

Chapter 8 : The Way Forward for Hong Kong

8.01 The theoretical considerations, international norms and comparative experience relevant to a system for the determination and adjustment of judicial remuneration have already been considered in the preceding chapters, and account has also been taken of the relevant materials in the Mason Report. In this final chapter, the relevant issues and possible alternatives in the development of Hong Kong's system in this regard will be considered, bearing in mind the recommendations in the Mason Report where relevant.

8.02 The point of departure for our analysis must be the existing system and its historical evolution up to the present. This has been well covered in chapter 2 of the Mason Report, and it is unnecessary to repeat the information provided therein. It will suffice to highlight some salient features of the Hong Kong system for the determination of judicial remuneration, particularly features that are significant in the light of the overseas experience discussed in this Report.

8.03 Unlike the case in many foreign jurisdictions, the salaries of judges in Hong Kong are not provided for in legislation. As in the case of civil servants' salaries, judicial salaries are legally determined as part of the contractual arrangement between the individual judge and the Government, and the salary scale for judges of different ranks is adjusted annually by the Government. Funding for judicial salaries forms part of the overall budget of the Judiciary, which in turn forms part of the overall budget of the Government which is approved annually by the legislature in appropriation legislation. Since the establishment of the Standing Committee on Judicial Salaries and Conditions of Service ("the Judicial Committee") in 1987, the annual adjustments have been made by the Government upon the advice of the Judicial Committee. The Judicial Committee has existed side by side with the three independent bodies that advise the Government on the salaries and conditions of service of civil servants – the Standing Committee on Directorate Salaries and Conditions of Service, the Standing Commission on Civil Service Salaries and Conditions of Service, and the Standing Committee on Disciplined Services Salaries and Conditions of Service. The four bodies are served by a common secretariat staffed by civil servants. Until recently, the Standing Committee on Directorate Salaries and Conditions of Service and the Judicial Committee shared the same membership.

8.04 One of the most significant characteristics from a comparative point of view of the Hong Kong system of judicial remuneration as it has evolved is the informal "peg" between the salaries of senior civil servants and judges and judicial officers. Before 1988, judges and judicial officers were paid on the Directorate Pay Scale or the Master Pay Scale of the civil service depending on their rank. In 1988, the Judicial Officers Salary Scale (JOSS) was established, and the scale was retitled the Judicial Service Pay Scale (JSPS) in 1999. From

1989 to 2001 (i.e. before the civil service pay reduction in 2002), the JOSS or JSPS was adjusted annually in line with adjustments to the civil service pay scales. In other words, a judge or judicial officer received the same pay adjustment (usually pay rises, and no pay cut) every year during this period as that received by a civil servant on the same salary as the judge or judicial officer. Until the introduction of the new “accountability system” for principal officials in 2002, corresponding points (or roughly equivalent points) could be found as between the JOSS or JSPS and the civil service pay scales for a judge or judicial officer of each rank. Since the introduction of the accountability system (under which principal officials are no longer civil servants and receive a remuneration package structured differently from that in the civil service (e.g. remuneration substantially in cash with few fringe benefits)), there are no points in the civil service scale equivalent to those in the JSPS occupied by judges above the judges of the Court of First Instance (whose salary point is equivalent to that of Permanent Secretary).¹

8.05 It has also been pointed out that –²

According to its terms of reference, the Judicial Committee established in December 1987 is to review the pay and conditions of service of judges and judicial officers and to conduct an overall review when it considers it necessary. But so far, it has only considered proposals initiated by either the Administration or the Judiciary on an ad hoc basis. ... in practice, since 1989, on the advice of the Judicial Committee, annual adjustments to judicial salaries have followed adjustments made to the upper salary band of civil servants ...

8.06 The picture that emerges is therefore roughly as follows. In Hong Kong we have an independent non-statutory body (i.e. the Judicial Committee) that advises the Government on judicial remuneration. Before 2002, this body had for many years adopted the approach of recommending annual adjustments to judicial salaries that were identical with the adjustments to the salaries of civil servants who occupied equivalent salary points on the civil service pay scale. Apparently the system worked satisfactorily before 2002. By comparison with the situations in the USA, Canada and Australia described in this report, the Hong Kong system had certainly worked well before 2002 in the sense that there was almost no controversy, dispute or complaint about judicial salaries.

8.07 However, two developments since 2002 have presented challenges to the existing system. First, the introduction of the accountability system meant that equivalent points can no longer be established between the civil

¹ Mason Report, para 2.28.

² Ibid, paras 2.14-2.15.

service pay scale and the JSPS as far as judges of the Court of Final Appeal and the Court of Appeal are concerned. Secondly, and this is a more serious problem than the first, the issue has to be faced of whether judicial salaries should be reduced in line with the reductions in civil service salaries that have been introduced since 2002. A related issue is whether the previous practice of informally pegging judicial salaries to civil service salaries should be abandoned, or whether adjustments (including increases) to judicial salaries in future should continue to be in line with the annual adjustments to civil service pay.

8.08 As far as the first issue is concerned, the solution is not difficult. It seems that the new remuneration package for principal officials is similar to the previous remuneration of principal officers (who were civil servants) in terms of total cost.³ It is therefore not impossible – if it is considered desirable – to continue a system of informal peg between judicial salaries and the salaries of senior officials. For example, the salary of the Court of First Instance Judge can continue to be pegged to that of the Permanent Secretary (note that in Britain the salaries of High Court judges and of Permanent Secretaries have also been close), and the salaries of more senior judges can be kept equivalent to those of principal officials in terms of “total cost”. Even if a system of performance pay and productivity bonuses (which, as pointed out in the Mason Report and by reports in Britain and Australia, are not appropriate for judges) is to be introduced for senior officials in future, it would still be possible to

equat[e] the function, for example, of a High Court Judge with that of a category of senior officials so that each should be regarded as receiving the same basic remuneration, while adding to the basic remuneration of the High Court Judge the median performance pay received by the senior official category.⁴

8.09 We now turn to the more difficult issue – that of the reduction or non-reduction of judicial remuneration in Hong Kong. Should judicial salaries be subject to the same reductions as those applied to civil servants since 2002? There are several relevant considerations in this regard.

