

*Mechanism for Handling Complaints  
Against Judges in Overseas Places*

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## **EXECUTIVE SUMMARY**

1. The Canadian Judicial Council is responsible for handling complaints against federally appointed judges. It was created by Canadian Parliament under the *Judges Act* in 1971. A major reason of the Council's creation was based upon the belief that the judiciary should become, to some extent, a self-disciplining body.
2. There is no formal machinery for complaints against judges in the United Kingdom. Criticism by the appellate courts may be viewed as part of the disciplinary machinery. In 1998, the Lord Chancellor set up the Judicial Correspondence Unit with specific responsibility for handling judicial complaints. In recent years, the Judicial Correspondence Unit has been expanded to meet the growing demand for an increasingly rigorous style of investigation.
3. In 1980, Congress of the United States acknowledged the need for some mechanisms to discipline judicial misbehaviour other than impeachment, and subsequently passed the *Judicial Conduct and Disability Act of 1980*. The Act provides the judiciary with a formal process for internally handling complaints about judicial behaviour. The Act was both a response to congressional concerns about the efficacy of impeachment and an acknowledgement of the states' successful experiences with judicial conduct organizations.
4. In the State of New York, the Commission on Judicial Conduct was established in 1977 through constitutional amendment, which has the power to receive, initiate and investigate complaints with respect to the conduct, qualifications and fitness of any judge in the unified court system.
5. Among the places studied, there is a general pattern that information relating to the judicial complaints handling procedures and associated statistics is either posted on the Internet or published in annual reports of relevant institutions. In Hong Kong, information regarding the judicial complaints handling mechanism and related statistics is not available to the public at the website and annual report of the Judiciary or through any other media.
6. In Canada, the United States and the State of New York, in order to assure public accountability, their traditional ways of disciplining judges through impeachment and parliamentary address are supplemented by a formal complaint system for resolving complaints of judicial misconduct.
7. Although judicial misconduct in Hong Kong can be disciplined through the tribunal and commission inquiry systems provided by the Basic Law and local legislation, these disciplinary mechanisms are unlikely to be used for less serious misconduct.
8. In Hong Kong, there are no direct sanctions for District Judges and above other than proceedings for removal. However, there are some conducts that may be inconsistent with the expected behaviour of judges and yet not necessarily warrant removal.

# **MECHANISM FOR HANDLING COMPLAINTS AGAINST JUDGES IN OVERSEAS PLACES**

## **PART 1 - INTRODUCTION**

### **1. Background**

1.1 The Legislative Council (LegCo) Panel on Administration of Justice and Legal Services at its meeting on 28 January 2002 requested the Research and Library Services Division (RLSD) to conduct a research on the systems for handling complaints against judges in overseas places. The Panel agreed that the research should cover the countries as in the earlier research report on "The Process of Appointment of Judges" prepared by RLSD, i.e. Canada, the United Kingdom (UK) and the United States (US).

1.2 This research studies the mechanism for handling complaints against judges at all levels in the UK. In both the US and Canada, only the mechanism at the federal level will be studied. The State of New York in the US is also selected because it has different appointment processes for the county and state levels. It will be interesting to study the mechanism for handling complaints against judges under different systems.

### **2. Scope of Research**

2.1 The scope of the research covers:

- (a) A brief discussion of the roles of the executive and the legislative branches in handling complaints against judges;
- (b) A detailed discussion of complaints handling procedures in the judicial branch, including:
  - Complaints filing procedures;
  - Initial screening process;
  - Investigation;
  - Formal proceedings in handling complaints;
  - Remedial actions;
  - Appeal procedures; and
  - Evaluation of complaints handling mechanism.

### **3. Methodology**

3.1 Information for this report is obtained from the Internet, government reports and relevant materials. Enquires were also sent to the relevant authorities in Canada, the UK, the US, the State of New York and Hong Kong.

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## PART 2 - CANADA

### 4. Background

4.1 Canada is a federal state with a parliamentary system of government. It has a bicameral legislature (the Senate and House of Commons) and a judiciary, with the Supreme Court of Canada being the highest court of appeal. The monarch is the Queen of England, who is represented by the Governor General. The Prime Minister leads a Cabinet consisting of members of the legislature.

4.2 The *British North America Act, 1867*, passed by the United Kingdom Parliament to create the Canadian federation, was renamed the *Constitution Act, 1867* in 1982. The *Constitution Act, 1982* declares that the constitution of Canada includes:

- (a) the *Canada Act 1982* and the *Constitution Act, 1982*;
- (b) 24 other Acts and Orders noted in Schedule 1, mostly comprising the *Constitution Acts 1867-1975*; and
- (c) any amendments to any Act or Order referred to in paragraph (a) or (b).

4.3 Pursuant to section 101 of the *Constitution Act, 1867*, the Parliament of Canada has created by statute the Supreme Court of Canada,<sup>1</sup> the Federal Court of Canada<sup>2</sup> and the Tax Court of Canada.<sup>3</sup> The federal government has the power to appoint judges to these federally constituted courts.<sup>4</sup> Pursuant to section 92(14) of the *Constitution Act, 1867*, provinces establish the 'superior courts' of the provinces<sup>5</sup>. Although the 'superior courts' are established<sup>6</sup> and administered by the provinces, the federal government is vested the power to appoint judges to these courts which include the District and County Courts in the provinces.<sup>7</sup> As of 1 January 2002, the number of federally appointed judges totalled 1 029.

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<sup>1</sup> *Supreme Court Act*, R. S. C. 1985, c. S-26.

<sup>2</sup> *Federal Court Act*, R. S. C. 1985, c. F-7.

<sup>3</sup> *Tax Court of Canada Act*, R. S. C. 1985, c. T-2.

<sup>4</sup> This power is implied in section 101 of the *Constitution Act, 1867*. For a general overview of the court structure in Canada, see Appendix I.

<sup>5</sup> 'Superior courts' of a province are divided into two levels: a trial level and an appeal level. There may be a single court, generally called a Supreme Court, with a trial division and an appeal division. Alternatively, a superior court may be divided into two separate courts, with the trial court being named the Supreme Court or the Court of Queen's Bench, and the appeal court being called the Court of Appeal.

<sup>6</sup> Their specific powers are defined by statutes such as the provincial Judicature Acts and the rules of court or rules of practice within each province. See Bernard W. Funston & Eugene Meehan, *Canada's Constitutional Law in a Nutshell*, 2nd ed., Scarborough, Ontario: Carswell, 1998, p. 41.

<sup>7</sup> There are other provincial courts which are constituted under provincial statutes with judges being provincially appointed.

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## 5. Role of the Executive and the Legislature

5.1 In Canada, both the executive and the legislative branches play certain roles in disciplining judges, especially in the removal process. Federally appointed judges maintain office during good behavior until age 75, and can only be removed from office by the Governor General on address to the Senate and House of Commons.<sup>8</sup> Nevertheless, Canada has never had a case in which a federally appointed judge was removed through such route, since in all cases thus far, the judges resigned before Parliament could vote on their removal.<sup>9</sup>

5.2 There is no common test for all courts as to what constitutes good behaviour.<sup>10</sup> Judges of the Supreme Court and the Federal Court hold office during good behaviour, pursuant to the provisions in the *Supreme Court Act*<sup>11</sup> and the *Federal Court Act*. Judges serving in superior courts in the provinces, by virtue of section 99 of the *Constitution Act, 1867*,<sup>12</sup> also hold office during good behaviour.

5.3 At the request of the Minister of Justice of Canada or the attorney general of a province, the Canadian Judicial Council (Judicial Council, see paragraphs 6.1-6.5) conducts inquiries to determine and recommend to the Minister of Justice whether a federally appointed judge should be removed from office. The grounds for such a request are provided in section 63 of the *Judges Act*.<sup>13</sup> The request in this context is mandatory, and the Judicial Council must establish an inquiry upon receiving such a request.<sup>14</sup> The grounds for a recommendation to the Minister of Justice are set out in section 65(2) of the *Judges Act*, which reads as follows:

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<sup>8</sup> Under conventional rules, the Governor General acts only upon the advice and consent of the Prime Minister and his cabinet.

<sup>9</sup> Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Canada: Canadian Judicial Council, 1995, p. 77.

<sup>10</sup> Gerald L. Gall, *The Canadian Legal System*, 4<sup>th</sup> ed., Scarborough, Ontario: Carswell, 1995, p. 279.

<sup>11</sup> Section 9(1) of the *Supreme Court Act* stipulates that "...the judges hold office during good behaviour, but are removable by the Governor General on address of the Senate and House of Commons."

<sup>12</sup> Section 99 provides that "the judges of superior courts shall hold office during good behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons." It could mean that a judge may be removed only by joint parliamentary address and only for bad behaviour. Alternatively, it could mean that a judge may be removed for bad behaviour by the government without the need for a joint parliamentary address, and may also be removed for any reason whatsoever by a joint parliamentary address. See Peter W. Hogg ed., *Constitutional Law of Canada*, Ontario: Thomson Canada Ltd., 2001, p. 183.

<sup>13</sup> The *Judges Act* specifies what judges can and cannot do while in office and the function of the Canadian Judicial Council.

<sup>14</sup> This kind of request was received five times since the Council's creation in 1971.



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"(2) Where, in the opinion of the Council, the judge in respect of whom an inquiry or investigation has been made has become incapacitated or disabled from the due execution of the office of judge by reason of

- (a) age or infirmity,
- (b) having been guilty of misconduct,
- (c) having failed in the due execution of that office, or
- (d) having been placed, by his conduct or otherwise, in a position incompatible with the due execution of that office,

the Council, in its report to the Minister under subsection (1), may recommend that the judge be removed from office."

5.4 The *Judges Act* establishes a role for the Judicial Council as the preliminary step for removal by Parliament by address. Nothing under the authority of the *Judges Act* affects the powers, rights or duties of Parliament and the Governor General in relation to the removal of judges from office.<sup>15</sup>

## 6. Canadian Judicial Council

6.1 The Judicial Council is responsible for handling complaints against federally appointed judges. It was created by Parliament under the *Judges Act* in 1971. A major reason of the Council's creation<sup>16</sup> was based upon the belief that the judiciary should become, to some extent, a self-disciplining body. Part II of the *Judges Act* provides for the composition of the Council. The Judicial Council is chaired by the Chief Justice of the Supreme Court. The other members include:

- (a) the chief justices and the associate chief justices of the provinces;
- (b) the senior judges in the three northern territories;
- (c) the Chief Justice of the Court Martial Appeal Court; and
- (d) the Chief Judge and Associate Chief Judge of the Tax Court.

6.2 It is a council of chief justices and there are no members other than these chiefs. Currently, the Judicial Council consists of 39 members.

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<sup>15</sup> Section 71 of the *Judges Act*.

<sup>16</sup> Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Canada: Canadian Judicial Council, 1995, pp. 87-90.

- 6.3 The Judicial Council's work falls into four broad categories:
- (a) continuing education of judges;
  - (b) handling of complaints against federally appointed judges;
  - (c) developing consensus among Council members on issues involving the administration of justice; and
  - (d) making recommendations to the Judicial Compensation and Benefits Commission, usually in conjunction with the Canadian Superior Courts Judges Association, about judicial salaries and benefits.

6.4 The Judicial Council is served by an Executive Director, a legal counsel and two supporting staff. The total budget of the Judicial Council for 2000-01 was CA\$706,160 (HK\$3,551,985).

6.5 There is no written code of conduct for federally appointed judges. In 1998, the Judicial Council published a booklet entitled *Ethical Principles for Judges*<sup>17</sup>, offering advice and guidance to judges.

## 7. Complaints Handling Procedures

### Regulatory Framework

7.1 The process for dealing with complaints against federal judges in Canada is governed by the *Constitution Act, 1867*, the *Judges Act*, and the *Canadian Judicial Council By-Laws (By-Laws)*<sup>18</sup>.

7.2 The Judicial Council deals with complaints involving judicial conduct only, but not judicial decisions<sup>19</sup>. The Judicial Council also does not investigate generalized complaints about the courts or the judiciary as a whole.

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<sup>17</sup> The document is available at [http://www.cjc-ccm.gc.ca/english/ethic\\_e.pdf](http://www.cjc-ccm.gc.ca/english/ethic_e.pdf).

<sup>18</sup> Section 61(3)(c) of the *Judges Act* authorizes the Judicial Council to make by-laws regarding the conduct of inquires and investigation of any complaint or allegation against judges. The *By-Laws* is available at <http://www.cjc-ccm.gc.ca/english/bylaws.htm>.

<sup>19</sup> Judges' decisions can be appealed to progressively higher courts.

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### Complaints Filing Procedures

7.3 There are two ways that complaints can be filed. The first way is that any member of the public may lodge a complaint by writing to the Judicial Council. There is no requirement that a complainant be represented by a lawyer or that a complaint be filed in a specific way or on a specific form. A Judicial Council member may also draw the attention of the Executive Director of the Council to any conduct of a judge in writing.

7.4 The second way, as mentioned in paragraph 5.3, is that the Minister of Justice or the attorney general of a province may request the Judicial Council to commence an inquiry as to whether a judge should be removed from office.

### Initial Screening Process

7.5 As provided in the *By-Laws*, complaints made by the public are first screened by the Chairperson or a Vice-Chairperson of the Judicial Conduct Committee (Committee)<sup>20</sup> of the Judicial Council. Comments are often sought from the judge who is the subject of the complaint and his or her Chief Justice. The Chairperson may close a file with an appropriate reply to the complainant. If the matter is serious enough to merit further consideration, it is referred to a Panel<sup>21</sup> of up to five judges. The Panel usually comprises members of the Judicial Council only, but it may include a judge who is not a member of the Council, often following a fact-finding investigation by independent counsel.

7.6 The Panel can close the file with or without an expression of disapproval of the conduct which led to the complaint (with an appropriate reply to both the complainant and the judge), or it can recommend to the full Judicial Council a formal investigation to determine whether it should recommend the judge's removal from office.

7.7 Before the Judicial Council considers the Panel's report, the Chairperson of the Committee is required to designate up to five members of the Council, excluding members of the court of which the judge subject to the complaint is a member, to serve on any subsequent Inquiry Committee that may be constituted. (see paragraph 7.9)

7.8 If a request is filed under the procedure described in paragraph 5.3, the initial screening process outlined above will be by-passed.

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<sup>20</sup> The Judicial Conduct Committee (Committee) is one of the standing committees of the Judicial Council, consisting of all nine members of the Executive Committee (they are elected by the Council from among its members). The Chairperson of the Committee is designated by the Chairperson of the Council from among Vice-chairpersons of the Council. The Vice-chairperson of the Committee is designated by the Chairperson of the Council after consultation with the Chairperson of the Committee.

<sup>21</sup> Members of the Panel are designated by the Chairperson of the Committee, excluding judges who are members of the court of which the subject of the complaint is a member.

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### Investigation and Formal Proceedings

7.9 If the Judicial Council decides to undertake a formal investigation, an Inquiry Committee is appointed. An Inquiry Committee can be established in one of two ways: by the Council itself under section 63(2) of the *Judges Act*, or at the request of the Minister of Justice or provincial Attorney General under section 63(1). Although the Committee generally consists of three Council members<sup>22</sup> together with two lawyers appointed by the Minister of Justice, the composition of the Inquiry Committee is not set out in the *Judges Act* or the *By-Laws*.

7.10 An Inquiry Committee has the same powers as a superior court to summon witnesses, take evidence and require the production of documents. A judge whose conduct is being investigated is entitled to be heard and be represented by counsel.

7.11 An inquiry or investigation may be held in public or in private, unless the Minister of Justice requires that it be held in public. In any event, the Inquiry Committee is required to conduct its hearings in public.<sup>23</sup>

7.12 The Judicial Council may prohibit the publication of any information or documents placed before it in connection with, or arising out of, an inquiry or investigation when it is of the opinion that the publication is not in the public interest.

### Disciplinary Actions

7.13 Upon completion of the investigation, the Inquiry Committee makes a report to the Judicial Council. This report could include a recommendation that the judge in question be removed, or not be removed, from judicial office because he or she has become "*incapacitated or disabled from the due execution of the office of judge*" for one or more of the reasons set out in the *Judges Act*. (see paragraph 5.3)

7.14 Only the full Judicial Council may recommend removal. In the five instances when there were formal inquiries directed by a Minister<sup>24</sup>, only once did the Council recommend to the Minister that a judge be removed from the bench.

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<sup>22</sup> The three Council members are designated by the Chairperson of the Judicial Conduct Committee, excluding members of the court of which the subject of the complaint is a member.

<sup>23</sup> In exceptional circumstances, the Inquiry Committee may hold all or part of the hearing in private if it considers that the public interest and the due administration of justice require this action.

