports make reference to timescales of the appointments process in its annual reports. The JAC has undertaken an exercise in conjunction with other key stakeholders to reduce the overall time taken to appoint a judge. This has resulted in a reduction from an average of 18

<sup>8</sup> Commissioner for Judicial Appointments for Northern Ireland Annual Report 1<sup>st</sup> April 2005 to 31 March 2006, pg 13 and 15 [http://cjani.courtsni.gov.uk/Annual\\_%20Report2006\\_4th.pdf](http://cjani.courtsni.gov.uk/Annual_%20Report2006_4th.pdf)

<sup>9</sup> Schedule 3, part 1, para 3 and part 2, para 4 (1) of the Justice (NI) Act 2002.

<sup>10</sup> Northern Ireland Judicial Appointment Ombudsman Annual Report, 1 April 2010-31 March 2011 Pg 19 [http://www.nijao.gov.uk/Documents/NIJAO\\_AnnualReport\\_20102011.pdf](http://www.nijao.gov.uk/Documents/NIJAO_AnnualReport_20102011.pdf)

<sup>11</sup> [http://www.niassembly.gov.uk/Documents/Official-Reports/Justice/2011-2012/120308\\_ReviewofJudicialAppointments.pdf](http://www.niassembly.gov.uk/Documents/Official-Reports/Justice/2011-2012/120308_ReviewofJudicialAppointments.pdf)

<sup>12</sup> Northern Ireland Judicial Appointments Commission Business Plan 2013/14, pg 13. [http://www.nijac.gov.uk/index/what-we-do/publications/business\\_plan\\_13\\_14\\_030513.pdf](http://www.nijac.gov.uk/index/what-we-do/publications/business_plan_13_14_030513.pdf)

months from launch of an exercise to receipt of success letter to eight months. Despite this decrease, JAC aims to reduce the process to five months.<sup>13</sup>

### ***Complaints Procedure***

NIJAC has a statutory duty to make arrangements for investigating complaints made to the Commission by a complainant who claims to be adversely affected by the maladministration of the Commission or a committee of the Commission.<sup>14</sup> Legislation specifies that these arrangements need not apply to a complaint made more than twenty eight days after the matter to which the complaint relates.<sup>15</sup> A summary of the process (as set out in NIJAC's complaints procedure) for making a complaint is as follows:

- A complaint about the applications process must be made in writing to the Chief Executive;
- The complaint must be made within 20 working days of the occurrence of the matter which is the subject of the complaint;
- The complaint must be made in writing and set out the specifics of the complaint made, the basis upon which the complaint is made and must include any documentation upon which the complainant will rely to support the complaint;
- The Commission will acknowledge receipt of the written complaint within three working days from the date of its receipt;
- The letter of acknowledgement will set out what action the Commission intends to take to investigate the complaint and indicate the expected timetable to conclude the investigation.

The Chairman of the Commission will appoint a Committee of the Commission to investigate and reach a determination on a complaint that falls within the scope of this procedure. The Committee will firstly decide whether a complaint falls within the scope of the procedure. If the complaint does not fall within scope of this procedure, the complainant will be informed and provided with a brief explanation. The Committee will endeavour to notify the complainant of a decision within 20 working days of the commencement of the investigation. At the end of the investigation, the Commission will state in writing its findings of fact in relation to the complaint, whether the complaint

