THE LAW SOCIETY OF HONG KONG
香 港 律 師 會

THE LAW SOCIETY'S WORKING PARTY

ON CIVIL JUSTICE FORM

Additional Report

in relation to

The Legislative Council's

Panel on Administration of Justice and Legal Services

on

"MECHANISM(S) FOR HANDLING COMPLAINTS

AGAINST JUDGES AND JUDICIARY STAFF"

The Law Society, as part of its continuing brief on "**Civil Justice Reform**", has been asked to consider the subject matter of "**Mechanism(s) for the Handling of Complaints against the Judiciary and Judiciary Staff**". This is contained in the following text, but subject to caveat as follows :-

(i) The Law Society considers that the word "*complaints*" has unfortunate connotations. The LSWP would prefer to address instances "*of poor or inappropriate Judicial Management*"; (Refer : Law Society "Report on Civil Justice Reform" Chapter 13 and Appendix 3 thereto).

(ii) The Law Society's Report has dealt with matters in relation to Civil Justice as opposed to Criminal Justice.

(iii) The Law Society in its deliberations deals only with the High Court and above, and not the lower Courts.

In preparing this Report, reference has been made to the following publications :

- *"Consultation Paper on Process of Appointment of Judges"*, December 2001;
- *"Mechanism for Handling Complaints against Judges in Overseas Places",* July, 2002 by the Legislative Council Secretariat ("**LCS**")
- *"Legislative Council Paper No.CB(2)1388/01-02 (02)*", March 2002;
- *"Legislative Council Paper No. CB(2) 159/02-03 (01)"*, October, 2002;
- *"Legislative Council Paper No. CB(2) 159/02-03 (02)"*;
- *"Legislative Council Paper No. CB(2) 159/02-03 (03).*

The Law Society in its Report on "Civil Justice Reform" ("**CJR**") Chapter 13, Paragraph 13 touched upon "complaints" in relation to the Judiciary and in Appendix 3 to that Report, Chapter 4 *et seq.*, made various comments under the Paragraphs entitled :

Judicial Ombudsman
Chief Justice
Fixed Term Contracts
Mechanism for Handling Complaints

With the benefit of the additional reference works cited above, and at the request of the Legislative Council, the Law Society has considered the matter further. One of the distinctions which the Law Society wishes to draw is between cases of poor or inappropriate Judicial Management in Civil matters as opposed to Criminal Proceedings. Civil Proceedings tend to have a less sensational aspect to them as opposed to Criminal matters, and civil litigants, for the most part, tend to be less "emotive" in relation to such matters.

In many instances in Civil matters heard before a Judge or Judicial Officer, the lay client will not be in attendance. It is thus frequently the case that it is only members of the Bar or solicitors which see at first hand those instances of poor or inappropriate Judicial Management. For members of the Bar and/or solicitors to protest about (or complain about) such matters could have significant professional ramifications for the barristers, firms of solicitors and individual solicitors when appearing before the same Judge or Judicial Officer at some time in the future. Consequently, the vast majority of instances of poor or inappropriate Judicial Management are not drawn to the attention of the authorities and/or reported for action, although well known in the professions. This is an important issue of which we would ask the Legislative Council not to lose sight. It was this "issue of professional prudence" which in part governed the recommendations made by the Law Society in its Report on CJR and prompted, in part, the suggestion of the appointment of a Judicial Ombudsman.

Upon giving the matter further consideration, the Law Society's view is that certain Hong Kong litigants, whether they be prominent Hong Kong based international corporate entities or otherwise, would also feel similarly constrained in lodging protests about poor or inappropriate Judicial Management. They would hazard, with some cause, that to make such a protest in relation to one matter might, conceivably cause them prejudice in another.

Those using the services of the Hong Kong Court System generally, and not just the High Court, wish to protect, at all costs, the sanctity of Judicial independence. The Law Society's representative at the Legislative Council meeting on 28th October, 2002 stressed this issue. We do so again.

The Law Society also need hardly opine to the Legislative Council in relation to the following, but do so to ensure that the matter is drawn to the attention of third parties which might read this Report. In the LCS Report, systems for "Handling Complaints against Judges" are dealt with in relation to Canada; the United Kingdom; the United States and the State of New York. All these jurisdictions enjoy mature constitutions and systems of Judicial process. Whilst Hong Kong enjoys the latter, the constitutional significance of the change of sovereignty of Hong Kong from a British Territory to that of a Special Administrative Region of The People's Republic of China, whose equivalent of a constitution is contained in the Basic Law, requires there to be some considerable distinction drawn between countries enjoying a mature and time-tested constitution, written or otherwise, as opposed to that are now enjoyed by Hong Kong.