<sup>24</sup> The Inquiry Committee Reports are available at [http://www.cjc-ccm.gc.ca/english/inquiry\\_reports.htm](http://www.cjc-ccm.gc.ca/english/inquiry_reports.htm).

### Remedial Actions

7.15 The Judicial Council cannot change judicial decisions, compensate individuals, grant appeals or address demands for new trials.

7.16 As mentioned in paragraph 7.6, the Panel can close the file with an expression of disapproval of the conduct which led to the complaint. In this case, such expression is considered to be remedial as it is intended to assist the judge in avoiding similar inappropriate conduct in the future. Regardless of whether there is an expression, the judge whose conduct was in question may voluntarily offer his or her apology to the complainant.

### Appeal Procedures

7.17 There is no formal appeal procedure in the complaints handling process. Occasionally, complaint files previously closed are re-opened and then re-closed. This may occur when additional information received leads to further action, such as a request for comments from the judge or the judge's Chief Justice.

7.18 Judicial Council's decisions on complaint files are subject to judicial review. For example, a complaint file, which was initially closed in 1994-95 and re-considered and re-closed in 1998-99, was the subject of judicial review in the courts. After the decision of the Court of Appeal was released, the complainant wrote again and requested the complaint be re-considered. The file was re-opened and the Chairperson then re-closed the file with an expression of disapproval.

## **8. Evaluation of Complaints Handling Mechanism**

8.1 The Judicial Council has its own website<sup>25</sup>, which contains information such as annual reports, inquiry reports and relevant legal materials. Statistics of its activities are shown in the annual reports.

8.2 In 2000-01, the Judicial Council opened 150 new files, when compared with 169 in the previous year and an average of 172 over the previous three years. (see Table 1)

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<sup>25</sup> <http://www.cjc-ccm.gc.ca/english/index.htm>.

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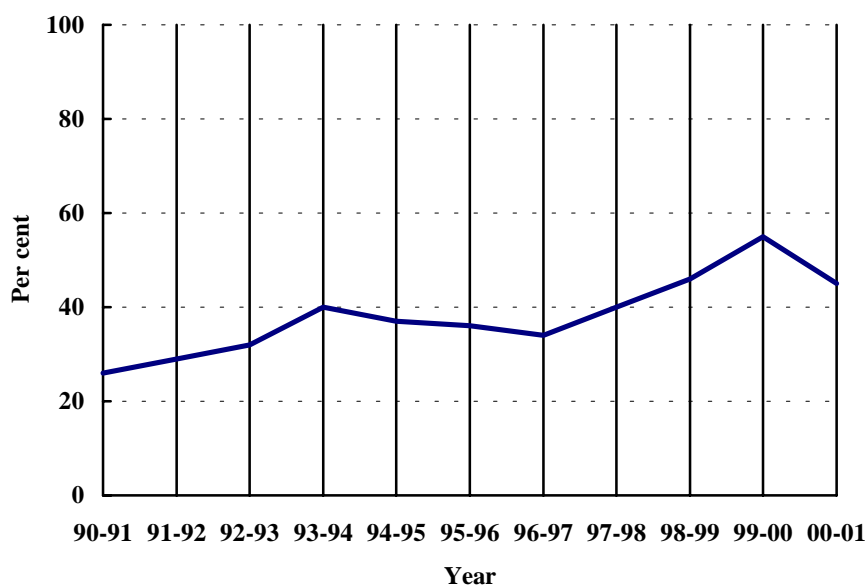
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**Table 1 - Complaint Files**

	New files opened	Carried over from Previous year	Total caseload	Closed	Carried into the new year
1991-92	115	16	131	117	14
1992-93	127	14	141	110	31
1993-94	164	31	195	156	39
1994-95	174	39	213	186	27
1995-96	200	27	227	180	47
1996-97	186	47	233	187	46
1997-98	202	46	248	195	53
1998-99	145	53	198	162	36
1999-2000	169	36	205	171	34
2000-01	150	34	184	155	29

Source: *Canadian Judicial Council Annual Report 2000-01*, p.12.

8.3 The Council has been keeping track of the type of allegations made. The largest single source of complaints involves family law matters. In 2000-01, custody, divorce and other disputes related to family law accounted for 44 per cent of complaints, a decline from 55 per cent in the previous year and a break from the pattern of steady increases in recent years. (see Chart 1) Complaints in family law and other matters often involve allegations of gender, racial, or religious bias.

**Chart 1 - Family Law Issues — Percentage of Total Complaints**

Source: *Canadian Judicial Council Annual Report 2000-01*, p. 12.

8.4 In other instances, individuals complain about conflict of interests, delay in rendering judgement, abuse of judicial power, undue impatience, harsh treatment of their concerns, unprofessional conduct, or other matters.

8.5 A complaint rarely results in a formal investigation. By far, the largest proportion of complaints is dealt with by the Chairperson of the Judicial Conduct Committee, and a smaller proportion goes to Panel Reviews. (See Table 2)

8.6 In 2000-01, the Judicial Council closed 155 cases. Out of these closed files, 45 per cent were closed within 60 days of receipt, and 63 per cent within 90 days. According to the Council's annual reports, when a file is closed without seeking comments from the judge or further investigation, typically the complainant is seeking direct or indirect channels to have the judge's decision altered or reversed.<sup>26</sup>

**Table 2 - Complaint Files Closed in 1999-2000 and 2000-2001**

Files Closed	Closed by the Chairperson* of the Committee		Closed by Panels		Other	
	99-00	00-01	99-00	00-01	99-00	00-01
After response from the judge	69	79 <sup>^</sup>	3	3 <sup>^</sup>	--	--
Without requesting response from the judge	98	73 <sup>#</sup>	--	--	--	--
Files "withdrawn" or "discontinued"	--	--	--	--	1 <sup>@</sup>	--
Total	167	152	3	3	1	0

Remarks: \* Or Vice-Chairperson  
 # Including two files closed as withdrawn/discontinued  
 ^ Including one file closed after a further inquiries by outside counsel  
 @ Inquiry directed by Minister — file closed when judge resigned

Source: *Canadian Judicial Council Annual Reports, 1999-2000 and 2000-01.*

<sup>26</sup> Canadian Judicial Council, *Annual Report 2000-01*, Ottawa: Canadian Judicial Council, 2001, p. 13.

8.7 The Judicial Council's complaints process was examined in detail by Professor Martin L. Friedland of the University of Toronto Law School in his 1995 report: *A Place Apart: Judicial Independence and Accountability in Canada*. He stated that:

*"The Council gave me full access to all of their complaint files. My overall opinion is that the Judicial Conduct Committee and the Executive Director have dealt with the matters received carefully and conscientiously. I never sensed that any matter was being 'covered up' by the Council after a complaint was made to it."*<sup>27</sup>

8.8 Professor Friedland offered some suggestions to improve the complaints process, which included: involving the Chief Justice of the judge subject to complaint at the initial stages to resolve the complaint, enhancing lay participation in formal inquiries and increasing the visibility of the complaints process.<sup>28</sup>

8.9 In March 2000, Judicial Council members decided to publish brochures explaining the complaints process and distribute them widely to the public and judges.<sup>29</sup>

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<sup>27</sup> Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, Canada: Canadian Judicial Council, 1995, pp. 94-5.

<sup>28</sup> *Ibid*, pp. 128-141.

<sup>29</sup> See Appendix II, "Conduct of Judges and the Role of the Canadian Judicial Council," a pamphlet published by the Council.

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## PART 3 - THE UNITED KINGDOM

### 9. Background

9.1 The United Kingdom (UK) is a unitary state with a parliamentary system of government. It has a bicameral legislature (the House of Commons and House of Lords) and a judiciary, with the House of Lords being the Supreme Court of Appeal.

9.2 The UK does not have a constitution set out in any single document. Instead, its constitution is made up of statute law, common law and conventions.

9.3 The court system<sup>30</sup> in England and Wales includes the House of Lords, the Supreme Court (comprising the Court of Appeal, High Court and Crown Court), the County Courts, the magistrates' courts and some tribunals.

9.4 The House of Lords is headed by the Lord Chancellor and has 12 Lords of Appeal in Ordinary. The Court of Appeal is headed by both the Lord Chief Justice and the Master of the Rolls, and consists of 35 Lords Justices of Appeal. The High Court has three separate Divisions. Each Division has its own head and a certain number of Justices of the High Court. The judges of the Crown Court are High Court Judges, circuit judges, recorders and assistant recorders.

9.5 There are some 220 County Courts below the High Court and they are presided by circuit judges and district judges. There are 92 district judges (magistrates' courts) who sit in the magistrates' courts. They are entitled to sit with lay magistrates or to sit alone. There are about 28 700 lay magistrates (also called justices of the peace).

9.6 The Lord Chancellor heads the judiciary and sits as a member of the judicial committee of the House of Lords. He is also in charge of the Lord Chancellor's Department.<sup>31</sup> In the UK, the personal role of the Lord Chancellor is crucial in the appointment, promotion and removal of judges.

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<sup>30</sup> There are three distinct court systems in the UK: England and Wales, Scotland, and Northern Ireland. This paper will only discuss the situation in England and Wales. For an outline of the court structure in England and Wales, see Appendix III.

<sup>31</sup> See Diana Woodhouse, *The Office of Lord Chancellor*, Oxford: Hart Publishing, 2001.

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## 10. Role of the Executive and the Legislature

10.1 Traditionally, the legislature's role in disciplining judges has been strictly restrained. By convention, a judge's conduct cannot be discussed in Parliament except on a substantive motion.<sup>32</sup> Members of the legislature and executive are by convention expected to avoid making direct criticism of judicial decisions or discussion of cases before the courts.

10.2 Judges of superior courts can be removed only by an address to both Houses of Parliament. Under the *Supreme Court Act 1981*, Judges of the High Court and the Court of Appeal, with the exception of the Lord Chancellor<sup>33</sup>, hold their offices during good behaviour subject to a power of removal by Her Majesty on an address presented to Her by both Houses of Parliament. *The Appellate Jurisdiction Act 1876* also provides that a Lord of Appeal "*shall hold his office during good behaviour.....but he may be removed from such office on the address of both Houses of Parliament.*"

10.3 Removal of judges on address of both Houses of Parliament has succeeded only once in the past 200 plus years. Such an address has to be introduced in the House of Commons. The accused judge is entitled to be heard at the Bar of the House or before a select committee; if the facts of misconduct are disputed, witnesses may be called to give evidence.<sup>34</sup>

10.4 Removing and disciplining circuit judges and below is the Lord Chancellor's job. Circuit judges may be removed by the Lord Chancellor on the grounds of incapacity or misbehaviour. The Lord Chancellor may also terminate the appointment of a recorder on the grounds of incapacity or misbehaviour or failure to comply with the terms of his appointment.

10.5 A district judge (magistrates' court) can only be dismissed by the Lord Chancellor on the grounds of incapacity or misbehaviour. Justices of the peace may be removed from the Commission of the Peace by the Lord Chancellor if he thinks fit.<sup>35</sup>

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<sup>32</sup> See Erskine May, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22<sup>nd</sup> ed., London: Butterworths, 1997, pp. 384-5.

<sup>33</sup> The Lord Chancellor holds Cabinet status and is removable by the Prime Minister.

<sup>34</sup> See Shimon Shetreet, *Judges on Trial: A Study of the Appointment and Accountability of the English Judiciary*, Amsterdam: North-Holland Publishing Co., 1976, Chapter VI.

<sup>35</sup> By convention, the Lord Chancellor does not remove them except for good cause, such as refusal to administer the law because the justice does not agree with it.

10.6 There is no statutory definition of 'misbehaviour', and it is up to the interpretation of the Lord Chancellor of the time. In July 1994, the Lord Chancellor stated that 'misbehaviour' could include: a conviction of drunk-driving; any offence involving violence, dishonesty, or moral turpitude; and a substantiated complaint of behaviour likely to cause offence on religious or racial grounds or which amounted to sexual harassment.<sup>36</sup>

## 11. Complaints Handling Procedures

11.1 There is no formal machinery for complaints against judges in the UK. Criticism by the appellate courts may be viewed as part of the disciplinary machinery. Appellate courts have criticized judges for improper behaviour such as falling asleep, for making impatient gestures and noises, for interrupting excessively, for incompetence, and for commenting in the press about a case he was still trying.<sup>37</sup>

11.2 In 1998, the Lord Chancellor set up the Judicial Correspondence Unit (Unit) with specific responsibility for handling complaints against judges. The Unit is under the ambit of the Judicial Group<sup>38</sup> in the Lord Chancellor's Department. Complaints about the handling of cases by the courts generally are dealt with by the Customer Service Unit of the Court Service. The Court Service is an executive agency of the Lord Chancellor's Department.

11.3 In recent years, the Unit has been expanded to meet the growing demand for an increasingly rigorous style of investigation. The Unit currently employs 13 staff, comprising executive and administrative officers. The staff costs for the Unit are £595,218 (HK\$6,964,050). The budget allocations for overheads (costs other than staff costs) in 2002-3 are £52,000 (HK\$608,400).<sup>39</sup>

### Regulatory Framework

11.4 There is no statutory regulatory framework for handling of complaints against judges in the UK. There is a protocol used by the Unit when dealing with complaints against judges.<sup>40</sup>

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<sup>36</sup> See Peeny Darbyshire, *Edey & Darbyshire on the English Legal System*, 7th ed., London: Sweet & Maxwell, 2001, p. 289.

<sup>37</sup> See Rodney Brazier, *Constitutional Practice: The Foundations of British Government*, 3<sup>rd</sup> ed., Oxford: Oxford University Press, 1999, p. 289.

<sup>38</sup> In addition to its work in supporting the Lord Chancellor's work on judicial appointment, the Judicial Group is also responsible for handling of complaints about judicial conduct.

<sup>39</sup> Information provided by the Unit.

<sup>40</sup> "Procedures for Dealing with Complaints about the Conduct of Members of the Judiciary," a document provided by the Unit. The document is currently being revised.

11.5 The Lord Chancellor only considers complaints about personal conduct, but not about judicial decisions. The term ‘personal conduct’ means a judge’s behaviour towards litigants, defendants or others in court and a judge’s behaviour or manner when dealing with a case. Personal conduct may include matters such as the making of inappropriate personal or offensive remarks by a judge during the course of a trial, which do not form part of his or her reasoning or decision in the case, and behaviour by a judge outside court which is inappropriate and would tend to bring the judiciary into disrepute.

11.6 Complaints about alleged discourtesy, discrimination or bias in the handling of a case may be amenable to the judicial appeal process, but may also be treated as complaints about judicial conduct, particularly where the alleged discrimination on racial or sexual grounds and offence has been caused to the complainant.<sup>41</sup>

11.7 A complaint of delay by a judge will not generally be regarded as a matter of conduct, but excessive delay, such as in the delivery of a judgement, will be so constructed.

### Complaints Filing Procedures

11.8 There is no formal procedure for filing a complaint. Complaints against judges may be sent to the Unit or to the Court Service directly by complainants or through an intermediary such as a Member of Parliament. Occasionally, complaints may be received through the media.

### Initial Screening Process

11.9 Depending on the complainant and the nature of the complaint, the case is allocated to either a caseworker or a senior caseworker within the Unit. This decision is made by a casework manager.

11.10 Complaints relating to judicial decisions will be dismissed. Complaints will also be refused if the hearing complained of took place so long ago and the judges concerned cannot reasonably be expected to remember the case, which broadly applies to cases more than two years ago.

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<sup>41</sup> Where such a complaint raises issues of conduct which are or are likely to be subject of legal proceedings, or where the proceedings are still in progress, the Lord Chancellor’s Department will not provide a substantive reply to the complainant until these proceedings have been completed.

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### Investigation and Formal Proceedings

11.11 The first stage of an investigation is to seek the complainant's consent to place the complaint before the judge concerned and ask for his or her comments. Unless this consent is received, the investigation cannot continue and the complaint will be dismissed.<sup>42</sup>

11.12 If the consent is ready, a letter is sent to the judge concerned, accompanied by a copy of the complainant's letter, asking for his or her comments on all aspects of the complaint. The judge concerned is asked to reply within 10 working days.

11.13 In complaints of a serious nature (involving, for example, senior members of the Judiciary, or allegations of corruption, sexual or racial bias, or criminal activity on behalf of the judge), the Lord Chancellor is notified of the complaint if it has not come through his office (as complaints made via Members of Parliament will have done).

11.14 Complaints against Judges of the High Court or Court of Appeal are also notified to the relevant Head of Division. Complaints against district judges (magistrates' courts) are notified to the senior district judge.

11.15 If the complainant's version of events differs significantly from that of the judge concerned, then the caseworker may need to listen to the tape recording of the relevant hearing to ascertain the facts. In some cases, the views of third parties who were present in court are also sought, and the judge concerned will be shown any comments that they make.