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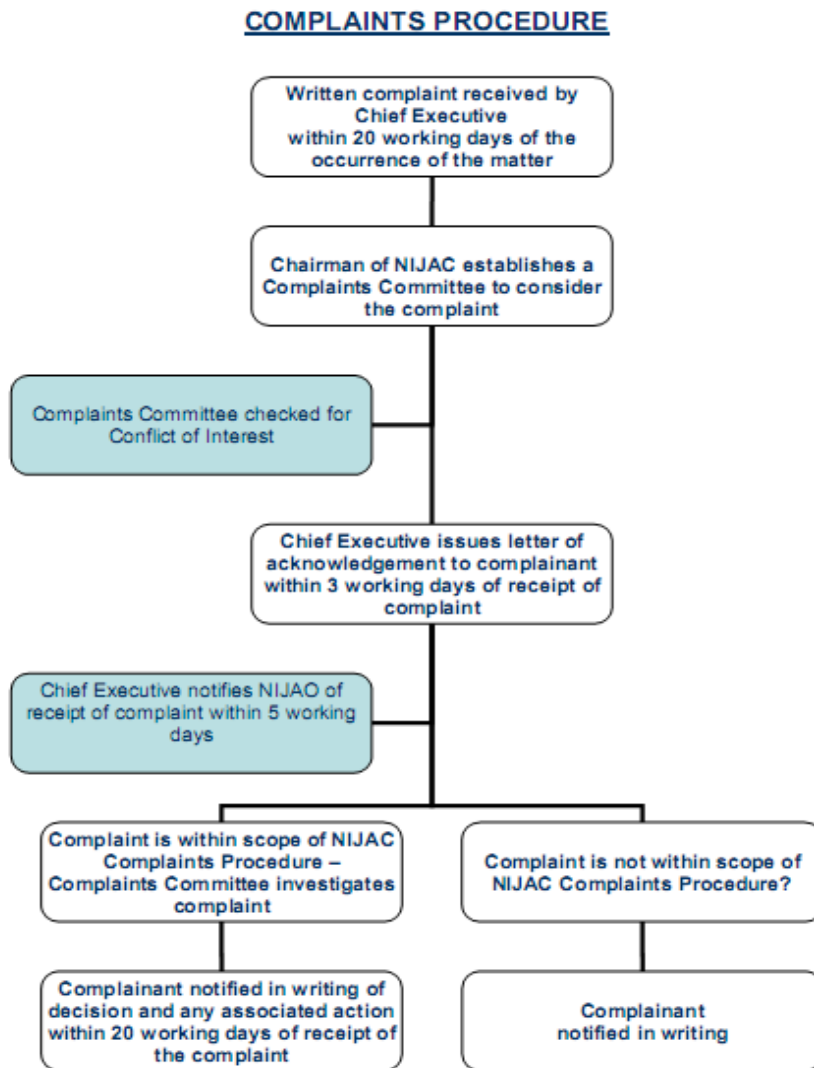
<sup>13</sup> The Judicial Appointments Commission Annual Report 2012-13, pg 14, [http://jac.judiciary.gov.uk/static/documents/Annual\\_Report\\_2012-2013.pdf](http://jac.judiciary.gov.uk/static/documents/Annual_Report_2012-2013.pdf)

<sup>14</sup> Section 9B of the Justice (NI) Act 2002 inserted by the Constitutional Reform Act 2005, s 124-126, see also NIJAC Complaints procedure, 1/2010, pg 2.

<sup>15</sup> Section 9C(3) of the Justice (NI) Act 2002

is upheld, and the action the Commission proposes to take. NIJAC's procedure for addressing complaints is set out in the diagram below.<sup>16</sup>

**Annex 1**



<sup>16</sup> Diagram taken from the Northern Ireland Judicial Appointments Commission Complaints Procedure, 1/2010, pg 7

In addition to the internal and statutory complaints procedure, NIJAC's Equal Opportunities Policy states that applicants have the right to seek advice and support from the Equality Commission or the right to pursue complaints of discrimination regarding equality of opportunity to an Industrial Tribunal or the Fair Employment Tribunal.<sup>17</sup>

A perusal of NIJAC's annual reports from 2007-08 to 2011-12 indicated that NIJAC mainly reported on how many (if any) complaints were made to the Ombudsman rather than information on complaints received by the Commission. The NIJAC annual report for 2006-07 indicated that all appointment schemes were administered within the agreed timeframes and no complaints were received. Similarly, the most recent NIJAC annual report for 2012-13 highlighted that no complaints were received during this reporting period.