8.10 First, it should be noted that the Basic Law contains provisions regarding the pay and terms of service of both civil servants and judges (including judicial officers). In the case of the former, article 100 enables public servants serving in Hong Kong before the establishment of the Hong Kong SAR to “remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before”. Article 103 provides for the maintenance after the handover of “Hong Kong’s previous system of recruitment, employment, assessment, discipline, training and

³ Ibid, para 2.25.

⁴ Mason Report, para 6.32.

management for the public service, including special bodies for their appointment, pay and conditions of service”. Article 160, which has also been referred to in the context of the dispute about civil service pay reduction, provides, among others, that contracts, rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and be recognised and protected by the Hong Kong SAR provided that they do not contravene the Basic Law.

8.11 As regards judges and judicial officers, article 93 of the Basic Law contains a provision similar to article 100. If they served in Hong Kong immediately before the handover, they “may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before”. Their right to pensions is also protected.⁵

8.12 At the same time, the Basic Law also provides for the maintenance of Hong Kong’s existing judicial system⁶ and of judicial independence. Article 85 provides that the courts of the Hong Kong SAR “shall exercise judicial power independently, free from any interference.” Article 39 provides, among others, for the continued application of the International Covenant on Civil and Political Rights (ICCPR). Article 14 of the ICCPR, implemented in Hong Kong by article 10 of the Hong Kong Bill of Rights in the Hong Kong Bill of Rights Ordinance, provides that “In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. As mentioned earlier in this report, a similar provision in the Canadian Charter of Rights and Freedoms has been held to provide the basis in Canadian constitutional law for judicial independence, including the guarantee of financial security for judges.

8.13 The reductions⁷ that have been applied to the salaries of civil servants do not reduce their salaries below the relevant salary levels of 30 June 1997. Indeed, when the last reduction comes into effect on 1 January 2005, civil service salaries (for existing civil servants) would be reduced to the relevant levels of 30 June 1997. Thus article 100 would not be violated. The point has been litigated with regard to the Public Officers Pay Adjustment Ordinance. It was argued that even if the actual salary of a civil servant was not reduced below its 1997 level, the mere introduction of legislation to reduce pay and thus to vary the terms of the existing contract of employment would be a violation of article

⁵ Art. 93(2) of the Basic Law. See also the similar provision for civil servants in art. 102.

⁶ Art. 81.

⁷ They are provided for in the Public Officers Pay Adjustment Ordinance (Cap 574) and the Public Officers Pay Adjustments (2004/2005) Ordinance (Cap 580). The former provides for a reduction which took effect on 1 October 2002. The latter provides for 2 reductions taking effect on 1 January 2004 and 1 January 2005 respectively.

100 and/or article 103. The argument has however been rejected by the Court of First Instance of the High Court.⁸

8.14 It can be argued that just as civil service pay reduction to a level not below that of 30 June 1997 would not violate article 100 of the Basic Law, a similar reduction of judicial salaries would not violate article 93 of the Basic Law. The next question is whether such a reduction would violate the principle of judicial independence.

8.15 As discussed in chapter 1 of this report, it is difficult to argue that a reduction of judicial salaries threatens judicial independence where it is introduced as an integral part of public economic measures that are generally applicable to all persons paid from the public purse. As discussed in chapter 2, a number of international instruments which affirm the general principle of non-reduction of judicial remuneration recognise that a reduction in such circumstances constitutes an exception to the general rule and is permissible. The review of overseas experience in other chapters of this report suggests that such a reduction is not generally considered to be objectionable from the perspective of judicial independence, and even in jurisdictions where the constitution contains an absolute or unqualified prohibition of judicial remuneration, it is not uncommon for the judiciary to accept a voluntary reduction in order to share the burden of economic difficulties experienced by the population as a whole.

8.16 Although the objection in principle to a reduction of judicial remuneration in the circumstances mentioned above may not be a strong one, there are some complications which need to be taken into account in considering the option of such a reduction. The complications relate to the means by which such a reduction may be achieved.

8.17 For the purpose of this study, I have been provided with specimen documents relating to the appointment or employment of judges and judicial officers in Hong Kong and their terms of service. They are in fact similar to those relating to the employment of civil servants. As in the case of a civil servant, a judge or judicial officer is employed by the issue of a letter of appointment which refers to an accompanying memorandum on conditions of service. As in the case of the civil service, the memorandum on conditions of service for judges and judicial officers contains, among others, the following terms. (Slight variations in the wording exist depending on whether the appointee was appointed before or after the handover.)

The judge [or “officer” in the case of a magistrate] is subject to Executive Orders issued from time to time by

⁸ *Lau Kwok Fai Bernard v Secretary for Justice* [2003] HKEC 711, 2003 HKCU LEXIS 902 (HCAL 177/2002; Hartmann J, 10 June 2003); *Scott v Government of the HKSAR* [2004] HKEC 1325 (HCAL 188/2002; Hartmann J, 7 Nov 2003).

the Chief Executive for the administration of the Judiciary and to regulations and directions made under these Orders [before the handover, the reference was to “Colonial Regulations” instead]; and also subject to Government Regulations and Circulars, Departmental Instructions, and to any Ordinances or Regulations which apply to the office to which he is appointed or to the Judiciary.

A judge [this provision does not apply to judicial officers such as magistrates] requires the prior consent of the Chief Executive of the Hong Kong Special Administrative Region of the People’s Republic of China before returning to practise as a barrister or solicitor in the Hong Kong Special Administrative Region. To this effect, an undertaking is to be signed by the judge before his appointment.