11.16 Once the investigations are completed, the caseworker will evaluate whether the complaint is justified. Unless the complaint is relatively trivial and is clearly unjustified, most cases which reach this stage will be sent to the Lord Chancellor for a final decision, with advice from the caseworker as to the action he should take.

11.17 The Lord Chancellor takes a close personal interest in the handling of complaints, particularly those alleging racial or sexual discrimination. He also reviews all serious complaints, most notably those alleging racial or sexual discrimination, and those which have attracted, or are likely to attract, publicity. In addition, he reviews all cases in which there is a record of similar complaints from several different sources about the conduct of a particular judge.

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<sup>42</sup> This particular point is currently being studied under the revisions to the protocol and may be subject to change.

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11.18 The Unit sets tight targets at each stage of the complaints handling process. Within two days of receipt of a complaint, an acknowledgment letter is issued to a complainant stating a target date (15 working days) when the Unit will have written to inform him the progress of the complaint. If 15 working days have passed and the investigation is ongoing, an interim letter is sent informing the complainant about the status of the investigation. There is an overall target that a fully-investigated complaint case should be concluded within three months.

11.19 The complainant will receive a full reply and a copy is also sent to the judge concerned. The Lord Chancellor always replies personally to complainants in those categories mentioned in paragraph 11.17 and to those received from Peers and Members of Parliament or the Assembly or Parliament Members in the devolved administrations.

11.20 If the fitness of a judge below the level of the High Court to hold office is called into question by the seriousness of a complaint which seems to have some merit, or by a succession of less serious complaints over time, the Lord Chancellor may invite the Lord Chief Justice to appoint a judge to investigate the case. The Lord Chief Justice will report back to the Lord Chancellor on whether the complaint is justified and, if so, whether it shows a failure to meet the standards required for judicial office.

11.21 Formal terms of reference are set for such an enquiry, and the investigating judge considers written evidence and, if necessary, conducts interviews with those concerned. The judge under investigation is entitled to see and challenge the evidence against him or her. On receiving such a report, the Lord Chancellor will consider with the Lord Chief Justice whether removal from office is appropriate, and will invite the judge concerned to make representations before reaching a final decision.

### Disciplinary Actions

11.22 As Head of the judiciary, the Lord Chancellor guides, counsels, advises or rebukes with a view to ensuring that judges uphold the standards of conduct which the public and he expects of them.

11.23 The Lord Chancellor's statutory powers are limited to the dismissal of judicial office holders below the level of the High Court Bench, on the grounds of misbehaviour or incapacity.

11.24 A formal and public rebuke is the Lord Chancellor's heaviest punishment short of dismissal.

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### Remedial Actions

11.25 Strictly speaking, the Lord Chancellor cannot offer any remedial actions. The Lord Chancellor is not legally liable to pay compensation in respect of actions of members of the judiciary. In accordance with section 2(5) of the *Crown Proceedings Act 1947*, there is no entitlement to compensation from the Crown for losses incurred as a result of judicial acts and the discharge of judicial responsibility.

11.26 The Lord Chancellor has a power to make *ex gratia* payments and will consider making such a payment on an exceptional basis where it appears that a clear judicial error has caused hardship to a deserving litigant which could not otherwise be remedied.

### Appeal Procedures

11.27 There is no formal appeal process against the Lord Chancellor's decision to reject a complaint, although the Lord Chancellor's actions are potentially subject to judicial review by the High Court. Complainants are free to write back regarding their complaints as often as they wish.

11.28 If complainants feel that their complaints have not been dealt with properly either by the Unit or by the Customer Service Unit of the Court Service, they can, via their Members of Parliament, contact the Parliamentary Commissioner for Administration (PCA). The PCA cannot investigate substantive complaints against judges, he can only consider the way in which the complaints have been handled by the Lord Chancellor's Department.

## **12. Evaluation of Complaints Handling Mechanism**

12.1 A brief description of the complaints handling procedures and relevant complaint statistics are provided in the *Judicial Appointments Annual Report*, which is available on the website of the Lord Chancellor's Department. The Court Service produces leaflets<sup>43</sup> that are available in all courts. These leaflets outline who to contact in the case of a complaint, including the Unit's contact details.

12.2 Table 3 shows the number of complaints against judges received by the Lord Chancellor between 1998 and 2001. The figures include all complaints received by the Unit and the Customer Service Unit of the Court Service. Most complaints are from individual litigants, predominantly those who have lost their cases.<sup>44</sup> The great majority of complaints are about judicial decisions and they are dismissed.

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<sup>43</sup> See Appendix IV, "I want to complain, what do I do?" published by the Court Service Customer Service Unit.

<sup>44</sup> Information provided by the Unit.

**Table 3 - Number of Complaints Received by the Lord Chancellor**

Complaints	8/1998-3/99	4/1999-3/2000	4/2000-3/01
Total No. of Complaints	2 109	2 459	2 332
No. of Complaints Related to Personal Conduct	183	246	463
No of Cases Required the Lord Chancellor's Action	5	7	8

Source: *Judicial Appointments Annual Reports*, various years.

12.3 There is no formal machinery for complaints against judges in the UK. By the 1980s, there were calls for the establishment of a formal complaints and disciplinary system by academics and senior members of the legal profession.<sup>45</sup> *Justice*, an influential group, in their 1992 report entitled *The Judiciary in England and Wales*, concluded that "something more than the current informal arrangements is needed."

12.4 The *Justice's* report proposed a Judicial Commission which would have a Judicial Standards Committee as a subcommittee. The work of the sub-committee is described as follows:<sup>46</sup>

*"Its function would be to provide an independent mechanism for reviewing the professional conduct of judges. The Sub-Committee would have its own secretariat but individual members of the Commission would supervise the consideration of complaints on a rota basis. For this purpose it might well be appropriate if there were two rota members: one legal, one lay."*

<sup>45</sup> See Kate Malleson, *The New Judiciary: The Effects of Expansion and Activism*, Aldershot: Ashgate, 1999, Chapter 6.

<sup>46</sup> *Justice, The Judiciary in England and Wales*, London: Justice, 1992, p. 25. Appendix 8 of the *Justice's* report sets out a suggested procedure of the Judicial Standards Committee.



## **PART 4 - THE UNITED STATES**

### **13. Background**

13.1 The United States (US) is a federal state with a presidential system of government. It has a bicameral legislature (the House of Representatives and Senate) and a judiciary, with the Supreme Court being the highest court of appeal.

13.2 The US has a written Constitution which applies the doctrine of separation of powers. The three branches of government, the executive, the legislature and the judiciary, are separated from one another with divided mandate of power conferred by the Constitution.

13.3 The focus in this part is on the mechanism for handling complaints against judges at the federal level. Under the Constitution, the President appoints federal judges with the advice and consent of the Senate.<sup>47</sup>

13.4 Congress has established two levels of federal courts under the Supreme Court: the trial courts and the appellate courts.<sup>48</sup> The US District Courts are the trial courts. The 94 judicial districts are organized into 12 regional Circuits, each of which has a US Court of Appeals. The Court of Appeals for the Federal Circuit has nationwide jurisdiction to hear appeals in specialized cases.

13.5 Each circuit has a Circuit Judicial Council, which oversees the administration of the courts located in its geographical circuit. Each Circuit Judicial Council consists of the Chief Judge, who serves as the chair, and an equal number of Circuit and District Judges. Circuit Judicial Councils are authorized by statute to issue orders to promote accountability and the effective and expeditious administration of justice within its circuit.

### **14. Role of the Executive and the Legislature**

14.1 The *US Constitution* includes several provisions relating to the discipline and removal of judges. Article 3 of the Constitution states that judges "*shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.*"

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<sup>47</sup> For detailed information, see Cheung Wai-lam, *The Process of Appointment of Judges in some Foreign Countries: The United States*, HK: Legislative Council Secretariat, 2000.

<sup>48</sup> For the structure of federal courts in the US, see Appendix V.

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14.2 Article 2, section 4 of the Constitution also says that "*the President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.*" Article 1 of the Constitution specifies that the House of Representatives can bring charges, and the Senate alone may try and convict, by two-thirds of the Members present.

14.3 Since 1789, the House of Representatives has impeached 13 federal judges and only seven were convicted and removed.<sup>49</sup> Hundreds of impeachment resolutions have been introduced in the House of Representatives, and judges were the targets in the overwhelming majority of the cases.<sup>50</sup> There have been numerous occasions that Congress takes up the responsibility to inquire the behaviour of federal judges.

14.4 The executive branch has neither a constitutionally role nor an inherent management role in the discipline and removal of federal judges.<sup>51</sup>

## 15. Complaints Handling Procedures

15.1 In 1980, Congress acknowledged the need for some mechanisms to discipline judicial misbehaviour other than impeachment, and subsequently passed the *Judicial Conduct and Disability Act of 1980*.<sup>52</sup>

15.2 Congress adopted the *Judicial Conduct and Disability Act* principally to assure public accountability.<sup>53</sup> The Act provides the judiciary with a formal process for internally handling complaints about judicial behaviour. The Act was both a response to congressional concerns about the efficacy of impeachment and an acknowledgement of the states' successful experiences with judicial conduct organizations.<sup>54</sup>

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<sup>49</sup> For a general description of judicial impeachments, see Emily Field Van Tassel & Paul Finkelman, *Impeachable Offenses: A Documentary History from 1787 to the Present*, Washington, D. C.: Congressional Quarterly Inc., 1999, pp. 91-185.

<sup>50</sup> Mary L. Volcansek, *Judicial Misconduct: A Cross-National Comparison*, Gainesville: University Press of Florida, 1996, p. 89.

<sup>51</sup> National Commission on Judicial Discipline & Removal, *Report of the National Commission on Judicial Discipline & Removal*, August 1993, p. 69.

<sup>52</sup> For a brief review of the Act's history, see Stephen B. Burbank, "Procedural Rulemaking under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980," *University of Pennsylvania Law Review*, December 1982, pp. 283-352.

<sup>53</sup> National Commission on Judicial Discipline & Removal, *Report of the National Commission on Judicial Discipline & Removal*, August 1993, p. 4.

<sup>54</sup> By 1980, forty-nine states and the District of Columbia had adopted disciplinary systems other than the traditional methods of impeachment, address and concurrent resolution.

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15.3 Federal judges abide by the *Code of Conduct for United States Judges*, a set of ethical principles and guidelines adopted by the Judicial Conference of the United States<sup>55</sup>. Nevertheless, a violation of the Code does not necessarily constitute judicial misconduct under the *Judicial Conduct and Disability Act*.

### Regulatory Framework

15.4 The process for dealing with complaints against federal judges in the US is governed by the *US Constitution*, the *Judicial Conduct and Disability Act of 1980* and relevant rules adopted by each circuit judicial council.

15.5 Complaints against federal judges, except the Supreme Court justices<sup>56</sup>, are filed under the *Judicial Conduct and Disability Act of 1980*. (28 U.S.C. Section 372(c)) Under the Act, any person may file a written complaint alleging that a Circuit, District, Bankruptcy or Magistrate judge has engaged in "*conduct prejudicial to the effective and expeditious administration of the business of the courts*" or "*is unable to discharge all duties of office by reason of mental or physical disability*."

15.6 There is no precise definition of what behaviour or activities are considered to be "*prejudicial to the effective and expeditious administration of the business of the courts*." In any event, examples may include use of the judge's office to obtain special treatment for friends and relatives, acceptance of bribes, improperly engaging in discussion with lawyers or parties to cases in the absence of representatives of opposing parties, and other abuses of the judicial office.

15.7 "Mental or physical disability" may include temporary conditions as well as permanent disability.

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<sup>55</sup> The Judicial Conference is the federal courts' national policy-making body. The Chief Justice of the United States presides over the Judicial Conference, which consists of 26 other members, including the Chief Judge of each Court of Appeals, one District Court judge from each regional circuit, and the Chief Judge of the Court of International Trade.

<sup>56</sup> The US Supreme Court is not subject to the Act or the *Code of Conduct for United States Judges*, although the Court uses the Code for guidance. For reasons why the Act does not apply to the US Supreme Court, see Randy J. Holland & Cynthia Gray, "Judicial Discipline: Independence with Accountability," *Widener Law Symposium*, Winter 2000.

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15.8 Under 28 U.S.C. 372(2)(c)(11), each Judicial Council may prescribe rules for the consideration of complaints relating to judicial misconduct or disability. It is required that "any such rule shall be made or amended only after giving appropriate public notice and an opportunity for comment." The complaints handling procedures adopted in the Ninth Circuit<sup>57</sup> will be used to illustrate essential characteristics of the existing mechanism.

#### Complaints Filing Procedures

15.9 Complaints are filed with the Clerk of the Court of Appeals on a form (see Appendix VI) for that purpose. The law allows any person to file a complaint, which includes an association, such as a bar association, as long as the name of a contact person is provided.

15.10 There is no prohibition against anonymous complaints. Anonymous complaints received by the Clerk will be forwarded to the Chief Judge for such actions as the Chief Judge considers appropriate.<sup>58</sup>

#### Initial Screening Process

15.11 The Chief Judge will review a complaint to determine whether it should be:

- (1) dismissed;
- (2) concluded if corrective actions have been taken; or
- (3) referred to a special committee.

15.12 A complaint will be dismissed if the Chief Judge concludes that:

- (1) the complaint is directly related to the merits of a decision or procedural ruling; or
- (2) the claimed conduct is outside the scope of the statute; or
- (3) the complaint is frivolous; or
- (4) under the statute, the complaint is otherwise not appropriate for consideration.

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<sup>57</sup> The Ninth Circuit, which is the largest judicial circuit in the US, includes the following states: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. For detailed information on complaints handling procedures in the Ninth Circuit, refer to "Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability" (Rules of the Judicial Council") available at <http://www.ce9.uscourts.gov/>.

<sup>58</sup> Rule 2(g) of "Rules of the Judicial Council".

15.13 There is no time limit for a complaint. However, a complaint may be dismissed if it is filed so long after the events in question occurred that the delay will make fair consideration of the matter impossible.

15.14 The Chief Judge may conduct a limited inquiry for the purpose of determining whether:

- (1) appropriate corrective action has been or can be taken without the necessity for a formal investigation; and
- (2) the facts stated in the complaint are either plainly untrue or incapable of being established through investigation.

15.15 If the Chief Judge dismisses a complaint or concludes the proceeding on the grounds that corrective action has been taken or that action on the complaint is no longer necessary because of intervening events, a petition for review may be addressed to the Judicial Council of the Circuit.<sup>59</sup>

15.16 Section 372(c)(3) requires that the order dismissing a complaint or concluding the proceeding contains a statement of reasons and that a copy of the order be sent to the complainant.

#### Investigation and Formal Proceedings

15.17 If a complaint is not dismissed or concluded, the Chief Judge will promptly appoint a special committee to investigate the complaint and make recommendations to the Judicial Council. A special committee will consist of the Chief Judge of the Circuit and equal numbers of Circuit and District Judges. There is no legal requirement on the size of a special committee. Although the law requires that the Chief Judge be a member of a special committee, it does not require that the Chief Judge presides over the committee. The Chief Judge may appoint another judge as the presiding officer.

15.18 Each special committee will determine the extent and methods of the investigation that are appropriate in the light of the allegations of the complaint. The special committee may hold hearings to take testimony and receive other evidence, to hear argument, or both. The judge under investigation is entitled to a hearing if he or she requests one and has the right to present oral and documented evidence. Additionally, the judge has the rights to compel the attendance of witnesses and the production of documents and to cross-examine witness at the hearing. The judge may also be represented by counsel.

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<sup>59</sup> For detailed information on the review of Chief Judges' disposition of a complaint by the Judicial Council, see Chapter III of the "Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability." If there is a petition for review, the Chief Judge will not participate in the Judicial Council's consideration of the petition.

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15.19 The complainant is entitled to be interviewed by a representative of the committee and permitted to offer oral argument through counsel. The complainant may also submit written argument to the special committee at any time.

15.20 There is a statutory mandate of confidentiality for all papers, documents, and records of proceedings related to the investigation.<sup>60</sup>

15.21 The special committee will file a written report with findings and a recommendation with the Circuit Judicial Council. The Circuit Judicial Council may conduct any additional investigation it considers necessary.

### Disciplinary Actions

15.22 The Judicial Council may:

- (1) dismiss the complaint;
- (2) certify the disability of a judge;
- (3) request that a judge voluntarily retires;
- (4) order that, on a temporary basis, no further cases be assigned to a judge;
- (5) censure or reprimand a judge by private communication;
- (6) censure or reprimand a judge by public announcement; or
- (7) order other actions as it considers appropriate under the circumstances.

15.23 Federal judges cannot be removed under the *Judicial Conduct and Disability Act*. The Judicial Council may refer a complaint to the Judicial Conference of the United States (Judicial Conference) with the Council's recommendations for action. The Judicial Conference can refer a complaint to the House of Representatives for consideration of impeachment.