In England and Wales, the JAC's 2012/13 Annual Report provides detail on its complaints procedure. It states that the JAC responded to all complaints within 20 days and in the relevant period it received 45 complaints, equating to an overall ratio of complaints to applicants of approximately 1%.<sup>18</sup>

Three complaints were upheld by the JAC; these all related to pilots of the online qualifying tests, and the candidates' applications were reinstated. Eight complaints were partially upheld by the JAC and apologies were issued, with one candidate being offered an automatic invite to the selection day for the next relevant exercise. These complaints related to the level of service received, including the quality of the feedback provided.

The remit of this research request asked whether it was possible to bring a judicial review in relation to decisions on judicial appointments. It has not been possible to find anything in literature that prohibits a complainant from bringing a judicial review. However it is important to note that there are limited grounds on which to bring a claim. They have been summarised succinctly by one legal academic, Professor Brice Dickson, as follows:<sup>19</sup>

- The decision being complained about was not within the powers of the body (i.e. it was Ultra Vires);
- The decision was taken in an improper way (e.g. no prior warning was given that it was going to be taken or the decision runs counter to the expectations affected persons had legitimately raised in their own minds);
- The action taken was one which no reasonable public body of that description could have taken (this is also known as Wednesbury Unreasonableness);

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<sup>17</sup> Northern Ireland Judicial Appointments Commission Equal Opportunities Policy, pg 9, [http://www.nijac.gov.uk/index/what-we-do/publications/equal\\_opportunities\\_policy\\_2011.pdf](http://www.nijac.gov.uk/index/what-we-do/publications/equal_opportunities_policy_2011.pdf)

<sup>18</sup> The Judicial Appointments Commission Annual Report 2012-13, pg 71, [http://jac.judiciary.gov.uk/static/documents/Annual\\_Report\\_2012-2013.pdf](http://jac.judiciary.gov.uk/static/documents/Annual_Report_2012-2013.pdf)

<sup>19</sup> B Dickson (2013) "Law in Northern Ireland" Hart Publishing, pg 132



- There was a lack of proportionality in the decision making.

Professor Dickson also emphasises that applications for judicial review are supposed to focus on the processes used by a public body when it comes to its decision, not on the substance (i.e. merits) of that decision. He stated “if judges could substitute their own views for those of administrators there would be a breach of the separation of powers doctrine.”<sup>20</sup> Interestingly, the JAC in England and Wales stated during the reporting period for 2012/13 that one applicant sought a Judicial Review over their non-selection, following rejection of their complaint by the JAC and the Ombudsman. However, the judge found no claims for bringing such a claim. At the oral hearing, the judge said that judicial review proceedings do not provide for avenue of appeal against the merits of a decision maker’s decision but allow for a review, and if appropriate, remedy of a decision that was made unlawfully.<sup>21</sup>

### 3 Northern Ireland Judicial Appointments Ombudsman

#### ***Remit and powers***

The statutory role of the Northern Ireland Judicial Appointments Ombudsman (NIJAO) is set out in sections 9A to 9H of the Justice (NI) Act 2002. Section 9D of the Justice (NI) Act 2002 makes provision for the Ombudsman to consider complaints from candidates for judicial office where maladministration by NIJAC or committees of the Commission or the Lord Chancellor is alleged to have occurred.

There is no definition of maladministration in the 2002 Act. The Collins Dictionary definition of maladministration is “bad, inefficient or dishonest management of the affairs of an organisation, such as a business or institution.” The NIJAO outlined in the 2012-13 annual report that in considering whether or not maladministration has occurred, the Ombudsman’s role is to determine whether the process for assessing the complainant’s application ensured that he or she was treated fairly.<sup>22</sup> According to the NIJAO website, the Ombudsman may investigate complaints against the Commission alleging issues such as:<sup>23</sup>

- Provision of inaccurate or misleading information;
- Prejudice against a complainant;
- Failure to recognise the seriousness of a complaint;
- Failure to respond in a reasonable timescale; and
- Not responding to a complaint in accordance with laid down procedures.