[The undertaking reads:

“To: The Chief Executive of the HKSAR

I hereby undertake that I will not, without the consent of the Chief Executive of the HKSAR of the People’s Republic of China, practise as a barrister or a solicitor in the HKSAR.”]

Subject to the Basic Law, notwithstanding anything contained in this Memorandum or in the covering letter of offer of appointment, the Government reserves the right to alter any of the judge’s terms of appointment, and/or conditions of service set out in this Memorandum or the said covering letter should the Government at any time consider this to be necessary.

8.18 The last clause set out above also appears in various versions of the Memorandum on Conditions of Service for civil servants. After June 2000, a new version of the clause was inserted in the Memorandum providing expressly that adjustments of pay may include a pay increase, pay freeze or pay reduction.⁹ “The Executive has accepted that in respect of public officers employed prior to June 2000 the general power to alter terms and conditions contained in the memoranda may not extend to the power to unilaterally alter a fundamental condition such as terms of remuneration.”¹⁰ This view would be applicable to judges and judicial officers as well.

⁹ See the discussion in *Lau Kwok Fai Bernard v Secretary for Justice* (ibid), paras 38-40.

¹⁰ Ibid, para 41.

8.19 Given the similarity between the terms and conditions of employment of civil servants and those of judges (including judicial officers), it would appear that the considerations regarding the means to introduce a pay reduction for civil servants are equally applicable to any pay reduction for judges. More particularly, as the Government has taken the view that it is legally risky to cut civil servants' pay without introducing legislation for this purpose, legislation would also be needed to effectuate a reduction in judicial salaries.

8.20 When the Public Officers Pay Adjustment Bill was introduced in the Legislative Council in 2002, the civil servants' unions and some legislators opposed the bill. Some of the arguments against the bill were legal arguments, and they were subsequently made before the court after the bill was enacted into law.¹¹ The main legal argument was that it is unconstitutional for the legislature to pass legislation to vary the terms of the contracts between civil servants and the Government, particularly a fundamental term relating to salary, and to deprive civil servants affected of the right to sue for compensation. It is foreseeable that if a bill to reduce judicial salaries were to be introduced in the legislature, it would be opposed by similar arguments, in addition to arguments about judicial independence and about overseas practice regarding the non-reduction of judicial remuneration. Furthermore, insofar as the bill would be solely on the reduction of the salaries of judges and judicial officers and would not also reduce the pay of others paid from the public purse at the same time, it may be criticised as discriminatory and as an attack on the judiciary.

8.21 As mentioned above, in the case of the civil service pay reduction, some civil servants have taken the matter to court and argued that the legislation to reduce their pay was unconstitutional and invalid. Although their challenges have been unsuccessful before the Court of First Instance, some of the legal and constitutional issues are indeed arguable. If legislation is introduced to reduce judicial salaries, the possibility that it will be challenged by individual judges or magistrates before the courts cannot be ruled out. This would mean that the Hong Kong judiciary would, like the judges of some of the jurisdictions discussed in this report, be put into the embarrassing position of adjudicating on their own salaries or those of their colleagues. There is also the possibility of the Standing Committee of the National People's Congress making an interpretation of the relevant provisions in the Basic Law.

8.22 It appears from the above discussion that even if the reduction of judicial remuneration as part of an overall public economic measure is not inconsistent with principle of judicial independence, such a reduction in the present circumstances of Hong Kong is likely to be controversial (unless it receives the unanimous support of and is introduced with the prior consent of the judiciary itself). This means that even if the recommendation in the Mason Report that legislation prohibiting absolutely any reduction in judicial

¹¹ See the cases cited in n 8 above.

remuneration is not accepted (the recommendation will be discussed later), it does not necessarily follow that judicial salaries should be or will be reduced in Hong Kong. In other words, one possible scenario is that neither legislation prohibiting reduction in judicial remuneration nor legislation reducing judicial remuneration is introduced, the practical effect of which is that judicial remuneration will not be reduced.

8.23 Thus one possible option which can be considered is the preservation of the existing system of the Government determining judicial remuneration upon the advice of the Standing Committee on Judicial Salaries and Conditions of Service (the Judicial Committee). The Judicial Committee can consider advising Government not to introduce legislation to reduce judicial pay in the light of the considerations mentioned above. This would mean that the traditional informal peg between civil service salaries and judicial salaries will (at least) be suspended (since civil service pay has been reduced since 2002). In the meantime, the Judicial Committee can consider whether it would be desirable to restore the peg some time in the future when the economy improves, the deficit problem is resolved and civil service pay rises again. If it decides in favour of the peg as a long-term strategy, it can still take into account the suspension of the peg in deciding how the peg is to be restored. For example, when the first increase of civil service pay next occurs, the Judicial Committee can consider not recommending an identical increase for the judiciary in view of the fact that they have not been subjected to the civil service pay cuts that preceded the latest civil service pay increase. An approach of this nature (though not involving any peg to civil service pay) has been mentioned by the Judiciary Administrator in his letter of 10 June 2003 to the LegCo Panel on Administration of Justice and Legal Services in response to the Panel's inquiry –

Deflation and inflation would be external economic factors which would be relevant for the independent body to consider when making recommendations on judicial remuneration (see Recommendation 7 [of the Mason Report]). While any reduction of judicial remuneration, (including reduction to account for the effects of deflation), would be in breach of the absolute prohibition against reduction (see Recommendation 1), the independent body could take past deflation into account in deciding on its recommendations when there is inflation, including whether judicial remuneration should be increased at a particular time and at what rate.

8.24 The next set of issues to be considered concerns the establishment of an independent statutory body recommended by the Mason Report. At present, the Judicial Committee is not a statutory body. Should it be transformed into a statutory body? In what ways should the new statutory body be different from the existing Judicial Committee?