### Remedial Actions

15.24 The formal investigation procedures are regarded as a last resort while informal methods of resolving problems will continue to be used. The Chief Judge will make every effort to determine whether it is possible to fashion a remedy without appointing a special committee.<sup>61</sup>

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<sup>60</sup> There are some exceptions, see 28 U.S.C. 372(c)(14).

<sup>61</sup> See Commentary on Rule 4 of "Rules of the Judicial Council".

### Appeal Procedures

15.25 Both the complainant and the subject of a complaint can petition to the Judicial Conference for review of any action taken by a Circuit Judicial Council.

## **16. Evaluation of Complaints Handling Mechanism**

16.1 In aid of the goal of public accountability, Congress requires the Director of the Administrative Office to include in the annual report filed with Congress a summary of the number of complaints filed under the Act, indicating their general nature and any actions taken. The following table shows a summary of activity in 2000-01.

**Table 4 - Report of Complaints Filed and Action Taken Under Authority of 28 U.S.C 372(c)  
During the 12-Month Period Ending 30 September 2001**

Summary of Activity	Circuits														National Courts	
	Total	Fed	DC	1 <sup>st</sup>	2 <sup>nd</sup>	3 <sup>rd</sup>	4 <sup>th</sup>	5 <sup>th</sup>	6 <sup>th</sup>	7 <sup>th</sup>	8 <sup>th</sup>	9 <sup>th</sup>	10 <sup>th</sup>	11 <sup>th</sup>	CC <sup>1</sup>	CIT <sup>2</sup>
Complaints Pending on 30 September 2001*	150	0	4	9	33	5	3	9	23	1	6	32	4	18	3	0
Complaints Filed	766	0	31	22	102	50	63	100	97	43	52	102	32	70	1	1
Complaint Type																
Written by Complainant	766	0	31	22	102	50	63	100	97	43	52	102	32	70	1	1
On Order of Chief Judge	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Officials Complained About**																
Judges																
Circuit	273	0	15	16	31	13	25	23	12	16	33	53	16	20	0	0
District	563	0	16	26	52	23	45	50	86	37	69	104	25	30	0	0
National Court	3	0	0	0	0	0	0	0	0	0	0	0	1	0	1	1
Bankruptcy Judges	34	0	0	2	2	6	2	2	1	3	0	12	2	2	0	0
Magistrate Judges	143	0	3	1	17	8	12	25	17	3	10	20	9	18	0	0
Nature of Allegations**																
Mental Disability	29	0	0	0	5	4	1	3	3	1	2	5	0	5	0	0
Physical Disability	1	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0
Demeanor	31	0	0	1	14	2	1	0	1	4	2	5	0	1	0	0
Abuse of Judicial Power	200	0	3	3	28	3	35	28	1	13	21	33	15	16	1	0
Prejudice/Bias	266	0	18	11	24	9	17	31	36	13	11	43	14	30	1	0
Conflict of Interests	38	0	0	0	10	4	3	8	1	1	0	5	4	2	0	0
Bribery/Corruption	61	0	0	0	2	5	4	6	1	1	1	33	3	5	0	0
Undue Decisional Delay	60	0	0	0	6	6	3	11	2	6	4	15	0	7	0	0
Incompetence/Neglect	50	0	0	2	5	8	3	3	7	0	1	20	0	1	0	0
Other	186	0	8	1	0	50	4	47	16	3	8	32	7	10	0	0
Complaints Concluded	668	0	18	16	75	53	61	108	68	39	41	100	30	58	1	0
Action by Chief Judges																
Complaint Dismissed																
Not in Conformity With Statute	13	0	1	0	4	0	0	0	1	2	1	4	0	0	0	0
Directly Related to Decision or Procedural Ruling	235	0	2	3	17	26	25	42	20	14	18	27	14	27	0	0
Frivolous	103	0	0	2	13	0	6	13	14	12	7	31	2	3	0	0



**Table 4 - 30 September 2001 - (Cont'd)**

Summary of Activity	Circuits														National Courts	
	Total	Fed	DC	1 <sup>st</sup>	2 <sup>nd</sup>	3 <sup>rd</sup>	4 <sup>th</sup>	5 <sup>th</sup>	6 <sup>th</sup>	7 <sup>th</sup>	8 <sup>th</sup>	9 <sup>th</sup>	10 <sup>th</sup>	11 <sup>th</sup>	CC <sup>1</sup>	CIT <sup>2</sup>
Appropriate Action Already Taken	4	0	0	0	0	1	0	0	0	1	1	0	1	0	0	0
Action No Longer Necessary Because of Intervening Events	5	0	0	0	0	0	0	0	0	0	0	0	0	5	0	0
Complaint Withdrawn	3	0	0	1	0	1	0	0	0	0	1	0	0	0	0	0
Subtotal	363	0	3	6	34	28	31	55	35	29	28	62	17	35	0	0
Action by Judicial Councils																
Directed Chief District Judge to Take Action (Magistrate Judge Only)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Certified Disability	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Requested Voluntary Retirement	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Ordered Temporary Suspension of Case Assignments	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Privately Censured	1	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0
Publicly Censured	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Ordered Other Appropriate Action	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Dismissed the Complaint	303	0	15	10	40	25	30	53	33	10	13	38	12	23	1	0
Withdrawn	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0	0
Referred Complaint to Judicial Conference	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Subtotal	305	0	15	10	41	25	30	53	33	10	13	38	13	23	1	0
Complaints Pending on 30 September 2001	248	0	17	15	60	2	5	1	52	5	17	34	6	30	3	1

Note: Excludes complaints not accepted by the circuits because they duplicated previous filings or were otherwise invalid filings.

<sup>1</sup>CC = U.S. claims court.

<sup>2</sup>CIT = Court of International Trade.

\* Revised.

\*\* Each complaint may involve multiple allegations against numerous judicial officers. Nature of allegations is counted when a complaint is concluded.

Source: *Judicial Business of the United States Courts 2001*, available at <http://www.uscourts.gov/judbus2001/tables/s22sep01.pdf>.

16.2 The figures show that the overwhelming majority of complaints are dismissed by Chief Judges and Judicial Councils.

16.3 Statistics of complaints against judges in the Ninth Circuit are provided in its annual report. In 2000, 113 complaints of judicial misconduct were filed. (see Table 5) This figure is in line with the annual figures for the past several years. Thirty-four complaints were from prisoner litigants, 66 from other litigants, three from attorneys, one from an officer of the court, and nine from other groups of complainants. The Council issued a public reprimand in two complaints that were consolidated for investigation. (see Table 6)

**Table 5 - Sources of Complaints Against Judges, 2000**

	<b>Circuit Judge</b>	<b>District Judge</b>	<b>Magistrate Judge</b>	<b>Bankruptcy Judge</b>	<b>Totals</b>
Prisoner Litigant	18	33	9	-	60
Other Litigant	22	62	14	9	107
Attorney	-	3	-	-	3
Other	1	12	3	-	16
<b>Totals</b>	<b>41</b>	<b>111</b>	<b>26</b>	<b>9</b>	<b>187</b>

**Table 6 - Disposition of Complaints, 2000**

	<b>Circuit Judge</b>	<b>District Judge</b>	<b>Magistrate Judge</b>	<b>Bankruptcy Judge</b>
Dismissed-Directly Related to the Merits of the Case	23	63	18	4
Dismissed-Not in Conformance with Statute	2	19	4	4
Dismissed-Frivolous	32	85	23	5
Dismissed-Other	2	8	3	-
Public Reprimand	-	2	-	-

Note: The figures contained in Tables 5 & 6 may not add up to the totals because a single complaint may include multiple charges against multiple judges and may be dismissed on multiple grounds.

Source: *United States Courts: Ninth Circuit Annual Report 2000*, available at <http://www.ce9.uscourts.gov/>

16.4 In 1990, Congress created the National Commission on Judicial Discipline and Removal. The Commission was authorized to investigate and study problems and issues related to the discipline and removal from office of life-tenured federal judges and to evaluate current and proposed mechanisms for the discipline and removal of federal judges. The Commission's appointment terminated in 1993 with the publication of its final report.<sup>62</sup>

16.5 Studies conducted by the Commission showed that the *Judicial Conduct and Disability Act* does not interfere with judicial independence.<sup>63</sup> The Commission also concluded that the Act is "working reasonably well"<sup>64</sup> and would work better with their proposed changes.

16.6 The provision of a formal disciplinary mechanism under the *Judicial Conduct and Disability Act* has facilitated the efficacy of informal discipline. Chief Judges have often been able to use the threat of formal sanction to discipline judicial misconduct. A major benefit of the Act's formal process has been to enhance the attractiveness of informal resolutions.<sup>65</sup>

16.7 However, the issue of confidentiality in the complaints process has led some commentators to complain that the *Judicial Conduct and Disability Act* provides only 'secret discipline'.<sup>66</sup> The low level of conviction rate has also been considered as a reluctance to impose formal public sanction upon a colleague.

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<sup>62</sup> National Commission on Judicial Discipline & Removal, *Report of the National Commission on Judicial Discipline & Removal*, August 1993.

<sup>63</sup> *Ibid*, p. 124.

<sup>64</sup> *Ibid*, p. 123.

<sup>65</sup> *Ibid*, p. 113.

<sup>66</sup> John P. Sahl, "Secret Discipline in the Federal Courts: Democratic Values and Judicial Integrity at Stake," *Notre Dame Law Review*, 1994.

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## **PART 5 - THE STATE OF NEW YORK**

### **17. Background**

17.1 The political structure of the State of New York (New York) resembles that of the federal government, with the Governor as the head of the executive, a bicameral state legislature (the Assembly and Senate) and a judiciary. New York has a written constitution, which provides for executive, legislative, and judicial institutions that are distinct and politically independent of each other.

17.2 Article VI of the *New York State Constitution* defines the powers and structure of the judiciary and provides that all courts located in the geographical jurisdiction of the state are part of a 'unified court system'. Appendix VII gives an outline of New York State court system. The Court of Appeals is the highest court in the state. A brief description of the distinguishing features of each court in the New York system is provided in Appendix VIII.

17.3 Although the *New York State Constitution* does not grant life tenure for judges and justices in the unified court system, it generally provides for terms in office that exceed terms of both the state's elected executive officers and members of the legislature.

17.4 Both Judges of the Court of Appeals, who are appointed by the Governor, and justices of the Supreme Court, who are elected, serve a 14-year term. Justices of the Supreme Court, who are appointed to the Appellate Division, sit for a five-year term or, if their remaining term as justice is less than five years, for the remainder of their term. Other judges have terms ranging from four to 14 years. There are currently 3 300 judges in the state unified court system.

### **18. Role of the Executive and the Legislature**

18.1 New York's Constitution authorizes the removal of judges by legislative impeachment or by a concurrent resolution of the Assembly and the Senate.

18.2 The Assembly is provided with the power of impeachment by a vote of a majority of all elected members. The court for the trial of an impeachment consists of the President of the Senate, Senators and judges of the Court of Appeals.

18.3 The legislature may remove judges of the Court of Appeals and justices of the Supreme Court only for cause pursuant to a concurrent resolution approved by a vote of two-thirds of the members of each house of the legislature. Judges of the other courts may be removed by the legislature only for cause on recommendation by the Governor and a vote of two-thirds of the elected members of the state Senate.

## 19. The Commission on Judicial Conduct

19.1 In the 1960s, a flood of cases disciplining judges for misconduct began to arise in New York.<sup>67</sup> In 1974, the State legislature created a temporary commission to investigate and prosecute cases of judicial misconduct. During 1976 and 1977, the *New York State Constitution* was amended to strengthen the commission, making it permanent and expanding its powers.

19.2 Article 6, section 22 of the *New York State Constitution* establishes the Commission on Judicial Conduct (Commission), which has the power to receive, initiate and investigate complaints with respect to the conduct, qualifications and fitness of any judge in the unified court system.

19.3 The Commission is composed of 11 members serving a four-year term. The members serve part-time without compensation. Four members are appointed by the Governor, three by the Chief Judge of the Court of Appeals, and one each by the four leaders<sup>68</sup> of the Legislature. The *New York State Constitution* requires that four members be judges, at least one be an attorney, and at least two be lay persons.

19.4 The Commission elects one of its members to be the chairperson and appoints the Administrator and the Clerk. The Commission's principal office is in New York City, with other offices in Albany and Rochester. The Commission has a budget of about US\$2 million (HK\$15.6 million), which supports a staff of 27, including nine attorneys, and six full-time and one part-time investigators.<sup>69</sup>

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<sup>67</sup> See William E. Nelson, "The Integrity of the Judiciary in Twentieth-century New York," *Rutgers Law Review*, Fall 1998.

<sup>68</sup> They are the Temporary President of the Senate, the minority leader of the Senate, the Speaker of the Assembly and the minority leader of the Assembly.

<sup>69</sup> *New York State Commission on Judicial Conduct Annual Report 2001*, available at <http://www.scjc.state.ny.us/annual.htm>.

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## 20. Complaints Handling Procedures

### Regulatory Framework

20.1 The process for dealing with complaints against judges in New York is governed by Article 6, section 22 of the *New York State Constitution*, Article 2-A of the *Judiciary Law of the State of New York*, the *Operating Procedures and Rules* and the *Rules Governing Judicial Conduct*.

20.2 Article 2-A, sections 40-48, of the *Judiciary Law of the State of New York*<sup>70</sup> is the enabling legislation associated with the creation of the Commission. The *Operating Procedures and Rules*<sup>71</sup> is promulgated by the Commission. The *Rules Governing Judicial Conduct*<sup>72</sup> is promulgated by the Chief Administrator of the Courts<sup>73</sup> with the approval of the Court of Appeals. Violations of the *Rules Governing Judicial Conduct* may result in disciplinary action by the Commission.

20.3 The types of complaints that may be investigated by the Commission include improper demeanor, conflict of interests, intoxication, bias, prejudice, favouritism, corruption, prohibited business or political activity, serious financial and records mismanagement, assertion of the influence of judicial office for the private benefit of the judge or others, and other misconduct on or off the bench. Physical or mental disability may also be investigated.

20.4 The Commission does not act as an appellate court. It does not review judicial decisions or alleged errors of law, nor does it issue advisory opinions, give legal advice or represent litigants.

### Complaints Filing Procedures

20.5 The law requires that complaints to the Commission be in writing and signed by the complainant. Complaints may be filed by letter or by a complaint form provided by the Commission<sup>74</sup>.

20.6 The Commission may initiate a complaint against any judge. Prior to commencing an investigation of a complaint initiated by the Commission, the Commission is required to file as part of its record an Administrator's complaint.

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<sup>70</sup> The document is available at <http://www.scjc.state.ny.us/judiciar.htm>.

<sup>71</sup> *McKinney's New York Rules of Court*, 2002, pp. 747-752.

<sup>72</sup> The document is available at <http://www.scjc.state.ny.us/rulesof.htm>.

<sup>73</sup> The Chief Judge appoints the Chief Administrator of the Courts with the advice and consent of the Administrative Board of the courts — a body consisting of presiding justices of the four Appellate Divisions of the Supreme Court and the Chief Judge of the State.

<sup>74</sup> The form is available at <http://www.scjc.state.ny.us/complain.htm>.

### Initial Screening Process

20.7 When a complaint is received or when the Administrator's complaint is filed, an initial review and inquiry may be undertaken by Commission staff.

20.8 The Commission meets several times a year. At its meetings, the Commission reviews each new complaint and makes an initial decision of whether to investigate or dismiss the complaint. No investigation may be commenced by staff without authorization by the Commission.

### Investigation and Formal Proceedings

20.9 After the Commission authorizes an investigation, the Administrator assigns the complaint to a staff attorney, who works with the investigative staff. If appropriate, witnesses are interviewed and court records are examined. The judge concerned may be asked to respond in writing to the allegations. In some instances, the Commission requires the appearance of the judge to testify during the course of the investigation. Although such an appearance is not considered a formal hearing, the judge is entitled to be represented by counsel. The judge may also submit evidence and materials for the Commission's consideration.

20.10 If the Commission finds after an investigation that the circumstances warrant further action, it will direct the Administrator to serve upon the judge concerned a Formal Written Complaint containing specific charges of misconduct. The serving of the Formal Written Complaint institutes the formal disciplinary proceeding.

20.11 The judge under investigation is expected to provide the Commission a written answer within 20 days after the serving of the Formal Written Complaint. After receiving the judge's answer, the Commission may, if it is determined that there are no disputed issues of fact, grant a motion for summary determination.

20.12 Where there are factual disputes, the Commission will appoint a referee to conduct a formal hearing and report findings of fact and conclusion. Referees are designated by the Commission from a panel of attorneys and former judges.

