

立法會

Legislative Council

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Panel on Education

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 12 July 2010**

Grievance and complaint mechanisms of the University Grants Committee-funded institutions

Purpose

This paper summarizes the major concerns expressed by the Panel on Education ("the Panel") on the grievance and complaint mechanisms of the University Grants Committee ("UGC")-funded institutions.

Background

2. In May 2001, the then Secretary for Education and Manpower commissioned the UGC to launch a comprehensive review of higher education in Hong Kong. The review covered all aspects of higher education provision, including the governance of the UGC-funded universities. In March 2002, the UGC published the review report entitled "*Higher Education in Hong Kong*" ("the Report"). After consultation with the Panel and the stakeholders on the Report, the UGC submitted its final recommendations to the Secretary for Education and Manpower in September 2002. The Government accepted most of the UGC's final recommendations, and announced in November 2002 the blueprint for the further development of higher education in Hong Kong. Under the blueprint, the UGC-funded universities were required to review their governance and management structures including the grievance and complaint mechanisms to ensure that they were "fit for the purpose". The Report stated that one issue "*which might be usefully included in the internal review is the fitness for purpose of mechanism to settle internal university disputes or to review administrative decisions. A possibility being considered elsewhere is the appointment of an Ombudsman for the sector.....In Hong Kong, the remit of the Office of the Ombudsman could be extended to cover the UGC sector.*" The governing bodies of the UGC-funded institutions started their "fit for the purpose" reviews in 2003 and had completed their reviews by 2008.

Deliberations of the Panel

3. Over the past few years, the Panel held a number of meetings to discuss and receive views from deputations on matters relating to the grievance and complaint mechanisms of the UGC-funded institutions. The major concerns raised by members are summarized in the ensuing paragraphs.

Establishment of an independent inter-institutional redress mechanism

4. Members noted with concern that many staff associations of the UGC-funded institutions had no confidence in the existing mechanisms for handling complaints lodged by staff against individual UGC-funded institutions and considered the mechanisms ineffective. Members pointed out that complaints relating to the primary and secondary school sector could be handled by the Education Bureau in accordance with the relevant codes of aid. However, complaints in the UGC sector were not dealt with by any authority. Staff complaints in the UGC sector often led to legal proceedings or were widely reported in the media. In the view of members, neither the Court nor the Legislative Council ("LegCo") was the appropriate forum for handling complaints against the UGC-funded institutions. Resorting to the Court would involve huge legal cost, whereas turning to the media or LegCo would politicize the matter.

5. For the purpose of effectively resolving complaints and grievances lodged by staff of the UGC-funded institutions, some deputations proposed the establishment of an independent inter-institutional redress committee. According to their proposals, such a committee should be statutory in nature, and its members should be drawn from the management and staff of the institutions and eminent members of the community. This committee should supplement and not replace the existing complaint and grievance mechanisms of individual institutions. Most deputations considered that an independent redress mechanism was of utmost importance in maintaining academic freedom and ensuring the handling of complaints in an impartial and transparent manner. Such a mechanism would work effectively as only persons with good understanding of the operation of tertiary institutions would become members of the committee.

6. There was, however, a view that given the unique history, mission, tradition and characteristics of each university, an inter-institutional redress mechanism would obscure its uniqueness, and there might be difficulties for it to function properly and smoothly in a timely manner. Instead of setting up such a mechanism, it was suggested that each university should develop its own redress mechanism that was tailored to its unique characteristics.

7. Members in general supported the establishment of an elected

inter-institutional complaints body to handle complaints lodged by staff in the UGC sector. Members considered that the establishment of an independent redress mechanism would provide a stable working environment for staff to concentrate on teaching and research work. The Panel passed a motion at its meeting on 17 July 2008 urging the Councils and the administrative arms of all UGC-funded institutions to establish an elected independent inter-institutional complaints committee.