Further, the Law Society, whilst making no observation at all in relation to the issue, bears in mind the recent controversy in the interpretation of the Basic Law by the People's Republic of China's National Congress. This has been construed in some quarters, wrongly or rightly, as a usurpation of Judicial independence in Hong Kong. The Law Society does not intend or wish that the sensitive issue of handling complaints against Judges becomes equally controversial. *The independence of the Judiciary must remain sacrosanct.* However, the competence of the Judiciary remains a component part of the bedrock of Hong Kong's Legal System and the Legal Services Industry. In this respect, the Law Society again refers to Chapter 13, Paragraphs 10 to 15 of its CJR Report, and the introduction to Appendix 3 thereof. The Law Society also notes that the Basic Law does, to same degree, constrain the Legislative Council in its consideration of the matter.

With reference to the LCS Report, (and ignoring the Basic Law), the Law Society comments as follows :-

Part 2 - Canada

The Law Society notes that the Judicial Council established in Canada under the Judges Act, 1971 is entirely composed of Judges, 39 in total. From this fact alone, the Law Society is not entirely convinced that the model could be appropriate for Hong Kong, where, in such matters as the Disciplinary Procedures in relation to solicitors, lay members have a very important role to play.

Moreover, in Canada, the largest source of complaints involved Family Law matters, invariably an emotive subject in all jurisdictions. That said, we note that complaints also extended to delays in :

Rendering Judgments, (an issue very salient to Hong Kong).

Undue impatience, (an unfortunate manifestation also to be found in Hong Kong).

Unprofessional conduct, (also to be encountered in Hong Kong).

Part 3 – The United Kingdom

The complaints handling procedures, similar to those in Hong Kong, are more informal in nature, with no statutory framework for the handling of complaints against Judges. A Judicial Correspondence Unit has been established as recently as 1998 by the Lord Chancellor. The Lord Chancellor has also considered complaints about the "personal conduct" of Judicial Officers, but not Judicial decisions.

"Personal conduct" in this context reflects a Judge's behaviour to litigants and their manner in dealing with a case. The Law Society agrees that certain matters may be "cured" or "remedied" on appeal, but this ignores the inordinate expense to which the litigants are exposed in having to appeal such matters. (In the U.K. Judicial delay is, curiously, not regarded as a matter of conduct, save for excessive delay in such matters as delivery of a Judgment).

Complaints can be channelled through Members of Parliament, and perhaps the Legislative Council should consider constituting a similar conduit for the public in Hong Kong.

Part 4 – the United States

With various levels of Judicial Officers, both national and federal, the procedures available in the United States would appear unnecessarily complicated or cumbersome for consideration by or adoption in Hong Kong. Having so stated, there is the possibility of anonymity of complaints which, bearing in mind the "small town" mentality of Hong Kong, might be an appropriate factor for consideration. The possibility of Judges under investigation being entitled to a hearing, and in fact "a trial about a trial" is broadly inappropriate.

The Law Society stresses in its CJR Report that "conciliation" be used to resolve problems. The complaints handling process in the United States is much more adversial *ab initio*. That said, for such matters as bribery / corruption, conciliation is entirely inappropriate; dismissal and presumably criminal sanction is the panacea to such issues.

We also note the Judicial Conduct and Disability Act has been criticised as not being transparent. The Law Society, however, considers that any process in relation to handling complaints about the Judiciary should be discreet. There is a sensitive dividing line between transparency and discretion, but one which the Legislative Council are implored to consider.

Part 5 – the State of New York

New York has a Commission on Judicial Conduct composed of four appointees by the Governor, three by the Chief Judge and one by each of the four leaders of the Legislature, of which four members are Judges, at least one is an Attorney and at least two are lay persons. The Law Society considered that the composition of the Commission is one of which the Legislative Council should take note.

Part 6 – Comparison of the various attributes of the Mechanism for Handling Complaints against Judges

There are 6 tables providing comparisons between the above four jurisdictions and that of Hong Kong.

We refer to the respective tables, as follows.

Table 8 : This sets out the constitutional positions.

Table 9 : Establishing the regulatory framework of Handling Complaints and Procedures, the Judicial Administration has responsibility for receiving complaints. Should there be an independent Judicial Ombudsman ?

Table 10 : Reference is made herein to a "Court Leader". We can find no statutory definition of this position or title. We are somewhat bemused that a complaint about a Judge may be made to the Judiciary – is that by way of letter or proceedings ?

Table 11 : Again, reference is made to a "Court Leader".