20.13 Following the Commission's receipt of the referee's report, on a motion to confirm or dis-affirm the report, both the Administrator and the judge concerned may present legal argument on issues of misconduct and sanction.

20.14 Commission proceedings are, by law, confidential. Upon completion of service, the Commission's determination and the record of its proceedings become public.

20.15 The Commission may dismiss a complaint at any stage during the investigation or adjudication. The Commission is required to inform complainants of the disposition of their complaints.

#### Disciplinary Actions

20.16 If the Commission determines that disciplinary action is warranted, it may render a determination to impose one of four sanctions, subject to review by the Court of Appeals upon timely request by the judge concerned. If review is not requested within 30 days of service of the determination upon the judge, the determination becomes final. The Commission may render determinations to:

- (1) admonish a judge publicly;
- (2) censure a judge publicly;
- (3) remove a judge from office; or
- (4) retire a judge for disability.

#### Remedial Actions

20.17 The Commission may issue a confidential Letter of Dismissal and Caution to a judge despite a dismissal of the complaint, when it is determined that the circumstances so warrant. The letter constitutes the Commission's confidential suggestions and recommendations to a judge.

#### Appeal Procedures

20.18 The judge has 30 days to request a review of the Commission's determination by the Court of Appeals. The Court may accept or reject the Commission's findings of fact or conclusions of law, make new or different findings of fact or conclusions of law, accept or reject the determined sanction, or make a different determination as to sanction.

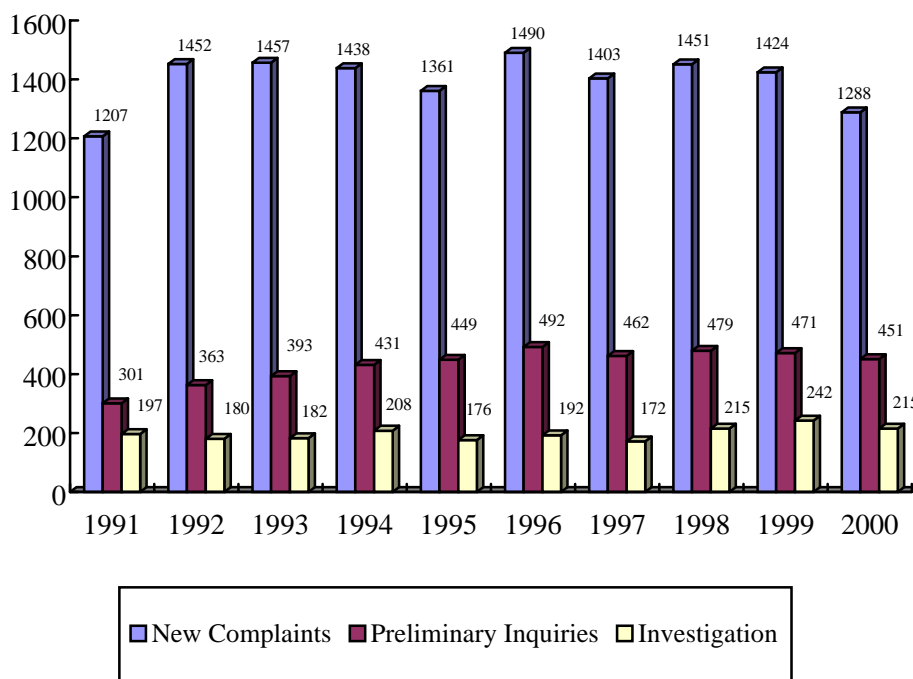


## 21. Evaluation of Complaints Handling Mechanism

21.1 The Commission has its own website<sup>75</sup>, which contains information on the Commission's authority and jurisdiction, its history and procedures, its recent decisions and other materials related to the field of judicial ethics and professional discipline. A brochure is also available with general information and answers to frequently asked questions of the Commission.<sup>76</sup>

21.2 The number of complaints received by the Commission has steadily increased over the past 26 years of its operation. In the last ten years, the Commission has averaged approximately 1 400 new complaints, 430 preliminary inquiries and 200 full-fledged investigations. (See chart 2) The Commission received 1 288 new complaints in 2000.

**Chart 2 - Complaints, Inquiries & Investigations Since 1991**



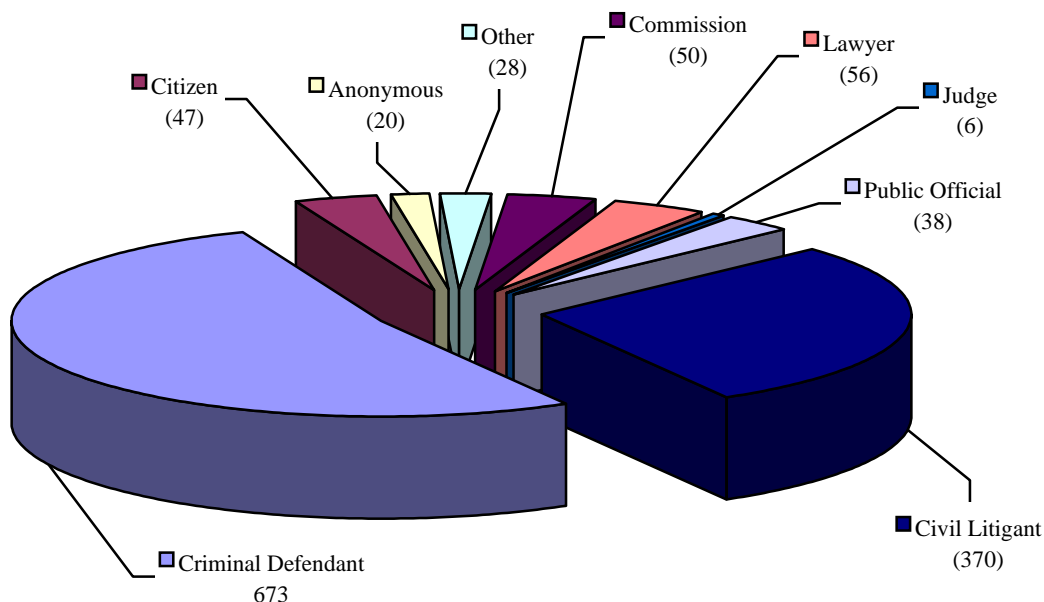
Source: *New York State Commission on Judicial Conduct Annual Report 2001*.

21.3 A breakdown of the sources of complaints received by the Commission in 2000 is presented in the following chart. Most of the complaints (52 per cent) are filed by criminal defendants.

<sup>75</sup> The URL is <http://www.scjc.state.ny.us/index.htm>.

<sup>76</sup> The brochure is available at <http://www.scjc.state.ny.us/brochure.htm>

**Chart 3 - Complaint Sources in 2000**



Source: *New York State Commission on Judicial Conduct Annual Report 2001*.

21.4 In 2000, the Commission commenced 215 new investigations – the second largest number in its history. In addition, there were 183 investigations pending from the previous year. The Commission dealt with the combined total of these 398 investigations in the following ways:

- 135 complaints were dismissed outright;
- 67 complaints involving 63 different judges were dismissed with Letters of Dismissal and Caution;
- seven complaints involving seven different judges were closed upon the judges’ resignation;
- six complaints involving four judges were closed upon vacancy of office due to reasons other than resignation, including the judges’ retirement or failure to win re-election;
- two complaints involving two judges were closed upon the judges’ removal on other charges;
- 36 complaints involving 27 different judges resulted in formal charges being authorized; and
- 145 investigations were pending as at 31 December 2000.

21.5 The Commission's investigations, hearings and dispositions in 2000 involving judges at various levels of the state unified court system are exhibited in the following table.

**Table 7 - Number of Investigations, Hearings and Dispositions of the New York State Commission on Judicial Conduct in 2000**

Events	Town & Village Justices (2 200) <sup>1</sup>			City Court Judges (378) <sup>2</sup>			Country Court Judges (77) <sup>3</sup>	Family Court Judges (118) <sup>4</sup>	District Court Judges (48) <sup>5</sup>	Court of Claims Judges (51) <sup>6</sup>	Surrogates (74) <sup>7</sup>	Supreme Court Justices (341) <sup>8</sup>	Court of Appeals Judges & Appellate Division Justices (59) <sup>9</sup>
	Lawyers	Non- Lawyers	Total	Part-time	Full-time	Total							
Complaints Received	114	232	346	37	86	123	173	133	11	26	16	253	27
Complaints Investigated	33	100	133	10	15	25	13	8	6	0	2	26	2
Judges Cautioned After Investigation	10	36	46	1	1	2	3	1	0	0	1	9	1
Formal Written Complaints Authorized	4	11	15	1	2	3	2	0	1	0	0	6	0
Judges Cautioned After Formal Complaint	1	2	3	0	0	0	1	0	1	0	0	0	0
Judges Publicly Disciplined	0	5	5	1	2	3	1	1	1	0	0	2	0
Formal Complaints Dismissed or Closed	1	11	12	0	0	0	1	0	1	0	0	1	0

Remarks: <sup>1</sup> ( ) = the approximate number of such judges, approximately 400 of this total being lawyers

<sup>2</sup> All lawyers, approximately 100 of this total serving part-time

<sup>3</sup> All lawyers, including six who serve concurrently as County and Family Court judges

<sup>4</sup> Full-time, all lawyers <sup>5</sup> Full-time, all lawyers <sup>6</sup> Full-time, all lawyers <sup>7</sup> Full-time, all lawyers

<sup>8</sup> Full-time, all lawyers, including 10 who serve concurrently as Surrogates and Family Court judges, and 30 who serve concurrently as Surrogate, Family and County Court judges

<sup>9</sup> Full-time, all lawyers

Source: Relevant data are drawn from the *New York State Commission on Judicial Conduct Annual Report 2001*.

21.6 In 2000, the Commission rendered 13 formal disciplinary determinations in 2000: four removals, one censure and eight admonitions. Five of the 13 disciplined judges were non-lawyer judges, and eight were lawyer-judges. Five of the disciplined judges were part-time town or village justices, and eight were judges of higher courts.

21.7 In the past, the only method for the removal of judges was by impeachment provided by constitutions of nearly all of the fifty states in the US. As the number of judges increases, impeachment has become a cumbersome method for disciplining judges and has been supplemented by a judicial disciplinary system in all of the fifty states.

21.8 The judicial complaint system in New York is quite different from the US federal system. One important difference is that there is lawyer and lay participation in the complaints process in the New York system, but virtually none in the federal system. As mentioned above, the law requires that members of the New York's Commission must include at least one attorney and at least two lay persons. The New York's Commission proclaims that they are offering a forum for citizens with conduct-related complaints, thereby promoting public confidence in the integrity and honour of the judiciary.

21.9 Another difference is that the complaints system in New York permits an ultimate appeal to the state's supreme court, which is the Court of Appeals. In the federal system, neither the Supreme Court of the US nor the Circuit Courts of Appeals play a direct role in the proceedings.

21.10 In addition, there is no role for Chief Judges to vet or resolve complaints in the New York system. In the federal system, the Circuit Chief Judge plays a crucial role in vetting and resolving complaints.

21.11 A final reminder is that some of the judges in the New York court system are elected to office. (See Appendix VIII) Election is one way of enhancing judicial accountability<sup>77</sup>, since misbehaved judges may be abandoned by voters in the next election. However, a judge's involvement in election may create the problem of misconduct in political activities, which is one of the major issues that the New York's Commission has to deal with.<sup>78</sup>

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<sup>77</sup> Sambhav N. Sankar, "Disciplining the Professional Judge," *California Law Review*, July 2000.

<sup>78</sup> *New York State Commission on Judicial Conduct Annual Report 2001*.

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## Part 6 - COMPARISON OF THE VARIOUS ATTRIBUTES OF THE MECHANISM FOR HANDLING COMPLAINTS AGAINST JUDGES

22.1 Table 8 to Table 13 summarize various attributes of the mechanisms for handling complaints against judges in the four places studied and Hong Kong. The information regarding Hong Kong is extracted from a Legislative Council (LegCo) paper<sup>79</sup> and reply received from the Judicial Administration.

22.2 Regarding the role of the Executive in disciplining judges in Hong Kong, in addition to what has been provided in Article 89 of the *Basic Law*<sup>80</sup>, the *Commissions of Inquiry Ordinance* (Cap. 86) empowers the Chief Executive in Council to appoint a commission to inquire into the conduct or management of any public body, the conduct of any public officer or into any matter whatsoever which was, in his opinion, of public importance.

22.3 In relation to the legislature's role, the *Basic Law* provides that the appointment or removal of judges of the Court of Final Appeal and the Chief Judge of the High Court requires endorsement by LegCo (Article 90). Article 73 of the *Basic Law* empowers LegCo to debate any issue concerning public interests, receive and handle complaints from Hong Kong residents, and summon persons concerned to testify or give evidence.

22.4 Certain provisions in the *Rules of Procedure of the Legislative Council* are relevant to this matter. Rule 25 (g) provides that, "A question shall not reflect on the decision of court of law or so drafted as to be likely to prejudice a case pending in a court of law." In addition, it is provided by Rule 41(8) that, "The conduct of judges or other persons performing judicial functions shall not be raised"<sup>81</sup> in speeches.

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<sup>79</sup> "Mechanism for Handling Complaints against Judges," LC Paper No. CB(2)1388/01-02(02), see Appendix IX.

<sup>80</sup> Before 1997, a tribunal may be set up under Article XVIA(6) of the *Letters Patent* to investigate whether a judge should be removed from office for misbehaviour.

<sup>81</sup> There is an opinion that under this rule, "it is hard to see how the removal of a judge, or even the promotion of an existing judge to the post of chief justice, could be discussed [in LegCo]" see Jill Cottrell and Yash Ghai, "Between Two Systems of Law: The Judiciary in Hong Kong," in Peter H. Russell & David M. O'Brien ed., *Judicial Independence in the Age of Democracy — Critical Perspectives from around the World*, Charlottesville: University Press of Virginia, 2001, pp. 207-232 at p. 213.

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**Table 8 - Role of the Executive and the Legislature**

Places	Role of the Executive*	Role of the Legislature*
Canada (only federal judges)	At the request of the Minister of Justice of Canada or the attorney general of a province, the Canadian Judicial Council conducts inquiries to determine and recommend to the Minister of Justice whether a federally appointed judge should be removed from office.	Federally appointed judges can only be removed from office by the Governor General on address to the Senate and House of Commons.
The United Kingdom	The Lord Chancellor is responsible for removing and disciplining circuit judges and below.	Judges of superior courts can only be removed by Her Majesty on address to both Houses of Parliament.
The United States (only federal judges)	No role.	Removal from office by impeachment.
The State of New York	Judges (except judges of Court of Appeals and justices of the Supreme Court) may be removed on recommendation by the Governor and a vote of two-thirds of the elected members of the state Senate.	Removal of judges by impeachment or by a concurrent resolution of the Assembly and the Senate.
Hong Kong	<p>The Chief Executive in Council may appoint a commission to inquire into the conduct of any public officer.</p> <p>A judge may only be removed by the Chief Executive (CE) on the recommendation for a tribunal of at least three local judges appointed by the Chief Justice. (In case of the Chief Justice, the tribunal is composed of at least five local judges appointed by the CE).</p> <p>Judicial officers (below District Court judges) may only be dismissed or disciplined during their term by the CE on the recommendation of the Judicial Officers Recommendation Commission.</p>	<p>Removal of judges of the Court of Final Appeal and the Chief Judge of the High Court requires endorsement by LegCo.</p> <p>LegCo can receive and handle complaints from Hong Kong residents, and can summon persons concerned to testify or give evidence.</p>

\* Some mechanisms involve both the executive and the legislature.

Table 9 - Regulatory Framework of Complaints Handling Procedures

Places	Regulatory Framework	Responsible Institutions
Canada (only federal judges)	<ol style="list-style-type: none"> <li>1. <i>The Constitution Act, 1867</i>;</li> <li>2. <i>the Judges Act</i>; and</li> <li>3. <i>the Canadian Judicial Council By-Laws</i>.</li> </ol>	The Canadian Judicial Council—consists of 39 members who are chief justices.
The United Kingdom	No statutory regulatory framework	Judicial Correspondence Unit of the Judicial Group in the Lord Chancellor's Department.
The United States (only federal judges)	<ol style="list-style-type: none"> <li>1. <i>The US Constitution</i>;</li> <li>2. <i>the Judicial Conduct and Disability Act of 1980</i>; and</li> <li>3. relevant rules adopted by each Circuit Judicial Council.</li> </ol>	<p>The Clerk of the Court of Appeals and Judicial Council in each circuit.</p> <p>Each Circuit Judicial Council consists of the Chief Judge and an equal number of Circuit and District judges.</p>
The State of New York	<ol style="list-style-type: none"> <li>1. <i>New York State Constitution</i>;</li> <li>2. <i>Article 2-A of the Judiciary Law of the State of New York</i>;</li> <li>3. <i>Operating Procedures and Rules of the Commission on Judicial Conduct</i>; and</li> <li>4. <i>the Rules Governing Judicial Conduct</i>.</li> </ol>	The Commission on Judicial Conduct—consists of 11 members serving a four-year term. The members serve part-time without compensation. Four members must be judges; among seven other members, at least one must be an attorney and at least two must be lay persons.
Hong Kong	<ol style="list-style-type: none"> <li>1. <i>The Basic Law</i>; and</li> <li>2. <i>the Judicial Officers (Tenure of Office) Ordinance</i>.</li> </ol>	The Judicial Administration.