8. In its written response to the motion, the Heads of Universities Committee ("HUCOM") stated that it did not support the proposal to establish such a committee. In its view, review and appeal mechanisms had been in place in all UGC-funded institutions for handling staff and student grievances and complaints. These mechanisms involved elaborate procedures conferring on the parties concerned substantial rights and opportunities to be heard, to defend and to appeal. Considering the complexities of university operation and management and the wide range of institutional differences that existed across the UGC-funded sector, it would be extremely difficult if not impossible for such an institutional complaints committee to function effectively and achieve its intended purpose. All UGC-funded universities enjoyed institutional autonomy and their Councils were vested with statutory powers to deal with appeals. Any parties who felt aggrieved could also lodge appeals to judicial bodies. If an inter-institutional complaints committee could super-impose its rulings on these bodies, it would be tantamount to usurping the legal powers of the university Councils, infringing on the autonomy of the institutions, and slighting the judgements of the courts. It was also questionable whether the mediation or decision from the committee would carry enough weight to be binding on the parties concerned.

9. In the Administration's view, all the UGC-funded institutions had established appeal and grievance mechanisms which were unique to the particular circumstances of each institution. The Administration considered that the suggestion to establish an independent inter-institutional redress mechanism would undermine the institutions' autonomy in handling staff matters and complaints having regard to their own policies, practices and individual circumstances. It would not be easy for an inter-institutional mechanism to be able to take into consideration the different traditions, cultures and practices of the institutions while respecting their autonomy. Having such a mechanism might duplicate the institutions' existing systems and add confusion. There would also be serious resource implications. Instead, it might be more efficient and practical to improve the existing complaint handling mechanisms of the institutions.

10. Similarly, the UGC was of the view that individual institutions were in the best position to handle complaints lodged by their staff. The UGC was concerned about the possible effect of the suggestion on institutional autonomy as currently the authority and responsibility for handling complaints laid with the individual institutions. It also doubted the effectiveness of such a

mechanism, given that the policies and practices adopted by different institutions varied according to their respective roles, missions and needs. The UGC supported the HUCOM's view to protect institutional autonomy which had been considered and endorsed by the Councils of the institutions. At the same time, the UGC considered it important that the established grievance and complaint handling mechanisms in the institutions should be transparent and made known to staff. The UGC considered that greater participation of persons not directly connected with the institutions at the final level of appeal might be useful, and had discussed that informally with the heads of the UGC-funded institutions.

11. Members considered that the Administration and the UGC should assume a more proactive role to ensure fairness, openness and impartiality in handling staff grievances and complaints in the UGC sector. The Administration and the UGC could not shirk their responsibility under the shield of institutional autonomy. Some members considered that the UGC's suggestion of increasing the participation of external persons at the final level of appeal was no different in effect from the proposal of establishing an inter-institutional complaints committee provided that the same group of persons was appointed by the institutions.

12. To facilitate further discussion on the proposal for the establishment of an inter-institutional complaints committee, members requested the Legal Service Division of the Secretariat to provide legal advice on the HUCOM's response, in particular on the view that the setting up of an inter-institutional complaints committee was tantamount to usurping the legal powers of the university Councils, infringing on the autonomy of the institutions, and slighting the judgement of the courts. The legal advice provided by the Legal Service Division is in **Appendix I**.

Extension of The Ombudsman's remit to cover the UGC sector

13. Members noted the recommendation in the Report to explore the possibility of extending the remit of The Ombudsman's to cover the UGC sector. Some members considered that such an option should be pursued. Others opined that extending the jurisdiction of The Ombudsman to cover the UGC sector could not resolve the problem of staff grievances and complaints since The Ombudsman could only handle procedural but not academic matters, and increasing external participation and transparency in handling grievances by the institutions should be a better approach.

14. The UGC advised that it had received mixed reactions about the proposal for extending the jurisdiction of The Ombudsman to cover the UGC-funded institutions during the consultation. The university Councils held a strong view that in line with the spirit of institutional autonomy, institutions should handle internal personnel matters themselves. The university Councils also pointed out that section 8 of The Ombudsman

Ordinance (Cap. 397) specified that The Ombudsman should not undertake investigation in, among other things, personnel matters such as appointments, dismissals, pay and conditions of service, etc.

15. The Administration shared the UGC's view but agreed to explore the feasibility of extending the jurisdiction of The Ombudsman to cover the UGC sector as requested by members. The Administration subsequently informed members that academic matters should not be handled by The Ombudsman. The Ombudsman was an independent body outside of the administrative structure and there would be great resource implications to acquire the required expertise and knowledge to make a judgment involving academic standard and practice. Having considered these factors, the Administration remained of the view that the remit of The Ombudsman should not be extended to cover the UGC-funded sector.