8.25 Although the Mason Report recommends the establishment of a new statutory body to advise the Government on matters of judicial remuneration, it has not discussed whether the existing system of Judicial Committee has worked in a satisfactory manner. As discussed above, the Hong Kong system of judicial remuneration has apparently worked well so far, particularly when assessed in the light of relevant experience elsewhere which often indicates dissatisfaction with judicial remuneration, political controversies and even litigation on issues of judicial remuneration.

8.26 Among the overseas models considered in the Mason Report and this report, it seems that the British, Australian and New Zealand systems have worked reasonably well. It should be noted that in these three countries, the independent body that recommends changes to judicial remuneration is not one whose role is “confined to judicial remuneration exclusively” as recommended by the Mason Report.¹² In the United Kingdom, the non-statutory Review Body on Senior Salaries advises the Government on the salaries of its three “remit groups” – senior civil servants, judges and senior members of the armed forces. It may also advise on the salaries of ministers and Members of Parliament. At present it consists of eleven members appointed by the Government, three of whom form the Judicial Sub-Committee of the Review Body.¹³ The recommendations on judicial salaries are made by the Review Body itself after considering the Judicial Sub-Committee’s report.

8.27 In Australia (at the federal level) and in New Zealand, the independent bodies that advise on judicial remuneration are, unlike that in Britain, established by statutes. However, like that in Britain, their jurisdiction is also not confined to judicial remuneration. The Australian Commonwealth Remuneration Tribunal, consisting of three members appointed by the Governor-General, makes determinations (subject to disallowance by Parliament) of the remuneration of Members of Parliament, Ministers, senior public servants, other public office holders and federal judges.¹⁴ In New South Wales, there is a similar Statutory and Other Offices Remuneration Tribunal which makes determinations (subject to disallowance by the legislature) of the salaries of senior public servants, holders of statutory positions and judges.¹⁵ As mentioned in chapter 5 above, similar remuneration tribunals with a broad jurisdiction extending beyond judicial salaries also exist in Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory. This contrasts with the situation in Victoria and Queensland, where the judicial remuneration tribunals – like the Canadian judicial compensation commissions discussed in chapter 6 above – specialise in setting the remuneration of judicial

¹² Mason Report, para 6.20 (Recommendation 5).

¹³ See Mason Report, para 4.6.

¹⁴ Ibid, para 4.22.

¹⁵ Ibid, para 4.35.

office holders.¹⁶ In New Zealand, the Higher Salaries Commission, consisting of three members appointed by the Governor-General, is, like the UK Review Body and the Remuneration Tribunal of Australia, a “generalist” body in the sense that it determines the salaries not only of judges but also of senior public servants, Members of the House of Representatives, senior local authority officers, senior university officials, and doctors and dentists employed by the Health Service.

8.28 The Mason Report (Recommendation 5) prefers a body that specialises in matters of judicial remuneration to a “generalist” body like the UK Review Body on Senior Salaries, the Australian Commonwealth Remuneration Tribunal, the remuneration tribunals in most Australian states and territories, and the New Zealand Higher Salaries Commission. Three reasons are given for this preference in the Mason Report –¹⁷

- (1) a specialist body will have the skills and experience appropriate to assessing that class of remuneration;
- (2) judges are a discrete class and the methodology by which their remuneration is to be assessed necessarily differs from that applicable to others in the public sector; and
- (3) factors such as performance bonus pay and productivity bonuses which may be taken into account in fixing public sector remuneration have no place in the assessment of judicial remuneration (see Recommendation 8).

The Mason Report also recommends that “no member of the independent body should serve concurrently as a member of any body assessing civil service remuneration”.¹⁸

8.29 On the other hand, the Mason Report has not discussed the advantages of the “generalist” bodies in the UK, Australia and New Zealand.¹⁹ With respect, it may be doubted whether the three reasons mentioned above in support of a “specialist” body are convincing. As regards reason (3), once it is agreed that performance pay should not be used in the case of judges (and this can be easily agreed upon in view of foreign experience), there is little difference between a “specialist” body and a “generalist” one as far as the issue of

¹⁶ Ibid, para 4.50 and chapter 5 of the present report, n 9.

¹⁷ Ibid, para 6.21.

¹⁸ Ibid, para 6.23.

¹⁹ It has been pointed out in Australia that “Opinion is divided on the question whether judicial remuneration should be determined by a tribunal established solely for that task, or by a tribunal which determines the remuneration of a wider range of public officials, including statutory officers, senior public servants and, perhaps, Ministers and Members of Parliament”: George Winterton, *Judicial Remuneration in Australia* (Melbourne: Australian Institute of Judicial Administration, 1995), p 78.

performance pay is concerned. As regards reasons (1) and (2), it may be noted that almost all of the factors which the Mason Report (para 6.28) recommends that the remuneration body should consider in the course of its work are either factors relevant to the determination of the remuneration of holders of any post paid from the public purse, or factors which can be easily understood even by members of a “generalist” committee. Indeed, it is doubtful whether any person can be regarded as a specialist in assessing the remuneration of judges alone. Furthermore, it is perfectly viable for a “generalist” committee to include as its members persons from the legal profession, or even to establish, as in the United Kingdom, a sub-committee that looks into judicial remuneration.

8.30 Even if it is decided to adopt the recommendation in the Mason Report to establish a statutory body that specialises in judicial recommendation, the recommendation in the Mason Report that “no member of the independent body should serve concurrently as a member of any body assessing civil service remuneration”²⁰ may be questioned. The Mason Report has not referred to any overseas jurisdictions that have adopted such a rule. On the contrary, the experience of the UK, Australia and New Zealand leans towards the “generalist” body that makes recommendations on the salaries of judges and senior public servants, or even ministers and Members of Parliament at the same time. In Hong Kong, the membership of the Judicial Committee has (since its establishment in 1987) until January 2004 been identical with the membership of the Standing Committee on Directorate Salaries and Conditions of Service, and there is nothing to indicate that this was an unsatisfactory arrangement. Even now, there is overlapping membership as between the Judicial Committee and the Standing Committee on Directorate Salaries and Conditions of Service.