<sup>20</sup> B Dickson (2013) “ Law in Northern Ireland” Hart Publishing , pg 132

<sup>21</sup> The Judicial Appointments Commission Annual Report 2012-13, pg 71

<sup>22</sup> Northern Ireland Judicial Appointments Ombudsman: Annual Report, 1 April 2012 to 31 March 2013, pg 7

<sup>23</sup> <http://www.nijao.gov.uk/how/types.htm>

The Ombudsman is not able to consider the merits of a decision in terms of whether the complainant or any other candidate should have been appointed.<sup>24</sup> The Ombudsman may also offer advice on changes to procedures that have come to his attention as a result of a complaint.<sup>25</sup> NIJAC reported in the annual report for 2007-08 that whilst the Ombudsman did not uphold a complaint received they have implemented minor associated administrative recommendations made by the Ombudsman.<sup>26</sup>

Complainants should have exhausted the complaints procedures within NIJAC or those established by the Lord Chancellor before bringing a complaint to the Ombudsman. Normally complaints should be made not more than twenty eight days after a complainant is notified of a decision of the Commission or the Lord Chancellor. However the Ombudsman can exercise his discretion in deciding whether a complaint can be registered and investigated after this period if he considers it consistent with the purposes of the legislation.<sup>27</sup>

Section 9E of the 2002 Act provides that the Ombudsman must prepare a report on any complaint he has investigated. The report must state what findings the Ombudsman has made, whether or not he considers that the complaint should be upheld in whole or part, and if he does, what if any action he recommends should be taken by the Commission or the Lord Chancellor as a result of the complaint. Recommendations made may include the payment of compensation.<sup>28</sup> Any recommendation for payment will only relate to loss by a complainant as a result of maladministration and not as a failure to be appointed to judicial office i.e. not in respect of earnings the complainant would have received had his/her application for appointment been successful.<sup>29</sup> There is no right of appeal against the Ombudsman's recommendations.<sup>30</sup>

The Ombudsman must submit a draft report to the First Minister and deputy First Minister and NIJAC if the complaint relates to a Commission complaint, or otherwise to the Lord Chancellor. In finalising the report, the legislation provides that the Ombudsman must have regard to any proposals for changes in the draft report made by the First Minister and deputy First Minister acting jointly or by NIJAC if the complaint was a Commission complaint or otherwise by the Lord Chancellor.<sup>31</sup>

The Committee requested information as to whether the Ombudsman had powers relating to his recommendations and if NIJAC had to accept his recommendations. The Ombudsman stated in his Annual Report 2012-13 that "Any recommendations arising from complaints are intended to provide the Commission with an additional dimension

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<sup>24</sup> Northern Ireland Judicial Appointments Ombudsman: Annual Report, 1 April 2012 to 31 March 2013, pg 7

<sup>25</sup> <http://www.nijao.gov.uk/how/powers.htm>

<sup>26</sup> See NIJAC Annual Report and Accounts 2007-08, pg 15,

<sup>27</sup> Northern Ireland Judicial Appointments Ombudsman Annual Report, 1 April 2012-31 March 2013. pg 8

<sup>28</sup> Section 9E (3) of the Justice (NI) Act 2002

<sup>29</sup> Section 9E (4) of the Justice (NI) Act 2002

<sup>30</sup> <http://www.nijao.gov.uk/how/powers.htm>

<sup>31</sup> Section 9F of the Justice (NI) Act 2002

for learning.”<sup>32</sup> During committee evidence on the Review of Judicial Appointments in Northern Ireland, Mr Alban Maginness, MLA, asked the Lord Chief Justice whether NIJAC accepted the following Ombudsman recommendation to the Commission relating to a complaint outlined in NIJAO 2010-11 Annual Report:<sup>33</sup>

I note there is no formal agreement between my role as an Ombudsman and the Commission whether the appointment process should continue whilst I am still considering a complaint. In this competition, the Commission had decided to make a formal recommendation to the Lord Chancellor before I issued my final report... I recommend that the Commission gives consideration to adopting a general policy that no formal part of the appointments process to fill a post will be made unless any outstanding complaints process relating to the same competition has been completed.