Updated development

16. In September 2009, the UGC conducted a research on the grievance handling procedures of 10 reputable overseas institutions/organizations in Australia, Canada, the United Kingdom and the United States. Based on the research findings, the UGC developed the "best practice" guidelines for consideration by the UGC-funded institutions.

17. The UGC made specific recommendations in four areas, namely, appointment of mediators, stipulating the time limits for handling grievances, guarding against retaliation and involvement of external parties in the final level of appeal.

18. The Panel will be briefed on the details of the UGC's recommendations and the responses of the UGC-funded institutions on the "best practice" guidelines at its meeting on 12 July 2010.

Relevant papers

19. A list of the relevant papers on the Legislative Council website is in **Appendix II**.

立法會
Legislative Council

LC Paper No. LS88/08-09

**Panel on Education
Paper for the Special Meeting on 6 July 2009**

**Comments of the Legal Service Division on the views of the
Heads of Universities Committee on the Establishment of
an Inter-Institutional Complaints Committee**

Purpose

The purpose of this paper is to provide for Members' reference the comments of the Legal Service Division on the views of the Heads of Universities Committee (HUCOM) on the establishment of an inter-institutional complaints committee.

Background

2. At the meeting of the Panel on Education on 9 February 2009, deputations were invited to express views on, among other things, the grievances and complaints handling mechanisms of the University Grants Committee (UGC)-funded institutions. Some deputations were of the view that the existing mechanisms were ineffective. They had no confidence in the existing mechanisms.

3. Some deputations proposed the establishment of an elected independent inter-institutional complaints committee (the Committee), which would work like an arbitration committee. Respectable persons from individual institutions such as professors and eminent members of the community should be elected as arbitrators to resolve complaints concerning UGC-funded institutions. The Committee would save resources and ensure effectiveness as persons with good understanding of the operation of UGC-funded institutions would assume the role of arbitrators. Members supported the proposal.

4. In a letter dated 2 February 2009 which was issued to Members before the said meeting (LC Paper No. CB(2)775/08-09(01)), the Administration set out the views of HUCOM on the establishment of the Committee, which are summarized below –

- (a) review and appeal mechanisms are already in place in all eight member universities of HUCOM for handling staff and student grievances and

complaints. There are also proper channels for staff and students to monitor and question the policies and operations of their universities;

- (b) it is difficult to set up the Committee, given the complexities of university operation and management and the wide range of institutional differences that exist across the UGC-funded institutions. Complaints and appeals from staff and students can be more effectively and expeditiously handled by members of the same institution, who have a better understanding of the mission, tradition, and culture of their own university;
- (c) all UGC-funded universities enjoy institutional autonomy and their Councils are vested with statutory powers to deal with appeals. Any party who still feels aggrieved after the Councils have ruled can lodge further complaints/appeals to judicial bodies. It is difficult to conceive how the Committee can super-impose its rulings on these bodies. It will be tantamount to usurping the legal powers of the university councils, infringing on the autonomy of the institutions, and slighting the judgments of the courts; and
- (d) it is questionable whether the mediation or decision of the Committee will carry enough weight to be binding on the disputed parties.

5. HUCOM concluded that the Committee can replace neither the existing mechanisms nor the judicial processes. Therefore, HUCOM did not support the proposal to establish the Committee.

6. Members requested the Legal Service Division to provide legal advice on the response of HUCOM's views, in particular paragraph (c) above, at the next meeting on the grievances and complaints mechanisms of UGC-funded institutions.

7. Members may refer to the minutes of the meeting (LC Paper No. CB(2)1003/08-09) for further information.

The Committee

8. The Committee has not been established. It should work like an arbitration committee but there is no concluded view as to its operation, terms of reference, its relationship with the universities, etc. The Legal Service Division is only able to comment according to the relevant general principles.

Comments on HUCOM's Views

9. HUCOM's view in paragraph 4(c) relates to –
- (a) institutional autonomy of UGC-funded institutions; and
 - (b) the relationship of the rulings of the Committee and judicial bodies.