8.31 There are some advantages in having a “generalist” body modelled on UK Review Body on Senior Salaries, the Australian Remuneration Tribunal and the New Zealand Higher Salaries Commission. Since they make recommendations or determinations on the salaries of senior civil servants, judges, ministers and Members of Parliament at the same time, they will have to take an overall view of the financial picture in the remuneration of the most senior people paid from the public purse. They are also more likely to be perceived as fair and independent, as guardians of the public interest rather than as advocates of the interests of particular groups of persons paid from the public purse. This is probably an important factor contributing to their success.

8.32 In Hong Kong at present, there is no “generalist” body of this kind. The three committees that advise on civil service salaries have been mentioned at the beginning of this chapter. As regards the remuneration and allowances for members of the Legislative Council and the Executive Council, there exists an Independent Commission on Remuneration for the Members of the Executive Council and the Legislature of the Hong Kong SAR appointed by the Chief

²⁰ Loc cit.

Executive. Whether the separate committees that currently exist should be re-organised and a new body or new bodies created to deal with the remuneration of persons paid from the public purse in Hong Kong is a larger question than what is covered by the current review of the mechanism for the determination and adjustment of judicial remuneration. I believe that it would be appropriate for the Judicial Committee to bring this issue to the Government's attention in the course of the present exercise. In particular, consideration should be given to whether a new non-statutory or statutory body along the lines of the "generalist" bodies in the UK, Australia and New Zealand mentioned above should be created to advise the Government on the remuneration of judges, senior civil servants and members of the Executive and Legislative Councils. This would mean in practice the merger of several existing committees in this regard.

8.33 Assuming that this "generalist" body is not to be established at least in the near future, and assuming that it is considered appropriate to have a body that specialises in the determination of judicial remuneration (even though, as suggested above, its membership may overlap with the membership of the Standing Committee on Directorate Salaries and Conditions of Service), I proceed to comment on the recommendations in the Mason Report on the establishment of a statutory body on judicial remuneration.

8.34 As implied in the discussion above, a policy choice has to be made between the continuation of the present arrangement of the non-statutory Judicial Committee and the creation of a new statutory body along the lines recommended by the Mason Report. The Mason Report has made a good case for the establishment of a statutory body (Recommendation 4).²¹ In particular, a statutory requirement that the reports of the body will be published will increase its transparency (Recommendation 9).²² The recommendations in the Mason Report on the advisory role of the body (Recommendation 3), its appointment (part of Recommendation 6) and the factors it should take into account (Recommendation 7) are also reasonable and deserve to be supported. The recommendation (Recommendation 8) that performance pay and productivity bonuses should not form part of judicial remuneration is also sound and well-supported by overseas experience.

8.35 As regards the composition of the proposed body, the recommendations of the Mason Report deserve more detailed examination. The Mason Report (para 6.23) proposes that the body would consist of five members, including a barrister and a solicitor appointed by the Government upon consultation with the governing bodies of the Bar and the Law Society. In this regard, the following views of Professor Winterton's, writing about the

²¹ Mason Report, para 6.19.

²² Ibid, para 6.33. See also Peter Wesley-Smith, "Injudicious pay cuts?" (1999) 29 Hong Kong Law Journal 2.

constitution of a proposed judicial remuneration tribunal for both federal and state (or territory) judges in Australia, are noteworthy –²³

Persons suitable for appointment to the Tribunal would include former independent statutory officers, such as Auditors-General, former public servants, former heads of private corporations, *non-practising lawyers*, and academics (not necessarily lawyers) with knowledge of the role and work of the judiciary. Anyone personally interested in the Tribunal's determinations, such as judges and former judges (affected through their pensions) would obviously be ineligible for appointment. *Practising lawyers working in the courts, whether as barristers or solicitors, should likewise be ineligible*, as should anyone subject to governmental (or other) direction, such as public servants. The Tribunal should include both men and women, and ought to include non-lawyers if possible. Determining judicial remuneration requires an appreciation of the position and work of the judiciary as well as wider economic considerations, none of which requires technical legal expertise. [emphasis supplied]

8.36 Professor Winterton did not articulate precisely the reasons why he believed that practising lawyers should not serve as members of the judicial remuneration tribunal, but the reasons relate probably to considerations both of judicial independence and of the independence of the remuneration tribunal. On the one hand, judicial independence or the perception thereof might be adversely affected by having lawyers who are in a position to determine (or participate in determining) the remuneration of judges representing clients and arguing cases before the courts. On the other hand, the independence or perceived independence of the tribunal might also be adversely affected by its having as members practising lawyers who may have professional contact with judges and who may be perceived as having an interest in avoiding judges' ill will or in being well regarded by judges. Such concerns about independence may however have less weight where practising lawyers form only a small minority of the membership of the independent body, as in the case of the Judicial Officers Recommendation Commission in Hong Kong, where the practising barrister and solicitor are only two members among a 9-member commission (the other members being the Chief Justice (chairman), two other judges, the Secretary for Justice, and three other members who are not connected with the practice of law).²⁴

²³ Winterton (n 19 above), p 82.

²⁴ See the Judicial Officers Recommendation Ordinance (Cap 92, LHK).