Table 12 : No comment.

Table 13 : We note that there is no appeal mechanism for either a complainant or a Judge.

<u>Part 7 – Reference for Hong Kong</u>

The Law Society commends to the Legislative Council that a system be established whereby the public can apprise itself of the existence of procedures for handling complaints about Judicial "misconduct". Such procedures can be publicised either on a website, through the Annual Report of the Judiciary and/or through media advertising.

The Law Society considers that there is a pressing requirement for a Guide or Code of Conduct relating to Judicial Practices, Discipline and Ethics.

The Law Society does not consider that "peer pressure" is a sufficient deterrent to forestall Judicial misconduct or, as the Law Society would prefer to have it, "poor or inappropriate Judicial Management", and, in particular, such matters as are cited in Chapter 13, Paragraph 13, of the Law Society's CJR Report. However, part of the root cause of such matters is the fact that

there is a dearth of Judicial resources to cope with the increased use of the Courts. Many of the problems derive from this fact alone : there are not enough Judges; the Judges are overworked. If the latter problems were addressed, quite possibly the controversial debate in relation to Handling Complaints against Judges might, for the most part, fall away.

Should the Judiciary be subject to self-discipline ? For the most part, all Judges exercise self-discipline and restraint and it is only the failure to do so, in certain very limited instances, which constitutes the problem to be addressed.

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

The Law Society concurs that the principle of Judicial Independence remains absolutely pivotal. However, the Law Society considers that its proposal for the appointment of a Judicial Ombudsman has much to commend it. A Judicial Ombudsman could work with the JORC and/or any Tribunal appointed by the Chief Justice or Chief Executive investigating Judicial Complaints. The Judicial Ombudsman could receive and consider complaints, or have an involvement whether the complaint is raised through the Legislative Council, or through the Administration, and endeavour to mediate or conciliate the "complaint".

For practitioners, where there are adverse observations about a Judge, these tend to relate to Judge's decisions and the (mis)conduct of the Judge, which may have led to an inappropriate Judicial decision. Lay clients, for reasons explained above, may not have been privy to the conduct of the Judge in Civil matters.

Whilst, broadly, we concur with the conclusions of **Paragraph 8** deriving as they do from **Paragraphs 6 and 7**, this presupposes that Hong Kong does not enjoy a "small town mentality" when that is, within the legal community at least, patently the case. It is realistic to expect a potential complainant, if they are a professional person, *not* to be exposing themselves to prejudice by making any complaint when, inevitably, at a later stage they will appear before the same Judicial Officer. Anonymity of complaints might assist, but patently any Judicial Officer, the subject of a complaint, will quickly conclude from whence - (be this from the client, solicitor

or barrister) - the complaint has derived. The Law Society has no panacea to this potential problem, but it is a matter for consideration by the Legislative Council.

Legislative Council Paper No. CB(2)159/02-03(01)

We note the opposition by the Judiciary to the suggestion by the LCS that Commission of Inquiry be appointed by the Chief Executive in Council under the Commission of Inquiry Ordinance. For reasons explained below, albeit different, the Law Society agrees. The Judiciary considers that there is, already, in place a formal system for such complaints, although not well publicised. This criticism it promises to address, together with statistics on complaints of Judges, in its Annual Report. Perhaps the word "statistics" should be extended to include the results of any such complaints for the sake of certainty.

In that a Guide or Code of Judiciary Conduct is mooted, the Judiciary considers that this should be a voluntary document and not one imposed upon the Judiciary. Its introduction is pressing, and breach of any provision of such a Guide or Code should constitute a ground for complaint. Moreover, it is unfeasible to have some members of the Judiciary which subscribe to the Guide / Code and others whom do not.

Legislative Council No. CB(2)(159/02-03)(02)

We refer to the paragraph enumeration of this text as follows :

Paragraph 5

The Law Society does not entirely endorse The Hon. Ms. Eu's comments that the majority of complaints against the Judiciary would not be directed to the Judges, but to the Court Administration staff. Complaints against Court Administration Staff are made to the Judiciary Administrator. For the Law Society, the majority of complaints are likely to concern Judicial conduct, but not exclusively. Certain "maverick" Judges who do not impress are well known to

those in the legal professions (and we anticipate other Judges). They do not serve the interests of either the Legal Community or the public.

Paragraph 7

The Judiciary Administrator's comments require a response. Appeals, as a component part of litigation generally, are expensive. If a decision at First Instance is patently wrong, sometimes it may not be possible on health, emotional, economic or other grounds, for the party wronged, (as wronged they are), to appeal. This ignores the damage caused to Hong Kong's international reputation as a legal centre by unnecessary appeals and unnecessary utilisation of valuable Court time.