Institutional Autonomy

10. Article 137 of the Basic Law provides that education institutions of all kinds may retain their autonomy and enjoy academic freedom. The court observes that the phrase "educational institutions of all kinds" refers to "institutions of higher learning, universities and the like where, in all open and democratic societies, autonomy and academic freedom are essential to their functioning."¹ University autonomy is therefore guaranteed by the Basic Law.

11. In another judgment², the court notes that, in relation to institutional autonomy, paragraph 40 of the **United Nations Committee on Economic, Social and Cultural Rights, General Comments No. 13** states that –

"The enjoyment of academic freedom requires the autonomy of institutions of higher education. Autonomy is that degree of self-governance necessary for effective decision-making by institutions of higher education in relation to their academic work, standards, management and related activities. Self-governance, however, must be consistent with systems of public accountability, especially in respect of funding provided by the State. Given the substantial public investments made in higher education an appropriate balance has to be struck between institutional autonomy and accountability. While there is no single model, institutional arrangements should be fair, just and equitable, and as transparent and participatory as possible."

12. In Hong Kong, universities self-governance is implemented through the ordinances establishing the universities. The University of Hong Kong (the University), for example, was incorporated under the University of Hong Kong Ordinance (Cap. 1053) (the Ordinance). It is given the power to enter into contracts. The governing bodies are given specific powers and functions, including the power to make statutes, in the governance of the University, conferring of degree, etc.

¹ Secretary for Justice v Commission of Inquiry on Allegations Relating to the Hong Kong Institute of Education, HCAL108/2007 at paragraph 49.

² Catholic Diocese of Hong Kong v Secretary for Justice [2007] 4 HKLRD 483 at 538, paragraph 245.

13. Councils of universities are also given power to make statutes in relation to the welfare and discipline of students or employees of the universities. Statute XIX 2(1) of the University provides that notwithstanding the generality of the powers vested in the Council by paragraph 1 of that statute and subject to the provisions of the Ordinance and the statutes, the Council shall have power –

"to appoint any person or committee to entertain and, if appropriate, adjudicate upon, on its behalf, complaints from members of the University and persons employed in it and to redress their grievances: Provided that the Council shall not entertain or adjudicate upon any complaint which falls within the jurisdiction of the Disciplinary Committee".

14. In relation to the Disciplinary Committee, which deals with complaint against a student, statute XIX 2(1a) also empowers the Council –

"to allow or dismiss an appeal from the Disciplinary Committee and to vary any penalty imposed by the Disciplinary Committee, or to appoint any person or committee to discharge those duties".

15. It appears that the Council of the University is not prevented by the Ordinance or its statute to appoint a person or a committee independent of the University to handle complaints and redress grievances, or to hear an appeal from the Disciplinary Committee.

16. Despite the above observations, since there is no substantive provision on the operation of the Committee, the Legal Service Division is not in a position to comment on how the Committee would be tantamount to "usurping the legal powers of the university councils, infringing on the autonomy of the institutions".

The Committee and Judicial Bodies

17. While the Basic Law provides that universities enjoy institutional autonomy, decisions of the universities are not free from judicial supervision. Universities are created by statute and are statutory bodies. One of their functions is to provide education and they are therefore discharging a public function. As such, decisions of the universities or a committee appointed by the universities in the discharge of public functions may be subject to judicial review.³ In determining whether judicial review is available, apart from the source of power, the court may examine the nature of the decisions.⁴ Examples of judicial review on decisions of universities include –

³ LEUNG Chak-sang v Lingnan University HCAL638/2000, 15 March 2001, per the Hon Mr Justice Chung.

⁴ R v Panel on Take-overs and Mergers, ex parte Datain plc and another [1987] 1 All ER 564.

- (a) **Jill Spruce v The University of Hong Kong** [1993] 2 HKLR 65. The applicant sought to review the decision of the Council of the University to dismiss her for breaches of regulations prescribed by the Council under section 12(14) of the Ordinance and the statute of the University. The application was dismissed by the courts of Hong Kong, which was upheld by the Privy Council;
- (b) **Li Yiu Kee v The Chinese University of Hong Kong** HCAL5/2008. The applicant challenged the policy on the language of instruction of The Chinese University of Hong Kong. The applicant contended that the language of instruction "shall be Chinese". The application was dismissed by the Court of First Instance on 9 February 2009.