8.37 In the case of the independent body proposed by the Mason Report, the barrister and solicitor are two members of a 5-member committee. In the light of the discussion above, it may be doubted whether this is an ideal arrangement. It should also be noted that none of the overseas remuneration bodies examined in the Mason Report and in the present report involves any statutory requirement that the body should include as its members practising lawyers (whether appointed with or without consultation with the professional body of lawyers). As mentioned in this chapter, the remuneration bodies in the UK, Australia and New Zealand are mostly “generalist” bodies which deal with judicial salaries as well as the salaries of other senior holders of public office, and it is to be expected that there is no statutory requirement that members of the legal profession should be included as members. However, even in the case of the two remuneration tribunals at state level in Australia that specialise in setting judicial salaries (i.e. in Victoria and Queensland), the relevant statutes also do not stipulate that the membership of the tribunals should include lawyers.²⁵

8.38 It remains for me to consider Recommendations 1 and 2 of the Mason Report. Recommendation 2 is that legislation should be introduced to provide for a standing appropriation to meet the payment of judicial remuneration. This is consistent with the practice in many common law jurisdictions of charging the salaries of judges on the consolidated revenue fund so that they need not be subject to the annual appropriation vote in Parliament. The practice can be traced back to England where a Consolidated Fund was established as early as 1787. In 1799 “the salaries of most of the Judges were fixed and charged wholly upon the Consolidated Fund”;²⁶ by 1830 the “total salary” of judges was placed upon the Consolidated Fund.²⁷ The significance of this arrangement, which distinguishes judges from civil servants and reflects the former’s constitutional status, was explained by Lord Rankeillour –

Parliament, by various Acts at different times, has given [judges] the special protection of segregating them from civil servants and commissioned officers, and so on, of the Crown, by placing their salaries on the Consolidated Fund: the effect of which is that their salaries cannot be reduced in the ordinary course in a debate on Estimates in the House of Commons.²⁸

²⁵ Neither do they expressly disqualify practising lawyers from serving on the tribunals. See the Judicial Remuneration Tribunal Act 1995 (Victoria) and the Judges (Salaries and Allowances) Act 1967 (Queensland), available at www.austlii.org.

²⁶ *Parliamentary Debates (House of Lords)*, 5th series, vol 90, col 78 (Viscount Sankey, Lord Chancellor; 23 Nov 1933).

²⁷ *Ibid*, col 79.

²⁸ *Ibid*, col 1055-1056 (1 March 1934).

8.39 The practice of charging judicial salaries on a consolidated fund so as to create a standing appropriation guaranteeing the payment of such salaries can be found both in countries whose constitutions contain a prohibition of reduction of judicial remuneration, and in countries without such a constitutional prohibition. Examples of the former are Singapore²⁹ and the Solomon Islands. Examples of the latter are the United Kingdom³⁰ and Canada.³¹

8.40 Some scholars believe that such a standing appropriation represents part of the minimum standard of institutional guarantee of financial security as a condition for judicial independence –

As an absolute minimum, judicial salaries must be payable automatically, and not at the whim of the executive. In other words, they must be a permanent charge on the Consolidated Revenue Fund. ... Of course, merely charging judicial salaries upon the Consolidated Revenue Fund offers minimal guarantee of independence, since the amount of such salary will be determined by Parliament (or its delegate) and thus, in practical terms, the executive, with obvious implications for judicial independence.³²

8.41 It may also be noted in this regard that a number of international instruments on judicial independence (discussed in chapter 2 above) require that judicial salaries be “secured by law”. For example, the Basic Principles of the Independence of the Judiciary endorsed by the General Assembly of the United Nations in 1985 provide that the remuneration of judges “shall be adequately

²⁹ Article 98(6) of the Constitution (1965) of Singapore (which contains an absolute prohibition of reduction of judicial remuneration in article 98(8)) provides: “Parliament shall by law provide for the remuneration of the Judges of the Supreme Court and the remuneration so provided shall be charged on the Consolidated Fund.” Section 107(2) of the Constitution (1978) of the Solomon Islands (which contains a qualified prohibition of reduction of judicial remuneration and the reduction of the salaries of holders of certain other offices) in section 107(3)) provides: “The remuneration and allowances payable to the holders of those offices [i.e. Governor-General, judges of the High Court and the Court of Appeal, Speaker, Ombudsman, Director of Public Prosecutions, Public Solicitor, Auditor-General, Commissioner of Police, and member of any Commission established by this Constitution] are hereby charged on and shall be paid out of the Consolidated Fund.”

³⁰ For example, section 12(5) of the Supreme Court Act 1981 provides: “Salaries payable under this section [to judges of the Supreme Court other than the Lord Chancellor] shall be charged on and paid out of the Consolidated Fund.”

³¹ Section 53(1) of Canada’s Judges Act 1985 (applicable to federal judges) provides: “The salaries, allowances and annuities payable under this Act ... shall be paid out of the Consolidated Revenue Fund.”

³² Winterton (n 19 above), pp 20-21.

secured by law”.³³ A law creating a standing appropriation for judicial remuneration will thus represent a fulfilment of this requirement.

8.42 Although it is arguable³⁴ that the practical significance of a standing appropriation might be limited because it is unlikely that the legislature in Hong Kong will bring about a situation in which all persons paid from public funds or judges as a class will cease to receive their salaries, the arrangement is useful for the purpose of underscoring the importance of the judiciary and its independence (which includes the guarantee of financial security as discussed earlier in this report) in Hong Kong. Furthermore, it will also enable Hong Kong to raise the level of its institutional protection of financial security as an element of judicial independence by following the examples of various common law jurisdictions as mentioned above, and implementing the requirement in various international instruments that judicial remuneration should be secured by law. Recommendation 2 (on the standing appropriation) in the Mason Report therefore deserves to be supported.

8.43 However, it should be noted that in the Commonwealth countries which have this arrangement, the standing appropriation is not limited to the judiciary but also extends to certain other designated holders of public office, particular holders of public office (such as the Attorney General, the Director of Public Prosecutions, the Director of Audit, the ombudsman, etc) whose independence needs to be guaranteed. If, therefore, judicial salaries are to be protected by a standing appropriation in Hong Kong, consideration should also be given to whether a standing appropriation should also be made for the salaries of other holders of public office who are similarly protected in other common law jurisdictions.