**Table 10 - Complaints Filing Procedures and Initial Screening Process**

Places	Complaints Filing Procedure	Initial Screening Process
Canada (only federal judges)	(1) Any member of the public may lodge a complaint by writing to the Judicial Council; and (2) the Minister of Justice or the Attorney General of a province may request the Judicial Council to commence an inquiry as to whether a judge should be removed from office.	Complaints made by the public are screened by the Chairperson or a Vice-Chairperson of the Judicial Conduct Committee.  If the matter is serious enough to merit further consideration, it is referred to a Judicial Council Panel of up to five judges.
The United Kingdom	Complaints against judges may be sent to the Judicial Correspondence Unit or to the Court Service directly by complainants or through an intermediary such as a Member of Parliament.	Depending on the complainant and the nature of the complaint, the case is allocated to either a caseworker or a senior caseworker within the Judicial Correspondence Unit. This decision is made by a casework manager.
The United States (only federal judges)	Complaints are filed with the Clerk of the Court of Appeals in a circuit on a form that has been developed for that purpose.	The Chief Judge will review a complaint to determine whether it should be dismissed, concluded if corrective actions have been taken, or referred to a special committee.
The State of New York	Complaints to the Commission on Judicial Conduct must be in writing and signed by the complainant. The Commission may initiate a complaint against any judge under certain conditions.	The Commission staff may perform an initial review and inquiry.
Hong Kong	A complaint about a judge may be made to the Judiciary by any person directly or may be referred to the Judiciary by others.	The complaint is directed to the relevant Court Leaders for preliminary investigation.



**Table 11 - Investigation and Formal Proceedings**

Places	Investigation and Formal Proceedings
Canada (only federal judges)	<p>An Inquiry Committee is appointed to perform an inquiry or investigation. The Committee generally consists of three Judicial Council members together with two lawyers appointed by the Minister of Justice.</p> <p>An Inquiry Committee has the same powers as a superior court to summon witnesses, take evidence and require the production of documents. A judge whose conduct is being investigated is entitled to be heard and represented by counsel.</p> <p>An inquiry or investigation may be held in public or in private, unless the Minister of Justice requires that it be held in public. The Inquiry Committee is required to conduct its hearings in public.</p>
The United Kingdom	<p>Officials in the Judicial Correspondence Unit will generally draw the complaint to the attention of the judge concerned and give him or her an opportunity to comment.</p> <p>The Lord Chancellor takes a close personal interest in the handling of complaints, particularly those alleging racial or sexual discrimination. He also reviews all serious complaints, most notably those alleging racial or sexual discrimination, and those attracting, or likely to attract, publicity. In addition, he reviews all cases in which there is a record of similar complaints from several different sources about the conduct of a particular judge.</p>
The United States (only federal judges)	<p>A special committee will be established, and its members consist of the Chief Judge of the Circuit and an equal number of Circuit and District Judges.</p> <p>Each special committee will determine the extent and method of investigation that are appropriate in the light of the allegations of the complaint. The special committee may hold hearings to take testimony and receive other evidence, to hear argument, or both.</p> <p>There is a statutory mandate of confidentiality for all papers, documents and records of proceedings related to the investigation.</p> <p>The special committee will file a written report with findings and recommendations with the Circuit Judicial Council. The Circuit Judicial Council may conduct any additional investigation it considers necessary.</p>

**Table 11 - Investigation and Formal Proceedings (cont'd)**

Places	Investigation and Formal Proceedings
The State of New York	<p>After the Commission authorizes an investigation, the Administrator of the Commission assigns the complaint to a staff attorney, who works with the investigative staff of the Commission.</p> <p>If the Commission finds after an investigation that the circumstances warrant further action, it will direct the Administrator to serve upon the judge concerned a Formal Written Complaint containing specific charges of misconduct. The serving of the Formal Written Complaint institutes the formal disciplinary proceeding.</p> <p>After receiving the judge's answer, the Commission may, if it is determined that there are no disputed issues of fact, grant a motion for summary determination.</p> <p>Where there are factual disputes, the Commission will appoint a referee to conduct a formal hearing and report findings of fact and conclusion. Referees are designated by the Commission from a panel of attorneys and former judges.</p> <p>Commission proceedings are, by law, confidential. Upon completion of service, the Commission's determination and the record of its proceedings become public.</p>
Hong Kong	<p>For a serious case, the Chief Justice will consider whether a tribunal should be appointed.</p> <p>A tribunal established under <i>the Judicial Officers (Tenure of Office) Ordinance</i> is subjected to the <i>Judicial Officers (Tribunal) Rules</i>. Every hearing must be held in public unless the tribunal determines that there is good reason for it to be held in private. The officer or a person interested in the proceedings may be represented by counsel.</p> <p>For a less serious case, the Court Leader will deal with the matter. The Court Leader has access to court files and audio recordings of the relevant proceedings, and can seek further information from the complainants and the judge's comments on the complaint.</p>

**Table 12 - Disciplinary and Remedial Actions**

Places	Disciplinary Actions	Remedial Actions
Canada (only federal judges)	An Inquiry Committee's report could include a recommendation that the judge in question be removed, or not be removed, from judicial office.	A Judicial Council Panel can close the file with an expression of disapproval of the conduct which led to the complaint.
The United Kingdom	The Lord Chancellor may guide, counsel, advise or rebuke a judge. The Lord Chancellor can dismiss a judicial office holder below the level of the High Court Bench.	No.
The United States (only federal judges)	<p>The judicial council may:</p> <ul style="list-style-type: none"> <li>(1) certify the disability of a judge;</li> <li>(2) request that a judge voluntarily retires;</li> <li>(3) order that, on a temporary basis, no further cases be assigned to a judge;</li> <li>(4) censure or reprimand a judge by private communication;</li> <li>(5) censure or reprimand a judge by public announcement;</li> <li>or</li> <li>(6) order such other action as it considers appropriate under the circumstances.</li> </ul> <p>The Judicial Council may refer a complaint to the Judicial Conference with the Council's recommendations for action. The Judicial Conference can refer a complaint to the House of Representatives for consideration of impeachment.</p>	The Chief Judge can make every effort to determine whether it is possible to fashion a remedy without the necessity of appointing a special committee.

**Table 12 - Disciplinary and Remedial Actions (cont'd)**

Places	Disciplinary Actions	Remedial Actions
The State of New York	The Commission may render determinations to: <ol style="list-style-type: none"> <li>(1) admonish a judge publicly;</li> <li>(2) censure a judge publicly;</li> <li>(3) remove a judge from office; or</li> <li>(4) retire a judge for disability.</li> </ol>	The Commission may issue a confidential Letter of Dismissal and Caution to a judge, despite a dismissal of the complaint, when it is determined that the circumstances so warrant.
Hong Kong	A judge can be removed by the CE on the recommendation of a tribunal. A judicial officer can be dismissed or disciplined by the CE on the recommendation of the Judicial Officers Recommendation Commission.	The Chief Justice or the Court Leader may counsel the judge concerned to seek to avoid recurrence of similar conduct.

**Table 13 - Appeal Procedures in the Complaints Handling Process**

Places	Appeal Procedures*
Canada (only federal judges)	No formal appeal procedures.
The United Kingdom	No formal appeal mechanism.
The United States (only federal judges)	<p>If the Chief Judge dismisses a complaint or concludes the proceeding on the grounds that corrective action has been taken or that action on the complaint is no longer necessary because of intervening events, a petition for review may be addressed to the Judicial Council of the Circuit.</p> <p>Both the complainant and the subject of a complaint can petition to the Judicial Conference for review of any action taken by a Circuit Judicial Council.</p>
The State of New York	The judge has 30 days to request a review of the Commission's determination by the Court of Appeals.
Hong Kong	No appeal mechanism.

\*For both the complainant and the judge concerned.

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## PART 7 - REFERENCE FOR HONG KONG

### Introduction

23.1 Based on the findings in this study, the followings are some issues which Members may wish to consider regarding the mechanism for handling complaints against judges in Hong Kong.

### Transparency of Complaints Handling Mechanism

23.2 Among the places studied, there is a general pattern that information relating to the judicial complaints handling procedures and associated statistics is either posted on the Internet or published in annual reports of relevant institutions. Their systems are open and structured so that members of the public know where and how to file complaints against judges. The public is also assured of the existence of procedures for handling complaints of judicial misconduct.

23.3 In Hong Kong, information regarding the judicial complaints handling mechanism and related statistics is not available to the public at the website<sup>82</sup> and annual report of the Judiciary or through any other media.

23.4 While the public may not be able to learn about the judicial complaints system in Hong Kong, without sufficient relevant data, it is difficult to access the extent of judicial misconduct in Hong Kong.<sup>83</sup>

### *Issues to be considered*

23.5 In order to ensure fairness and openness, Members may wish to consider whether the Judiciary should increase the accessibility and visibility of the existing system of handing complaints against judges. Members may also wish to consider whether the Judiciary should publicize relevant complaint statistics on a regular basis.

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<sup>82</sup> The Judiciary's website is at <http://www.info.gov.hk/jud/eindex.htm>. According to a reply received from the Judiciary Administrator, "*The pamphlets published by the Judiciary for the public and the Judiciary web site provide information as to where members of the public should address their enquiries. (This would include the making of complaints.)*"

<sup>83</sup> An enquiry was sent to the Judiciary Administration regarding complaint statistics in Hong Kong. Their reply is attached as Appendix X.

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### Quest for Judicial Accountability

23.6 The four places studied all gear towards developing an open and accountable judiciary system to a certain extent.<sup>84</sup> Judges in those places, like other public officials, are expected to be held accountable to the public through various means.

23.7 As judges in Hong Kong under the *Basic Law* are involved in decisions that affect many aspects of social life, there is a need for greater judicial accountability. In addition, other areas of the public service are gradually developing towards greater accountability — such as the new accountability system for principal officials.

23.8 In Hong Kong, there is no code of conduct relating to judicial discipline or ethics. In both the US<sup>85</sup> and New York, there are codes of conduct for judges. In Canada<sup>86</sup>, there is a document entitled *Ethical Principles for Judges*. Although these ethical documents may not be used as a legal document to define judicial misconduct, they serve as useful guidelines for judges.<sup>87</sup> A code of conduct may provide a good starting point for laying down the standards and criteria for disciplinary action.

#### *Issue to be considered*

23.9 Members may wish to consider whether the Judiciary should develop relevant codes of conduct for judges and judicial officers in Hong Kong so as to enhance judicial accountability.

### A Formal or Informal Complaints Handling System

23.10 Whereas most of the places studied have a formal complaints handling mechanism against judges, there is no such system in Hong Kong. The Judiciary in Hong Kong, as in the UK, largely relies upon peer pressure as the principal means of dealing with judicial misconduct.

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<sup>84</sup> For the UK, see, for example, K. D. Ewing, "A Theory of Democratic Adjudication: Towards a Representative, Accountable and Independent Judiciary," *Alberta Law Review*, November 2000. For the US, see, for example, Randy J. Holland & Cynthia Gray, "Judicial Discipline: Independence with Accountability," *Widener Law Symposium*, Winter 2000 and Penny J. White, "Judicial Independence: Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations," *Fordham University Law Journal*, February 2002.

<sup>85</sup> Only refer to the federal level.

<sup>86</sup> Only refer to the federal level.

<sup>87</sup> In the UK, there is a "Guidance on Outside Activities & Interests" for judges, which is available at <http://www.lcd.gov.uk/judicial/geninf/joutactfr.htm>.

23.11 Although judicial misconduct in Hong Kong can be dealt with through the tribunal and commission inquiry systems<sup>88</sup> provided by the *Basic Law* and local legislation, these disciplinary mechanisms are unlikely to be used for less serious misconduct.<sup>89</sup>

23.12 In Hong Kong, there are no direct sanctions for District Judges and above other than proceedings for removal.<sup>90</sup> However, there are some conducts that may be inconsistent with the expected behaviour of judges and yet not necessarily warrant removal.

23.13 In Canada, the US and New York, in order to assure public accountability, their traditional ways of disciplining judges through impeachment and parliamentary address are supplemented by a formal complaints system for resolving complaints of judicial misconduct.

23.14 In the UK, the Judicial Correspondence Unit (which was set up with specific responsibility for handling complaints) has been expanded in recent years to meet the growing demand for an increasingly rigorous style of investigation.

23.15 As at 30 September 2001, there were 157 judges and judicial officers in Hong Kong. Comparing to the size of judiciary in the places studied, Hong Kong has a relatively small judiciary.

#### *Issues to be considered*

23.16 In view of the overseas practices, Members may wish to consider whether a formal complaint system against judges should be established in Hong Kong. Members may also wish to consider whether a new informal mechanism should be adopted, given that Hong Kong has a small Judiciary.

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<sup>88</sup> Both the tribunal and commission inquiry systems are subject to board executive power, see A. J. Harding, "The 1988 Constitutional Crisis in Malaysia," *International and Comparative Law Quarterly*, Vol. 39, 1988, pp. 57-81. In this case, the executive was able to invoke a tribunal procedure which had been established specifically to avoid political interference with the judiciary.

<sup>89</sup> According to the information provided by the Director of Administration, they are not aware of any tribunals that were set up under Article XVIA(6) of the *Letters Patent* before 1997 and any tribunals that have been set up under the *Judicial Officers (Tenure of Office) Ordinance*. In addition, they are not aware of any commissions that have been set up under the *Commissions of Inquiry Ordinance* to inquire into misconduct or misbehaviour of judges. Besides, they are not aware of any judges or judicial officials who have been removed from office because of inability or misbehaviour. However, in 1847, Governor Sir John Davis suspended Chief Justice Hulme for alleged drunkenness, though an inquiry before the Executive Council had substantially exonerated him. See J. W. Norton-Kyshe, *The History of the Laws and Courts of Hong Kong from the Earliest Period to 1898*, Vol. I, 1898 (reissue, Hong Kong: Vetch and Lee Ltd., 1971), pp.154-166. In September 1996, Governor Christopher Patten decided to accept a recommendation by the acting Chief Justice that a judicial tribunal should be appointed under Article XVIA(6) of the *Letters Patent* to inquire whether District Judge Caird should be removed from office for misbehaviour, in that he made false allegations that two other judges had attempted to influence him in his handling of the trial of Aaron Natrass. The inquiry was dropped in December 1996, with Judge Caird retired on medical grounds.

<sup>90</sup> The *Judicial Officers (Tenure of Office) Ordinance* only applies to judicial officers below District Court judges.



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### Impact on Judicial Independence

23.17 Accountability and independence are not mutually exclusive<sup>91</sup>, but it is important not to compromise judicial independence.<sup>92</sup>

23.18 The *Basic Law* provides a number of safeguards for judicial independence, which include separation of powers, security of tenure, freedom from interference, and immunity from legal action.<sup>93</sup>

23.19 The issue is whether a judicial discipline system could be devised that maintains a proper balance between accountability and independence. Professor Friedland has remarked that: "*A well-thought-out, balanced system should enhance accountability and at the same time, increase the public's confidence in the judiciary and therefore encourage respect for judicial independence.*"<sup>94</sup>

23.20 Drawing from the experiences in Canada, the US and New York, a formal complaints system against judges poses little threat to judicial independence. In essence, their systems operate within a framework of judicial self-discipline. In Canada and the US, members of relevant complaints handling institutions are exclusively judges. In New York, judges constitute a majority of the Commission's membership as well.

23.21 Additionally, while complaints handling institutions in these three places are authorized to investigate complaints of judicial misconduct, their disciplinary powers are narrowly circumscribed. The complaints handling procedures are prescribed by specific legislation and detailed rules. Important aspects of judicial independence have also been incorporated into their systems. In particular, their complaints handling institutions do not handle complaints which are related to the merits of judicial decisions or procedural rulings.

### *Issue to be considered*

23.22 Members may wish to take reference from the cases of Canada, the US and New York in the event of devising a new formal complaints handling mechanism against judges in Hong Kong.

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<sup>91</sup> See Randy J. Holland & Cynthia Gray, "Judicial Discipline: Independence with Accountability," *Widener Law Symposium*, Winter 2000.