The Lord Chief Justice as Chairman of NIJAC responded:

Yes. We have a very positive relationship with the ombudsman; I meet him during the year when he visits. We look very carefully at all the recommendations that he makes as a result of his involvement. We have accepted and implemented that particular recommendation, and indeed others. We are very grateful for his advice, and in virtually in every case, we re-examine our procedures, and almost invariably, accept his recommendation.<sup>34</sup>

Legislation does not appear to make provision as to whether these recommendations are binding on NIJAC.

### ***Number of complaints to the NIJAO***

When considering complaints, the Ombudsman examines each individual aspect highlighted within the complaint. The table below sets out the number of complaints regarding NIJAC recruitment competitions made to the NIJAO and highlights areas where particular aspects of a complaint have been upheld. The information has been obtained from NIJAO annual reports.<sup>35</sup> One of the areas of interest to the Committee was whether there was information on which competition each of the complaints related to. Information has been included where available. Unfortunately the information is limited as the annual reports do not contain details on the particular appointment schemes related to the complaints.

### **Complaints made to the Northern Ireland Judicial Appointments Ombudsman 2006/07-2012/13**

<sup>32</sup> Northern Ireland Judicial Appointments Ombudsman Annual Report, 1 April 2012-31 March 2013, pg 4

<sup>33</sup> See Committee for Justice Official Report ,Review of Judicial Appointments, 8 March 2012available at <http://www.niassembly.gov.uk/Assembly-Business/Committees/Justice/Minutes-of-Evidence/> : See also Northern Ireland Judicial Appointments Ombudsman Annual report 1 April 2010-31 March 2011, pg 19

<sup>34</sup> see Committee for Justice Official Report “Review of Judicial Appointments” 8 March 2012

<sup>35</sup> [http://www.niassembly.gov.uk/Documents/Official-Reports/Justice/2011-2012/120308\\_ReviewofJudicialAppointments.pdf](http://www.niassembly.gov.uk/Documents/Official-Reports/Justice/2011-2012/120308_ReviewofJudicialAppointments.pdf)  
<http://www.nijao.gov.uk/publications.htm>

<b>Year</b>	<b>Number of Complaints</b>	<b>Was the complaint upheld?</b>	<b>Judicial post applied for</b>
2012-13	0	N/A	N/A
2011-12	1	Complaint not upheld	The report does not specify which competition this complaint related to except that the complaint follows other complaints made by the same candidate in relation to the same competition and the complaint was initiated before devolution of policing and justice.
2010-11	2 (concerned with two different competitions)	Upheld the aspect of one of the complaints raising the issue of inappropriate involvement by persons outside the appointment process, but did not consider this had resulted in a basic flaw in the competition for this particular judicial role.	The first complaint related to a competition for position of lay member to a Tribunal. The second post was for application for judicial role but report does not specify which office.
2009-10	1	Two aspects of the complaint were upheld, one in relation to the moderation process by the Selection Committee and another regarding an appearance of unfairness by the Selection Panel. No other aspects of the complaint were upheld and the Ombudsman did not consider that the appointments process was	Report specifies complaint related to appointment process for judicial post but does not specify the type of judicial post.

		flawed in relation to this particular competition.	
2008-09	0	N/A	N/A
2007-08	2 (from same complainant re respective roles of the Appointments Commission and Court Service)	Neither complaint upheld	The report stated that in order to ensure anonymity, no distinction has been made between tribunal and judicial roles. However in capacity as Northern Ireland Judicial Appointments Ombudsman, he reported the complainant applied for a judicial position during 2007.
2006-07	0	N/A	N/A