8.44 I turn finally to Recommendation 1, which is that “Legislation should be enacted prohibiting absolutely any reduction in judicial remuneration.” It should first be pointed out that the precise scope of the proposed legislation is not completely clear from the Mason Report. Is it to be modelled on the relevant UK legislation, which, as explained in chapter 3 of this report, only provides that the executive branch of government acting administratively may increase but not decrease judicial salaries, leaving open the question whether Parliament may reduce judicial salaries by an Act of Parliament? Or is it to be modelled on the American, Australian or New Zealand constitutions, or those constitutions mentioned in chapter 7 of this report that contain a provision on the non-reduction of judicial remuneration and alteration of other terms of service?

³³ Article 11 of the Basic Principles (the full text of the article has been set out in chapter 2 above). As is apparent from chapter 2, the other international instruments containing similar provisions are the International Bar Association Code of Minimum Standards of Judicial Independence, the Draft Universal Declaration on the Independence of Justice (“Singhvi Declaration”), and Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges (for details, see chapter 2 above).

³⁴ See eg para 6.20 above.

8.45 If it is the former (i.e. the UK model), it may be doubted whether such a move is necessary. The similarity between the terms of employment of judges (and judicial officers) and civil servants in Hong Kong has already been discussed above. Just as the Government believes that legislation need to be introduced in order to effectuate a civil service pay cut, it is inconceivable that judicial salaries will be reduced administratively without going through the legislative process. Thus the UK model is irrelevant to Hong Kong. In the UK, originally only Parliament had the power to set judicial salaries. The relevant legislation (containing the provision on non-reduction of judicial remuneration) was enacted for the purpose of delegating the authority to set judicial salaries from Parliament to the executive, and as a condition of the delegation it is provided that the executive may not use the delegated power to reduce judicial salaries. In the case of Hong Kong, the salaries of judges have been determined by contract rather than by legislation, and can apparently only be reduced by legislation in the absence of a consensual variation of the contract. As long as this present position is maintained and the understanding continues to exist that the Government acting administratively has no power to reduce the salaries of incumbent judges, legislation along the lines of the UK model would not be necessary.

8.46 I now turn to examine the second of the two possible versions of the legislation protecting judicial remuneration identified above, i.e. legislation along the lines, not of the UK model, but of the American, Australian or New Zealand constitutions. Technically it is possible to introduce legislation in Hong Kong providing, as in New Zealand, that the salary of a judge shall not be reduced during the continuance of the judge's commission. This would at least have the effect of prohibiting the Government acting administratively from reducing judicial salaries. However, insofar as the provision on the non-reduction of judicial remuneration is not in the Basic Law itself, it will not have the effect of binding the legislature of the Hong Kong SAR for the future. In other words, it would in theory be possible for a future Legislative Council to pass a bill introduced by a future Administration in the SAR to repeal this provision and to provide for a particular reduction in judicial remuneration. This does not mean, however, that such a provision would be meaningless with regard to a future legislature. Once such a provision is introduced into Hong Kong law, any future move to repeal it is likely to meet with strong resistance, given that the purpose of the provision would be to safeguard judicial independence in Hong Kong. In any event, such a provision, if adopted, will have symbolic value in highlighting the importance of the judiciary and its independence in Hong Kong.

8.47 We now return to the original and most fundamental question, which is whether Recommendation 1 of the Mason Report, in either of the two possible forms mentioned above (i.e. the UK model and the American/Australian/New Zealand model) is worthy of support. It should be apparent from this report that financial security is an essential condition for and guarantee of judicial independence, and that as a general rule financial security

requires that the salary of a judge should not be reduced during the continuance of his or her office. However, on the basis of the theoretical considerations, international norms and overseas experience discussed in this report, it appears that there is considerable support for the view that an exception to the general rule of non-reduction of judicial remuneration exists where a reduction is introduced as an integral part of an overall economic measure that is applicable generally to all persons paid from the public purse. The contrary view that judicial independence requires an absolute prohibition against reduction irrespective of the circumstances seems to me less defensible. This is however an issue on which reasonable people may differ.

8.48 Nevertheless, if the foreign experience recounted in this report contains any lesson for us here in Hong Kong today, I believe it is that issues of judicial remuneration, like other issues of remuneration from the public purse, have the potential to become politically controversial and to divide the community. While those who support a stronger degree of protection for judicial remuneration will inevitably resort to arguments from judicial independence and the rule of law, there will always be others who question the moral rightness of judges being exempted from the obligation to shoulder, with the rest of the community and in particular with all those paid from the public purse, the burdens of difficult economic times and severe budget deficits. The net effect on the judiciary of a controversy on judicial remuneration may well be negative in terms of its standing in the eyes of the community. Indeed, immediately after the publication of the Mason Report, one public opinion poll³⁵ reported that nearly 90% of those polled believed that the judges should share the burden with citizens by reducing salaries; 65% believed that reduced pay would not have a detrimental effect on judicial qualities; more than 50% believed that the incident showed that “judges were only concerned about their own interests”; and more than 70% believed that “the request for legislative protection of judicial salaries would have an influence on the public perception of judges in Hong Kong”. I am not relying on this survey result as an authoritative one, but I think it is useful in illustrating the kind of feelings which may exist in the community on the matter. To quote again the passage from the judgment of the Supreme Court of Canada which was first quoted in chapter 6 of this report –

Nothing would be more damaging to the reputation of the judiciary and the administration of justice than a perception that judges were not shouldering their share of the burden in difficult economic times.³⁶

³⁵ Oriental Daily News, 25 April 2003 (in Chinese).

³⁶ *Reference re Remuneration of Judges* [1997] 3 SCR 3, para 196 (per Chief Justice Lamer).

8.49 It seems therefore that little is to be gained, and much would be put at risk, if the Government were to introduce a bill in the present circumstances along the lines recommended by Recommendation 1 of the Mason Report. However, as suggested earlier in this chapter, neither is it advisable to introduce legislation to reduce judicial salaries similar to that introduced for the civil service (nor the administrative reduction of judicial salaries which the Government must already have recognised as legally questionable). Thus judicial salaries can remain at their present level for incumbent judges and judicial officers.