18. Article 80 of the Basic Law provides that the courts of the Hong Kong shall be the judiciary of the Region, exercising the judicial power of the Region. Article 84 also provides that the courts of Hong Kong shall adjudicate cases in accordance with the law applicable in Hong Kong as prescribed in Article 18 of the Basic Law. Article 85 further provides that the courts of Hong Kong shall exercise judicial power independently, free from any interference. With these provisions in mind, it appears that the rulings of the Committee are subject to judicial review and could not oust the jurisdiction of the court.

19. Although there is no substantive provision as to how the Committee would operate, in the light of the above provisions of the Basic Law, the Legal Service Division cannot find any legal basis to support the proposition that the decisions of the Committee would be tantamount to "slighting the judgments of the courts".

Enforcement of the Decisions of the Committee – HUCOM's Views at paragraph 4(d)

20. If the Committee is going to operate as an arbitration committee, an agreement to arbitration is essential before arbitration is possible. Section 18 of the Arbitration Ordinance (Cap. 341) provides that unless a contrary intention is expressed in an arbitration agreement, the arbitration agreement shall be deemed to contain a provision that the award to be made by the arbitrator shall be binding on the parties. Section 2GG further provides that the award of arbitration is enforceable, with the leave of the Court of First Instance, in the same way as a judgment, order or decision of the Court of First Instance.

HUCOM's Views in Paragraph 4(a) and (b)

21. Paragraph 4(a) and (b) concerns the merits of the existing mechanisms. It appears to be a matter of judgment for Members to decide. It is not appropriate for the Legal Service Division to comment.

Conclusion

22. To conclude –

- (a) university autonomy is guaranteed under the Basic Law. However, as there is no substantive provision as to how the Committee should operate, the Legal Service Division cannot comment on how the decisions of the Committee would be tantamount to "usurping the legal powers of the university councils, infringing on the autonomy of the institutions" ; and
- (b) the Committee cannot oust the jurisdiction of the court. The Legal Service Division cannot find any legal basis for the proposition that the decisions of the Committee would be tantamount to "slighting the judgments of the courts".

23. An arbitral award of the Committee is enforceable in the court.

Prepared by

Legal Service Division
Legislative Council Secretariat
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**Relevant papers on
grievance and complaint mechanisms of the University Grants
Committee-funded institutions**

Meeting	Date of meeting	Paper
Panel on Education	17.5.1999 (Item IV)	Minutes Agenda
Panel on Education	27.9.1999	Minutes CB(2)2875/98-99(01) CB(2)2895/98-99(01) CB(2)2895/98-99(02)
Panel on Education	17.4.2000 (Item VIII)	Minutes Agenda
Panel on Education	18.3.2002 (Item IV)	Minutes Agenda
Panel on Education	26.3.2002 (Item I)	Minutes
Panel on Education	2.4.2002 (Item I)	Minutes Agenda
Panel on Education	7.5.2002 (Item I)	Minutes
Panel on Education	2.12.2002 (Item I)	Minutes
Panel on Education	17.2.2003 (Item IV)	Minutes Agenda
Panel on Education	3.3.2003 (Item II)	Minutes Agenda
Finance Committee	11.4.2003	Minutes Agenda
Panel on Education	21.6.2004 (Item IV)	Minutes Agenda
Panel on Education	5.7.2004 (Item I)	Minutes Agenda

Meeting	Date of meeting	Paper
Panel on Education	11.1.2005 (Item I)	Minutes Agenda
Panel on Education	26.1.2006 (Item III)	Minutes Agenda
Panel on Education	14.5.2007 (Item V)	Minutes Agenda
Panel on Education	9.7.2007 (Item III)	CB(2)2071/06-07(06) CB(2)2357/06-07(04) CB(2)2357/06-07(05)
Panel on Education	17.7.2008 (Item II)	Minutes Agenda
Panel on Education	9.2.2009 (Item VI)	Minutes Agenda
Panel on Education	6.7.2009 (Item I)	Minutes Agenda
Panel on Education	11.1.2010 (Item IV)	Minutes Agenda CB(2)1576/09-10(01)

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