Equally, it is not appropriate to introduce a system whereby "appeals" can be made by way of complaint to Tribunals, etc. Perhaps an appropriate factor for consideration would be for a re-trial to be recommended / ordered. It begs the question as to who will be responsible for the wasted costs incurred in the first trial – should this be from the Judiciary's budget?

Paragraph 8

We consider that it is likely that there may be a considerable increase in complaints in relation to the conduct of Judges were it not for the fact that by making complaint, legal practitioners could prejudice themselves for a future occasion. We do not consider that the relatively few complaints received against Judicial Decisions and/or Judicial Conduct reflects the reality of the situation and the number of complaints that would otherwise be made.

Paragraph 9

The Law Society is aware of two complaints made against staff of the Court to the Judiciary Administrator's Office, which in both cases were not actioned as the circumstances might reasonably have demanded. There is, consequently, a view that to make such complaints is a waste of time and might prejudice, especially, legal practitioners at a later date.

Legislative Council Paper No. CB(2)159/02/03 (03)

No comment.

The Legislative Council's letter to the Law Society dated 4th November, 2002

The Legislative Council summarises the position of the Law Society that it is appropriate to establish a system to address instances of poor or inappropriate Judicial performance. However, with respect, the Law Society went further than that. One of the innovations which the Law Society mooted for consideration was the appointment of a Judicial Ombudsman. We refer to Appendix 3, (sub-heading) Chapter 4 of the Law Society's CJR Report in this context.

Article 85, Basic Law states *inter alia* that : "*Members of the judiciary shall be immune from legal action in the performance of their judicial functions*". This raises two questions :

(i) Would the making of a complaint about a member of the Judiciary or a Judicial Officer offend Article 85 ?

(ii) Would the creation of the position of Judicial Ombudsman offend Article 85 ?

The Law Society's answers to both questions are "no". The Judicial Ombudsman could investigate such matters, and, if he so determined, report the matter for further action to one of the Tribunals envisaged in Article 89, Basic Law.

Article 89 addresses the *removal* of members at the Judiciary. Making a complaint about a Judge, whether this falls within the Law Society's description of poor or inappropriate Judicial Management or otherwise, need not necessarily anticipate or involve "removal". As stated, the Law Society has in mind a conciliatory / mediatory role of the Judicial Ombudsman to ensure that such instances of poor or inappropriate Judicial Management as are reported are not repeated. If there were further reports of such matters concerning a particular Judge, presumably the Judicial Ombudsman would report his findings on such matters to either the Chief Executive ("**CE**") or

the Chief Justice of the Court of Final Appeal ("**CJ**") as is envisaged in Article 89. Repeated "offences" would presumably justify the convening of a Tribunal as envisaged in Article 89 in any event.

If you refer to sub-paragraph (a) of the Legislative Council's letter to the Law Society of 4th November, 2002, it is stated that the Judiciary comment that *investigation* into the conduct of Judges can only be dealt with in accordance with Article 89, Basic Law. This is not actually the case. Concerning "Judges" generally, no reference to "investigations" is made at all in Article 89. "Investigations" only relate to the CJ. In that this invitation for comment must derive from the Judiciary Administration's letter of October, 2002 (Legislative Council Paper No. CB(2) 159/02-03 (01)), they are both incorrect.

The opening paragraph to Article 89 states as follows :

> *"A judge of a Court of the Hong Kong Special Administrative Region 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 appointed by the Chief Justice of the Court of the Final Appeal and consisting of not fewer than three local Judges ...."*

There is no mention of "investigations" in this paragraph at all. It is only in the second paragraph of Article 89 that "an investigation" is contemplated, and this is solely in relation to the CJ, as follows :

> *"The Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region may be* ***investigated*** [our emphasis] *only for inability to discharge his or her duties, or for misbehaviour by a tribunal appointed by the Chief Executive and consisting of not fewer than five local Judges and may be removed by the Chief Executive on the recommendation of the tribunal and in accordance with the procedures prescribed in this Law."*

This means that it is only the CJ who can be "investigated", and only then for an inability to discharge his / her duties or for misbehaviour, and the investigation is conducted by a Tribunal appointed by the CE consisting of at least five local Judges and, if the Tribunal makes (we presume) a recommendation for the removal of the CJ, he can be removed by the CE in accordance with the procedures laid down in the Basic Law.

Consequently, we regret that the Law Society considers the summations of the Judicial Administrator (for the Judiciary) and the Legislative Council to be incorrect as to investigating members of the Judiciary (save for the CJ) although apropos "removal" we agree with their construction of Article 89.