8.50 *Summary of this chapter* : Unlike the case in many foreign jurisdictions, the salaries of judges in Hong Kong are not provided for in legislation. As in the case of civil servants' salaries, judicial salaries are legally determined as part of the contractual arrangement between the individual judge and the Government, and the salary scale for judges of different ranks is adjusted annually by the Government. One of the most significant characteristics from a comparative point of view of the Hong Kong system of judicial remuneration as it has evolved is the informal "peg" between the salaries of senior civil servants and judges and judicial officers. In Hong Kong, an independent non-statutory body – the Standing Committee on Judicial Salaries and Conditions of Service first established in 1987 – advises the Government on judicial remuneration. Before 2002, this body had for many years adopted the approach of recommending annual adjustments to judicial salaries that were identical with the adjustments to the salaries of civil servants who occupied equivalent salary points on the civil service pay scale. Apparently the system worked satisfactorily before 2002. However, two developments since 2002 have presented challenges to the existing system. They are the introduction of the accountability system for principal officials (which means that equivalent points can no longer be established between the civil service pay scale and the judicial service pay scale as far as judges of the Court of Final Appeal and the Court of Appeal are concerned), and the reductions in civil service salaries that have been introduced since 2002, which raise the issue of whether judicial salaries should be reduced in line with the civil service pay cuts. This chapter suggests that whereas the problem raised by the first development is a technical one that can be easily resolved, the issue of whether judicial remuneration should be reduced is more difficult to tackle.

8.51 Article 100 of the Basic Law provides that public servants' pay and conditions of service after the handover shall be no less favourable than before, and article 93 contains a similar provision regarding judges and judicial officers. In the case of civil servants, the Government has taken the view that the Basic Law would not be contravened so long as the reduction of civil service pay does not take it below the level where it was at immediately before the handover, and in the cases litigated before the Court of First Instance so far, the civil service pay reduction has been upheld. It might therefore appear that a reduction of judicial salaries in line with the civil service pay cuts would not contravene article 93 of the Basic Law.

8.52 The next question is whether such a reduction would violate the principle of judicial independence. As discussed in the preceding chapters of this report, it is difficult to argue that a reduction of judicial salaries threatens judicial independence where it is introduced as an integral part of public economic measures that are generally applicable to all persons paid from the public purse. However, although the objection in principle to a reduction of judicial remuneration in these circumstances may not be a strong one, there are some complications which need to be taken into account in considering the option of such a reduction in Hong Kong. The complications relate to the means by which such a reduction may be achieved.

8.53 Given the similarity between the terms of appointment and conditions of service of judges (including judicial officers) and those of civil servants in Hong Kong, and given that the Government has conceded that legislation is necessary in order to effectuate a pay cut for incumbent civil servants, legislation would also be necessary if a reduction of the salaries of incumbent judges and judicial officers is to be introduced in Hong Kong. The legislation to implement the civil service pay cut in 2002 against the will of the civil servants' unions was politically controversial and has given rise to legal challenges before the courts. It is likely that given the Mason Report and the importance of judicial independence, any bill to reduce judicial remuneration in Hong Kong will be politically controversial as well. Even if the bill is passed, the possibility must be recognised of judges or judicial officers affected bringing an action before the courts challenging the legislation on grounds similar to those that have already been used by civil servants (but not successful before the Court of First Instance) as well as grounds of judicial independence. This would result in the embarrassing situation of judges adjudicating on their own salaries or those of their colleagues. In the light of these considerations, it is not advisable to reduce the salaries of incumbent judges in Hong Kong.

8.54 This means that even if the recommendation in the Mason Report that legislation prohibiting absolutely any reduction in judicial remuneration is not accepted, it does not necessarily follow that judicial salaries should be or will be reduced in Hong Kong. In other words, one possible scenario is that neither legislation prohibiting reduction in judicial remuneration nor legislation reducing judicial remuneration is introduced, the practical effect of which is that judicial remuneration will not be reduced.

8.55 One possible option which can be considered for the way forward is the preservation of the existing system of the Government determining judicial remuneration upon the advice of the Standing Committee on Judicial Salaries and Conditions of Service. Another option is to turn the committee into a statutory body. A third option is to establish an independent body modelled on the UK Review Body on Senior Salaries, the Australian Commonwealth Remuneration Tribunal, the remuneration tribunals in most Australian states and territories, and the New Zealand Higher Salaries Commission in the sense that its jurisdiction is not confined to judicial salaries but extends to the determination of the salaries of

senior civil servants, principal officials and members of the Executive and Legislative Councils. This would in effect mean the combination into one body of the existing Standing Committee on Directorate Salaries and Conditions of Service, the Standing Committee on Judicial Salaries and Conditions of Service and the Independent Commission on Remuneration for the Members of the Executive Council and the Legislature of the Hong Kong SAR.

8.56 This chapter suggests that there is much to be said for the third option. However, in the event that this option is considered not feasible at least in the short term, the second option mentioned above of turning the existing Standing Committee on Judicial Salaries and Conditions of Service into a statutory body is worth pursuing. In this context, the recommendations in the Mason Report regarding the establishment of an independent statutory body on judicial remuneration deserve to be supported except the following which need to be further scrutinised as discussed in this chapter –

- (1) the recommendation that no member of the independent body should be allowed to serve concurrently as a member of any body assessing civil service remuneration; and
- (2) the recommendation that the body must include as its members a barrister and a solicitor appointed in consultation with the governing bodies of the Bar and the Law Society.

8.57 This chapter supports the recommendation in the Mason Report regarding a standing appropriation for judicial remuneration, but expresses reservations regarding its proposal to enact legislation “prohibiting any reduction in judicial remuneration”. On the other hand, as mentioned above, neither is it considered advisable to introduce legislation to reduce judicial salaries similar to that introduced for the civil service (nor the administrative reduction of judicial salaries which the Government must already have recognised as legally questionable). Thus judicial salaries can remain at their present level for incumbent judges and judicial officers.