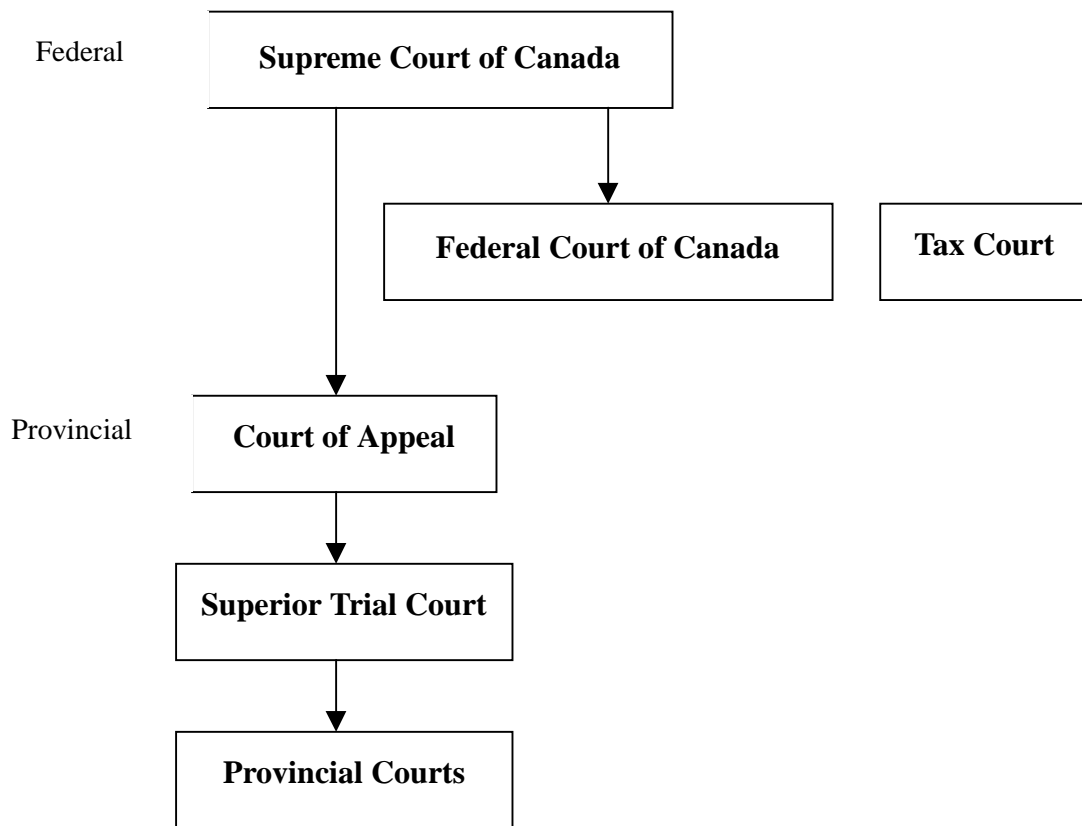
<sup>92</sup> For Hong Kong, see Steve Tsang ed., *Judicial Independence and the Rule of Law in Hong Kong*, HK: Hong Kong University Press, 2001.

<sup>93</sup> Those provisions include: Hong Kong shall be vested with independent judicial power, including that of final adjudication (Article 19); courts in Hong Kong shall have jurisdiction over all cases in Hong Kong (Article 19); and courts shall exercise judicial power independently, free from any interference (Article 85). The appointment of judges in Hong Kong must be made on the recommendation of an independent commission (Article 88) and judges may be removed only on the recommendation of a special tribunal composed of local judges (Article 89); the previous system of appointment and removal shall be maintained for members of the judiciary other than judges (Article 91). Judges and other members of the judiciary shall be chosen on the basis of their judicial and professional qualities (Article 92) and their conditions of service are given a certain protection (Article 93).

<sup>94</sup> Martin L. Friedland, *A Place Apart: Judicial Independence and Accountability in Canada*, *Canadian Judicial Council*, 1995, p. 264.

**Appendix I**

**The Court Structure in Canada**





# The Conduct of Judges

and the role of the  
**Canadian  
Judicial Council**



Every year Canada's federally appointed judges make hundreds of thousands of decisions on matters that range from procedural questions to the most basic interests of those appearing before them.

Judges can make mistakes. When one side or the other in a legal dispute thinks that the judge has come to the *wrong decision*, our system of justice allows that person to appeal the decision to a higher court. Appeal courts can reverse or vary decisions of other judges. The fact that an appeal court has overturned a judge's decision does not mean that the judge's conduct was improper.

Whether judges are correct or incorrect in their decisions, a high standard of personal conduct is expected of them. When someone believes that a judge's *behaviour is of serious concern*, or that a judge is not fit to be on the bench, here too our system of justice provides for a remedy.

In this case a complaint may be made to the Canadian Judicial Council.

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## An important difference

The distinction between *decisions* and *conduct* is fundamental.

<b>Issue</b>	<b>Remedy</b>
A judge's <b><i>decision</i></b> is questioned	Review of the <b><i>decision</i></b> by a higher court – appeal
A judge's <b><i>conduct</i></b> is questioned	Review of the <b><i>conduct</i></b> by the Canadian Judicial Council – complaint

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## The complaints process

It is open to you to make a written complaint if you believe that a judge's conduct is improper, on or off the bench, including conduct toward anyone involved in a case before that judge.

There are no required forms. You need not be represented by a lawyer. There are no prescribed deadlines. There is no cost to you.

The Council examines every complaint seriously, conscientiously, and as promptly as possible.

The process is open and accessible to everyone, whatever their knowledge of the legal system, skill, status, position or financial resources. The Council takes care to be fair to everyone involved. Given that judges sometimes have to make unpopular decisions, the Council tries to establish whether complaints about judges are well-founded.

Council by-laws provide for a complaint to be reviewed first by the Chairperson or a Vice-Chairperson of the Judicial Conduct Committee. He or she may forward a copy of the complaint to the judge in question and to the judge's chief justice, requesting their comments. The matter may also be referred to a Panel of Council members for consideration. Further inquiries may be made by an independent lawyer.



If the complaint is considered sufficiently serious, a Panel may recommend that the Council formally investigate it. Ultimately, the Council may recommend to the Minister of Justice that a judge be removed from the bench by Parliament. By law, a judge can be removed "by reason of:

- (a) age or infirmity,
- (b) having been guilty of misconduct,
- (c) having failed in the due execution of that office, or
- (d) having been placed by his conduct or otherwise, in a position incompatible with the due execution of that office." (*Judges Act*, s. 65)

## *Judicial independence: Fundamental to justice under law*

*Canadians expect the judges in their courts to act impartially: that is, to make decisions on the basis of law and the facts before them, free of outside threats or pressures of any kind.*

*We have confidence that judges will act without bias because we are assured of their independence.*

*Guarantees of judicial independence are imbedded in Canada's own Constitution Act of 1867, in language borrowed from legislation adopted three centuries ago by the Parliament of the United Kingdom: That judges shall hold office during good behaviour, and be removable only by the Governor General on Address of the Senate and House of Commons.*

*Canada's Parliament has also set in place a process to assess alleged breaches of good behaviour by federally appointed judges. Under the Judges Act that role has been played since 1971 by the Canadian Judicial Council.*

The Council's only power is to recommend to Parliament that a judge be removed from office. Parliament has never had to face such a situation, although sometimes judges retire or resign before the matter gets that far. Where appropriate, the Council may express disapproval of a judge's conduct where the matter is not serious enough to recommend that the judge be removed.

The Canadian Judicial Council receives many complaints each year that it cannot deal with. Note that the Council **cannot**:

- overturn or change the decision of a judge, grant appeals or address demands for new trials;
- compensate individuals;
- look into general complaints about the courts or the judiciary as a whole;
- investigate complaints about unnamed judges; or
- investigate complaints about court employees or lawyers.

## How to proceed

You may make a complaint in writing to:

The Canadian Judicial Council  
Place de Ville B  
112 Kent Street  
Suite 450  
Ottawa, Ontario K1A 0W8

Your letter should include:

1. Your name and address;
2. The judge, court, date and circumstances of the conduct you wish to complain about;
3. A description of the alleged misconduct, with as much detail as possible.

The Canadian Judicial Council can only review complaints about judges from the following courts:

### Canada:

Supreme Court of Canada  
Federal Court of Appeal  
Federal Court of Canada,  
Trial Division  
Court Martial Appeal Court  
of Canada  
Tax Court of Canada



**Newfoundland:**

Supreme Court, Court of Appeal  
Supreme Court, Trial Division

**Prince Edward Island:**

Supreme Court, Appeal Division  
Supreme Court, Trial Division

**Nova Scotia:**

Court of Appeal  
Supreme Court

**New Brunswick:**

Court of Appeal  
Court of Queen's Bench

**Quebec:**

Court of Appeal  
Superior Court

**Ontario:**

Court of Appeal  
Superior Court of Justice

**Manitoba:**

Court of Appeal  
Court of Queen's Bench

**Saskatchewan:**

Court of Appeal  
Court of Queen's Bench

**Alberta:**

Court of Appeal  
Court of Queen's Bench

**British Columbia:**

Court of Appeal  
Supreme Court

**Yukon:**

Supreme Court

**Northwest Territories:**

Supreme Court

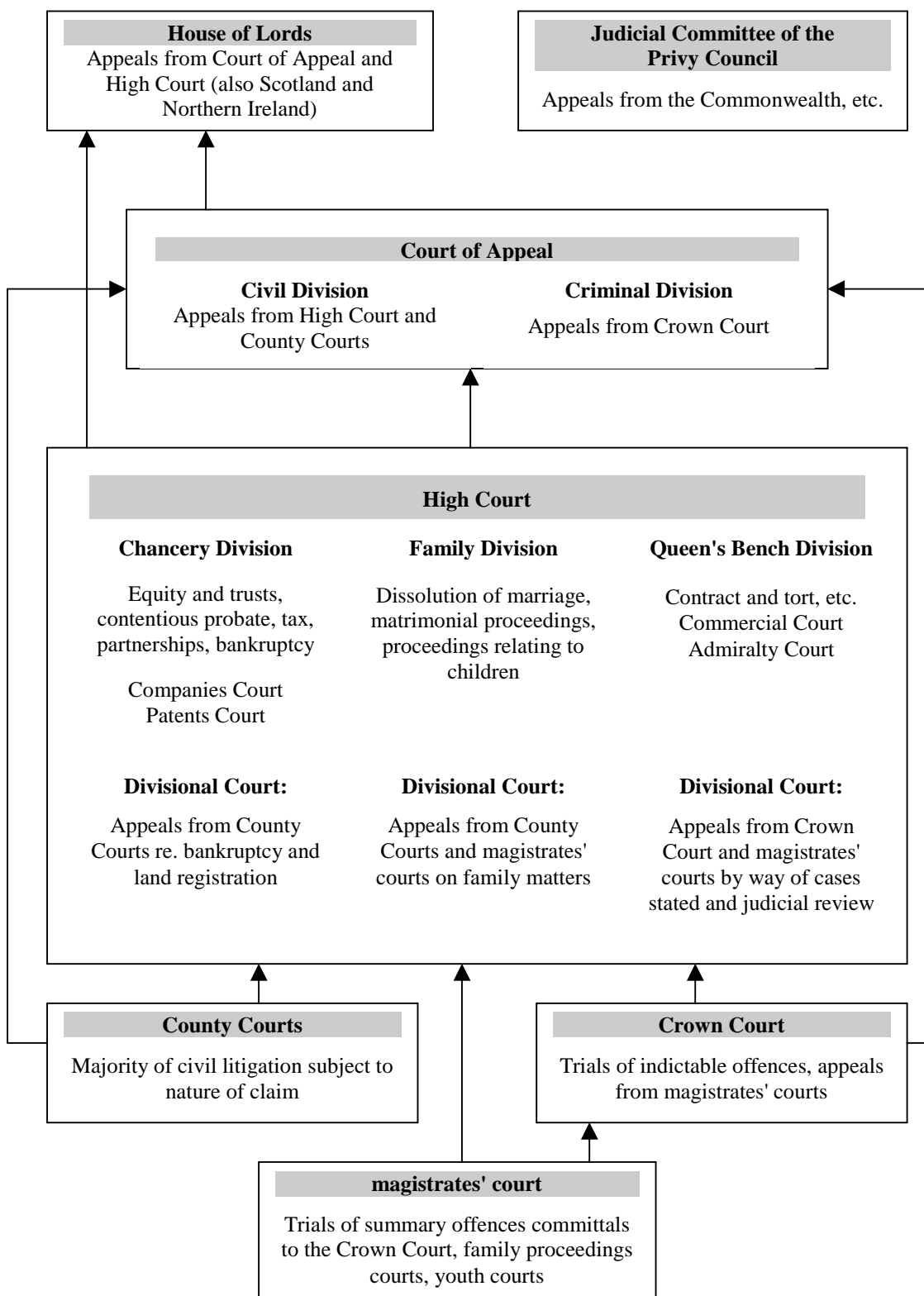
**Nunavut:**

Court of Justice

A complaint about a provincial or territorial court judge should be directed to the judicial council in your province or territory.

**Appendix III**

**An Outline of the Court Structure in England and Wales**



Source: The Lord Chancellor's Department, *Judicial Statistics Annual Report 2000*, p. 3.

**The Court Service**  
**Ex343**

*I want to  
complain*

*What do I do?*

**Court Service Customer Service Unit**

Southside  
105 Victoria Street  
London  
SW1E 6QT

Telephone: 020 7210 2266  
Fax: 020 7210 2176  
Minicom: 020 7210 2231  
Disability Helpline: 0800 358 3506  
(freephone)



*Service First*



**Introduction**

This leaflet explains what to do if you feel unhappy with the service you have received from the administrative staff or with any procedural aspect of your case. Each complaint we receive gives us the opportunity to put things right.

However, you **cannot** use the procedures set out in this leaflet if you want to complain because you think:

- the decision in your case was unfair; or
- the judge's **personal** behaviour was unacceptable.

And you cannot use this procedure if your complaint is about your barrister, solicitor or another organisation involved in your case other than the Court Service.

If you do not agree with the decision a judge has made, the only option you may have is to appeal against that decision. Staff can give you more information and any forms you may need, but they cannot advise you on whether you should appeal or have the right to appeal. You will need to get advice from a solicitor, local law centre or Citizens Advice Bureau.

If you want to complain about the way the judge/ registrar behaved toward you (not the way they handled the case or that the decision went against you), you can write to The Lord Chancellor's Department.

The address is:

The Lord Chancellor's Department  
Departmental Correspondence Unit  
Selborne House  
54-60 Victoria Street  
London  
SW1E 6QW

Your letter should include:

- your name and address
- the name of the court/registry/office you attended
- your case/application number
- the name of the deceased (for Probate matters)
- the date of your hearing/appointment and, if possible, the name of the judge/registrars concerned
- your reason for making the complaint.

If you have a complaint about your barrister, you can get more information by writing to:

The General Council of the Bar  
2-3 Cursitor Street  
London  
EC4A 1NE  
Telephone: 020 7440 4000

If you have a complaint about your solicitor, you should first contact the solicitor's firm and let them know you are not happy. If you are still not satisfied you can write to the Office for the Supervision of Solicitors.

The address is:

Victoria Court  
8 Dormer Place  
Leamington Spa  
Warwickshire  
CV32 5AE

Telephone: 01926 822007

If you are dissatisfied with another organisation, for example the Crown Prosecution Service, the police, the Family Court Welfare Service or the Probation Service, you should contact these organisations direct. Staff may be able to give you their local addresses and telephone numbers.

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## **How do I make a complaint?**

Before you make a complaint you may want to see the relevant Courts' Charter leaflet. The leaflets are free from all courts/offices. They set out the level of service you should expect when you come to court/office. When you complain, the staff will try to sort out your problem there and then. All courts also have a Customer Service Officer and a Court Manager, who may be able to help. This is a general leaflet on the complaints procedure. However, if you require more information please contact the office involved in your case, in the first instance.

If you prefer to complain in writing you can write to the Court/Tribunal or Probate Manager. Each would be the local manager for their court or office. (You may want to use our complaints form for this and staff can give you a copy.) If you need to write to another court/office, any member of staff will be able to give you the address.

In your letter you should:

- provide your name and address;
- say what you are complaining about;
- give the name of your case/the deceased and the case/application number (if this is relevant to your complaint);
- give as much relevant detail about your complaint as possible, for example by including dates and events; and
- say what you would like us to do to put things right.

### **What will happen next?**

The local manager will confirm receipt of your letter and investigate your complaint.

After the investigation you will receive a full reply.