Moreover, to convene a Commission of Inquiry under Ordinance, Cap.86, may be appropriate in some exceptional cases, but surely the position of a Judicial Ombudsman has much to commend it as a workable and, we trust, more economic and expedient alternative ? Commissions of Inquiry tend to be and are inherently adversarial in nature, with the various protagonists represented by lawyers. This is more akin to the complaints handling process established in the United States, about which we make adverse observation above. A review of the Commissions of Inquiry Ordinance will show that these are, by another name, tantamount to trials. This is not within the contemplation of the Law Society at all.

Conclusion

As an interim step, it should be incumbent upon the Judiciary, through those responsible for the Administration of Judicial Services, to publicise exactly how "complaints" can be made in relation to the professional and/or personal conduct Judges and Judicial Officers, and under what terms of reference. The introduction of a Guide or Code of Judicial Conduct is a sensible innovation and one which the Law Society suggests might be best prepared by in consultation with regular Court users, that is representatives from the Bar and the Law Society. The proposal can be extended to processes of complaint in relation to the Court Administration Services, to include a Judge's Clerk. Further, the Guide or Code must be complied with, without exception. In the event that there is a breach of any provision of such Guide or Code, then complaint can be made to the relevant authority.

The Law Society, having considered the above reference works and having further considered the matter, again commend for consideration by the Legislative Council the creation of the post of a "Judicial Ombudsman". He / she could be the recipient of such "complaints" and, subject to the Ordinance creating the post, be in a position to investigate both Judges and Judicial Officers (save for the CJ who would be excluded by virtue of Article 89, Basic Law in any event), with his primary role being one of conciliation / mediation of any problem about which complaint is made.

In this capacity, the Judicial Ombudsman could, presumably, vet those complaints which might be expected to be received from a party aggrieved by Judicial process through to more substantive complaints about the personal conduct or behaviour of a Judge / Judicial Officer by the litigants, their legal advisers and/or Counsel. In this latter context, we anticipate substantive professional matters, such as the handing-down Judgments / Orders not supported by the facts or wrong in law. It is not intended by the Law Society that this becomes an "alternative appeals procedure"; the appeal process must continue. However, fundamentally flawed or wrong decisions when they occur or, decisions made by Judges which are contradicted by the law do need the sanction of a sophisticated complaints procedure, in which the Judicial Ombudsman could serve a useful role. The Judicial Ombudsman's findings in respect of matters could, ultimately, be referred to the Tribunal(s) envisaged in the first paragraph of Article 89.

The Law Society's suggested panacea of the appointment of a Judicial Ombudsman has not, it appears, been considered by the authorities, and we respectfully remind the Legislative Council of the existence of that proposal. As to where the Judicial Ombudsman would fit in the Civil Service hierarchy is moot, for the reasons explained in Appendix 3 to the Law Society's Report on CJR. However, the Law Society approached and again approaches the matter as one of "conciliation" rather than punishment, although for grievous offences, such as bribery / corruption, other considerations and institutions would no doubt come into play. For example, the Independent Commission Against Corruption.

This is an extremely sensitive issue. The Law Society's proposals bear in mind the attendant problems, including limited Government resources being available for the Judiciary. Again, the Law Society's Report on the CJR addresses the provision of legal services generally in relation to Civil Justice. That said, many of the issues raised for consideration in that Report would also apply to Criminal cases. We again urge that a Review of Civil Justice Reform be not focused merely upon the Rules and Procedures applied in Court, but as a component part of a general reappraisal of the Legal Services Industry. In this context, the overwhelming majority of members of the Judiciary in Hong Kong in the performance of their often thankless and solitary duties for the community at all times remain above criticism and are held in the greatest of awe and respect for their role as determiners of legal issues, and whose conduct in (and out of) Court

remains, at all times, exemplary. There are rather fewer Judicial Officers who do not command the same sentiments. To sustain the pre-eminence of Hong Kong as a legal services centre for East Asia, and beyond, a system to provide for investigation of instances of poor or inappropriate Judicial Management is necessary, and one which must be rigorously applied.

We trust that the foregoing paper is of assistance to the Legislative Council in its further deliberations on this most sensitive of issues. We repeat, however, that *the sanctity of the independence of the Judiciary must remain the paramount consideration for the Legislative Council on behalf of the community and the wider international constituency which elects to use the Courts of Hong Kong to determine legal disputes.*

Working Party on Reform of
the Civil Process in Hong Kong
The Law Society of Hong Kong
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