The reply will:

- set out your complaint so that you can be sure we have understood it;
- describe the events and circumstances surrounding it;
- say whether or not the court/office staff have made a mistake; and

- give a reason for this decision.

If the investigation finds that staff have made a mistake, the manager will apologise and explain what will be done to avoid a similar mistake happening again.

### **What if I am not satisfied with the local manager's reply?**

Most problems are solved by the local manager. But if you are not happy with their response to your complaint you can write to the Group Manager. You can obtain their address from the local court/office. You should explain that you have complained to the local manager and say why you are not satisfied with their reply. The Group Manager will then obtain copies of your complaint letter and the reply you received, and make further investigations.

If you are still not satisfied after receiving the Group Manager's reply you can write to the Court Service Customer Service Unit. Their address is given on the back of this leaflet. You should tell the Customer Service Unit that you have already complained to the local manager and the Group Manager and say why you are not satisfied with their replies. The Customer Service Unit will then make its own enquiries.

**NB** The Master of the Crown Office and the Head of the Civil Appeals Office are the respective Group Managers for those courts. The Registrar of Criminal Appeals is the Group Manager for the Court of Appeal (Criminal Division)

## **Can I claim compensation if I have lost money because of a mistake by the court?**

If you believe you have lost money or run up costs because of a mistake by administrative staff, please follow the procedure above including proof of any financial loss, such as travel expenses or solicitor's charges. You must also say how much you believe you have lost.

In these cases we will consider refunding your losses. But because we are dealing with taxpayers money, we must make sure that we only pay claims which can be fully justified.

The local manager will look at your claim and send it to the Group Manager with a report. You will be told when this happens. If you are not entitled to any money you will be told why.

If you are still not satisfied you can write to the Customer Service Unit.

The Group Manager deals with most financial claims. But larger claims will be sent to the Customer Service Unit. As these claims can be more complicated, the Unit may have to get legal advice, and the claim may take longer to process.

## **How quickly will I get a reply?**

If you write to the local manager a full reply will be sent within 10 working days.

If you write to the Group Manager or the Customer Service Unit, your letter will be acknowledged within 2 working days and a full reply sent within 15 working days. However, if legal advice is needed a full reply will be sent within 35 working days. If, for any reason, we cannot meet these targets, we will write to you to let you know why and tell you when a full reply will be sent.

## **Is there anyone else I can ask to investigate my complaint?**

We treat all complaints fairly. But if you are not satisfied with the way we handled your complaint you can ask the Parliamentary Commissioner for Administration (also called the Ombudsman) to investigate it. The Ombudsman cannot investigate complaints about a judge's decision or recommend compensation if you lost money because of that decision.

You **cannot** complain to the Ombudsman yourself, you must ask your Member of Parliament (or another MP) to do this for you.

Your local library or Citizens Advice Bureau can give you your MP's name.

You can get a leaflet which explains more about how the Ombudsman can help you by telephoning 0845 015 4033.

(2.01)

**Appendix V**

**The United States Federal Courts**

<b>SUPREME COURT</b>	<b>UNITED STATES SUPREME COURT</b>
<b>APPELLATE COURTS</b>	<b>US Courts of Appeals</b> 12 Regional Circuit Courts of Appeals US Court of Appeals for the Federal Circuit
<b>TRIAL COURTS</b>	<b>US DISTRICT COURTS</b> 94 Judicial Districts US Bankruptcy Courts <b>US Court of International Trade</b> <b>US Court of Federal Claims</b>
<b>FEDERAL COURTS AND OTHER ENTITIES OUTSIDE THE JUDICIAL BRANCH</b>	<b>Military Courts (Trial and Appellate)</b> <b>Court of Veterans Appeals</b> <b>US Tax Court</b> <b>Federal administrative agencies and boards</b>

**Appendix VI**

**COMPLAINT FORM  
JUDICIAL COUNCIL OF THE NINTH CIRCUIT  
COMPLAINT OF JUDICIAL MISCONDUCT AND DISABILITY**

*MAIL THIS FORM TO THE CLERK, UNITED STATES COURT OF APPEALS, P.O. BOX 193939, SAN FRANCISCO, CA 94119-3939. MARK THE ENVELOPE "JUDICIAL MISCONDUCT COMPLAINT" OR "JUDICIAL DISABILITY COMPLAINT." DO NOT PUT THE NAME OF THE JUDGE ON THE ENVELOPE.*

SEE RULE 2(e) FOR THE NUMBER OF COPIES REQUIRED FOR FILING.

**1. Complainant's name**

Address:

Daytime telephone:

**2. Name of judge complained about:**

Court:

**3. Does this complaint concern the behavior of the judge in a particular lawsuit or lawsuits?**

• Yes    • No

If "yes" give the following information about each lawsuit (use reverse side if there is more than one):

Court:

Docket Number:

Are (were) you a party or lawyer in the lawsuit?    • Party    • Lawyer    • Neither

If a party, give the name, address, and telephone number of your lawyer:

Docket numbers of any appeals to the Ninth Circuit:

**4. Have you filed any lawsuits against the judge?    • Yes    • No**

If yes, give the following information about each lawsuit (use the reverse side if there is more than one):

Court:

Present status of suit:

Name, address, and telephone number of your lawyer:



Court to which any appeal has been taken:

Docket number of the appeal:

Present status of appeal:

**5. Statement of Facts:** On separate sheets of paper, not larger than the paper this form is printed on, describe the facts and evidence that support your charges of misconduct or disability. See Rules 1(c) (proper grounds for a complaint; does not include merits of judges' decisions), 2(b) (content of the statement of facts) and 2(d) (attachment of supporting materials). Do not use more than 5 pages (5 sides). Most complaints do not require that much.

**6. You should either:**

- (1) Check the first box below and sign this form in the presence of a notary public; or
- (2) Check the second box and sign the form. You do not need a notary public if you check the second box.

- I swear (affirm) that:
- I declare under penalty of perjury that:

**I have read rules 1 and 2 of the Rules of the Judicial Council of the Ninth Circuit Governing Complaints of Judicial Misconduct or Disability, and the statements made in this complaint are true and correct to the best of my knowledge.**

\_\_\_\_\_  
(Signature)

Executed on \_\_\_\_\_  
(Date)

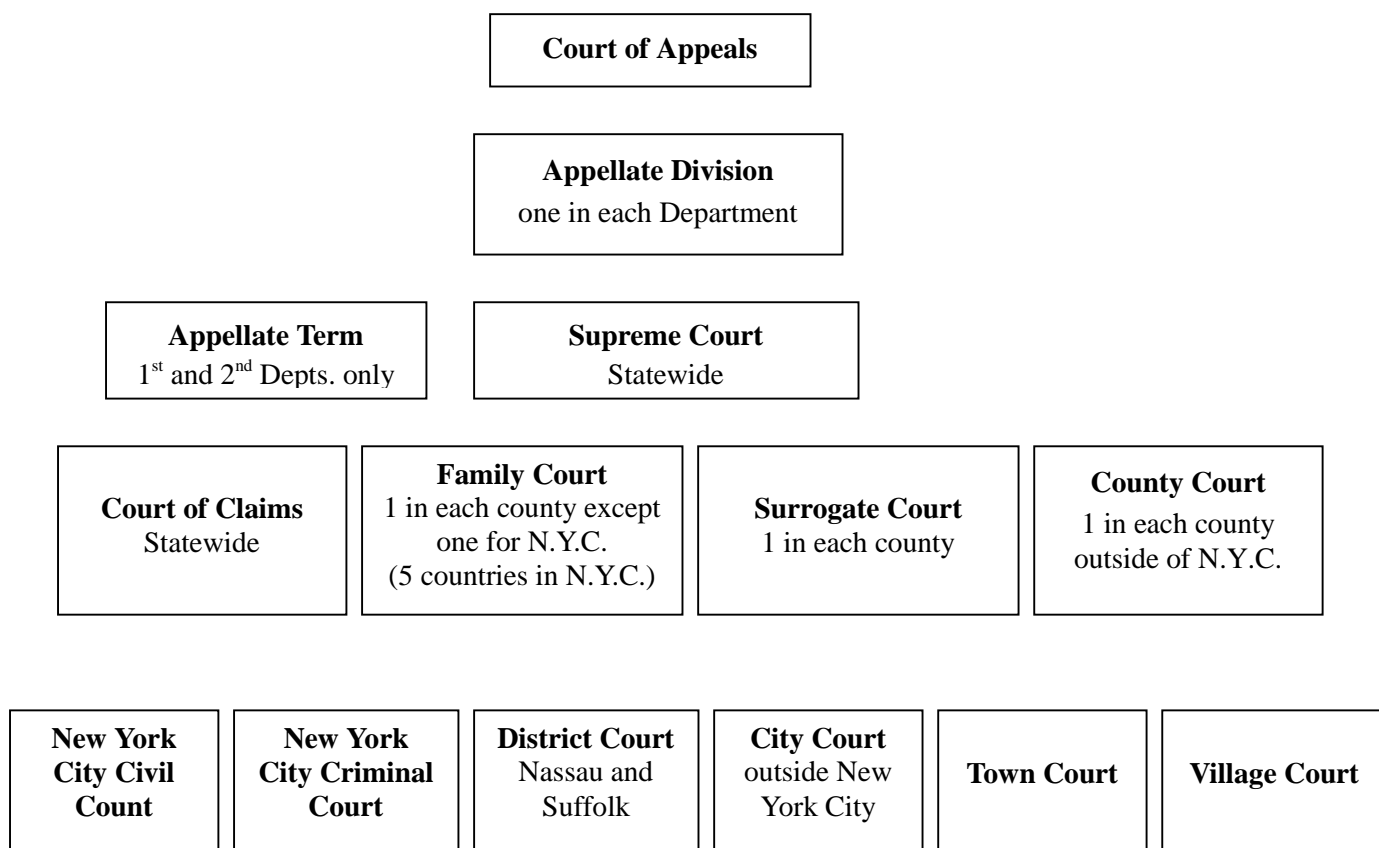
Sworn and subscribed to before me \_\_\_\_\_  
(Date)

\_\_\_\_\_  
(Signature of Notary Public)

My commission expires: \_\_\_\_\_

**Appendix VII**

**Outline of New York State Court System**



N.Y.C. — New York City

Geographically, the New York State court system is divided into four judicial departments, and each department is subdivided into judicial districts consisting of one or more counties.

Source: New York State Bar Association, "The Courts of New York," NY: New York State Bar Association, 2001.

## Appendix VIII

## New York State Court System Characteristics

Court	No. of authorized judges*	How selected	Term
Court of Appeals	7	Gubernatorial appointment with advice and consent of Senate.	14 years.
Appellate Division	24 permanent; no. of temporary justices varies.	Gubernatorial designation from among duly elected Supreme Court justices.	Presiding justice: 14 years, or balance of term as Supreme Court justice. Associate justice: 5 years, or balance of terms as Supreme Court justice.
Appellate Term	Varies.	Designation by Chief Administrator of Courts, with approval of presiding justice of the Department, from among duly elected Supreme Court justices.	Varies.
Supreme Court	288	Elected.	14 years.
Court of Claims	64	Gubernatorial appointment with advice and consent.	9 years or, if appointed to fill that term.
Surrogate's Court	62	Elected.	14 years in New York City. 10 years outside the City.
County Court	124**	Elected.	10 years.
Family Court	124	Mayoral-appointment in New York City.	10 years or, if appointed to fill a vacancy that term.
Civil Court of New York City	120	Elected.	10 years.
Criminal Court of New York City	107	Mayoral-appointment	10 years, or, if appointed to fill a vacancy, the period remaining in that term.
District Court	50	Elected.	6 years.
City Court	158	Most elected; some acting judges appointed by Mayor or Common Council.	Varies.
Town Court	Approx. 2 000	Elected.	4 years.
Village Court	Approx. 570	Elected.	Varies.

Mandatory retirement age of 70 for all judges except Town and Village Courts.

Remarks \* Numbers accurate as of 31 December 1994.

\*\* Includes one, two, and three-hatted judges (see County Courts).

Source: An extract from Thomas W. Church & Brian J. Nickerson, "New York's Courts," in Jeffrey M. Stonecash, *Governing New York State*, 4th ed., New York: State University of New York Press, 2001, pp. 165-186 at pp. 170-1.

## Appendix IX

LC Paper No. CB(2)1388/01-02(02)

### **Legislative Council** **Panel on Administration of Justice and Legal Services**

#### **Mechanism for Handling** **Complaints against Judges**

#### **Relevant matters**

The mechanism for handling complaints against judges (which should be read as including judicial officers) takes into account the following matters:

- (a) The principle of judicial independence is fundamental. The safeguards for judicial independence include the security of tenure for judges. Under Article 89 of the Basic Law, a judge may only be removed for inability to discharge his or her duties or for misbehaviour by the Chief Executive on the recommendation of a tribunal of at least three local judges appointed by the Chief Justice. (In the case of the Chief Justice, the tribunal of at least five local judges is appointed by the Chief Executive.)
- (b) Under the Judicial Officers (Tenure of Office) Ordinance, Cap.433, judicial officers (below District Court judges) may only be dismissed or disciplined (including reprimand) during their term by the Chief Executive on the recommendation of the Judicial Officers Recommendation Commission (JORC) which is made after considering the report of a tribunal appointed by the Chief Justice.
- (c) The principle of judicial independence also involves the independence of each judge at any level to adjudicate according to law without interference.
- (d) Judges have the duty of resolving disputes. One side is likely to be disappointed or dissatisfied by the judicial decision.

#### **Handling of complaints**

2. A complaint about a judge may be made to the Judiciary by any person directly or may be referred to the Judiciary by others (e.g. a member of LegCo or by the Administration).

3. To whoever in the Judiciary a complaint against a judge is sent, it is directed to the relevant Court Leaders. Complaints against (i) judges in the Court of Final Appeal are handled by the Chief Justice; (ii) those against High Court judges by the Chief Judge of the High Court; (iii) those against judges of the District Court, the Family Court and the Lands Tribunal by the Chief District Judge; and (iv) those against magistrates and judicial officers of the Labour Tribunal, Small Claims Tribunal, Coroner's Court and Obscene Articles Tribunal by the Chief Magistrate.

4. Complaints against judges are usually of two types: (i) Against the judge's judicial decision. Most complaints are of this type. (ii) Against the judge's conduct.

#### **Complaints against judicial decision**

5. If the complaint is a complaint against the judge's judicial decision, the Court Leader will explain to the complainant that the matter in question is within the judge's judicial decision and inform the complainant of the relevant appeal procedures.

#### **Complaints against judges' conduct**

6. As regards complaints against judges' conduct, after preliminary investigation by the Court Leader, if *prima facie*, it appears to be a sufficiently serious case, the matter will be referred to the Chief Justice for consideration. The Chief Justice will consider whether a tribunal should be appointed under Article 89 of the Basic Law or the Judicial Officers (Tenure of Office) Ordinance.

7. If, after preliminary inquiry, the case does not fall within paragraph 6 above, the Court Leader will deal with the matter, consulting the Chief Justice as appropriate. The Court Leader has access to court files and audio recordings of the relevant proceedings and can seek further information from the complainant and the judge's comments on the complaint. The Court Leader will send a reply to the complainant. In it, he can express a view whether he regards the judge's conduct as appropriate. However, he has no disciplinary power as such. Where the Court Leader has expressed an adverse view of the judge's conduct in his reply, he will inform the judge concerned of his view. The matter may be brought to the attention of the Chief Justice. And the Chief Justice or the Court Leader may discuss the matter with and counsel the judge concerned to seek to avoid recurrence of similar conduct. Further the matter will be brought to the attention of JORC at the appropriate time.

**Conclusion**

8. The present complaint mechanism is satisfactory. It respects judicial independence (including the independence of each judge to adjudicate without interference) and the constitutional and statutory guarantees for security of tenure to safeguard judicial independence. At the same time, it enables legitimate complaints against judges to be satisfactorily dealt with and responded to.

Judiciary Administration  
March 2002

## Appendix X

## Number of Complaints Against Judges and Judicial Officers from 1999 to 2001

Year	No. of Complaints		Total
	Judicial Decision	Judicial Conduct	
1999	85 (71%)	34 (29%)	119 (100%)
2000	105 (71%)	42 (29%)	147 (100%)
2001	91 (76%)	29 (24%)	120 (100%)

Note: (1) The total number of complaint cases will be less than the above figures for the following reasons:

- (a) One complaint case may cover complaints against both the judicial decision and the judicial conduct.
- (b) A complainant may first complain against a judge or judicial officer, and then complain against the decision of the court Leader regarding his or her complaint.
- (c) Some frivolous complainants may keep on lodging complaints even if his or her complaint has been dismissed by the Chief Justice.

(2) The total no. of cases disposed of by judges and judicial officers in 2001 is 751 533.

Source: Information provided by the Judiciary Administrator.

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