

Chapter 3

Institutional Structure, Mechanism and Methodology for the Determination of Judicial Remuneration

(This chapter presents our recommendations on the institutional structure, mechanism and methodology for the determination of judicial remuneration.)

3.1 In his letter of 20 January 2004, the Chief Executive asked the Judicial Committee to make recommendations on whether the Judiciary's proposal based on the Mason Report should be accepted. This we have done in the previous chapter. The Chief Executive in the same letter also asked the Judicial Committee to make recommendation to him on the appropriate institutional structure, mechanism and methodology for the determination of judicial remuneration. These two issues are intertwined. For completeness, we set out in this chapter our recommendations in full, even at the risk of recapitulating some of the points already covered in earlier parts of this report. In formulating our recommendations, we have considered the overseas experience and the local situation in the light of the findings and recommendations of the studies carried out by Professor Chen and the Hay Group.

Institutional Structure

Independent Body

3.2 Central to our proposed institutional structure is an independent body to advise on judicial remuneration. Our recommendations are set out below –

- (a) The independent body should be dedicated to matters relating to the structure, pay and conditions of service of judges and judicial officers. This body should be entitled to make independent judgments having regard to factors that are unique to the Judiciary, and can adopt mechanisms and processes that may not be applicable to other public service jobs.

- (b) As mentioned in paragraphs 2.26 to 2.29, the independent body should, in due course, be established by statute. This will not only strengthen the status of the body, but also highlight the importance the community attaches to safeguarding judicial independence in Hong Kong. It can also enhance the transparency of the body through the mechanism enshrined in the statute. But pending the introduction of legislation, all the features pertaining to the independent body as recommended in the Mason Report should, subject to our comments in this report, be adopted.
- (c) The body should be advisory in nature. The authority for the determination of judicial remuneration should continue to be vested in the Chief Executive of the Hong Kong Special Administrative Region. The body should carry out its functions and exercise its powers as prescribed by its terms of reference and in due course, by relevant legislation. The advice tendered by this body and the Chief Executive's decision shall be made public.
- (d) The independent body should comprise seven non-official members, with one practising solicitor and one practising barrister. To avoid real or perceived conflict of interest, serving or retired judges should not be appointed.
- (e) Appointments should be staggered so that fresh inputs can be introduced on a regular basis.
- (f) To allow cross-fertilisation of ideas and expertise, it should be permissible for some members of the independent body to serve on other public bodies including JORC and advisory bodies on civil service salaries and conditions of service.

3.3 The above recommendations can be achieved by expanding the existing Judicial Committee and by promulgating more detailed terms of reference in accordance with the recommendations made in this report and transforming the same into a statutory body through introducing legislation in due course.

3.4 The functions of the new independent body should largely follow those of the Judicial Committee. Its primary responsibility is to

ensure that the judicial remuneration is sufficient to attract and retain legal professionals of suitable calibre for the respective ranks in the Judiciary. In tendering its advice to the Administration on issues relating to pay and conditions of service, the body should have regard to the following considerations –

- (a) the need to maintain an independent Judiciary of the highest integrity;
- (b) the ability to attract and retain people with suitable calibre;
- (c) the general economic situation in Hong Kong;
- (d) competitiveness with private sector legal professionals' income;
- (e) public sector pay as a reference;
- (f) differences in remuneration structures, including benefits and allowances, between the Judiciary and the private and public sectors; and
- (g) the relative levels of responsibility of judicial offices compared to each other.

3.5 We have also reviewed the secretariat support it needs to facilitate its work and to ensure its independence. We believe that such support may continue to be provided by the Joint Secretariat as it does at the moment in respect of the Judicial Committee. Our experience is that the existing Joint Secretariat has proved to be able to render support services to several related advisory bodies concurrently without compromising the independence and individual characteristics of any one of them.

Standing Appropriation

3.6 An underlying feature of judicial independence is fiscal autonomy. As elaborated in paragraphs 2.16 to 2.23, we **recommend** that, as an additional safeguard of judicial independence, the Administration should, in due course, consider introducing standing appropriation for judicial pay along the lines of similar arrangements in some other jurisdictions such as the United Kingdom. The Administration would need to work closely with the Judiciary in developing appropriate parameters and arrangements agreeable to parties concerned.

3.7 We further **recommend** that the authority to create judicial posts at directorate level should be vested in the Chief Justice or the Judiciary Administrator through further delegation of authority from the legislature subject to rules and limits to be drawn up. This is in line with the fiscal arrangements for some independent bodies such as the Ombudsman. The Judicial Committee or the new independent body may continue to play an advisory role in this regard. It is noteworthy that the Chief Executive will retain the authority to make judicial appointments on the recommendation of JORC.

3.8 Increased autonomy must be accompanied by enhanced accountability. As the Judiciary is publicly funded, it is right for the community to expect the Judiciary to continue to exercise due diligence in ensuring prudent financial management in performing judicial functions. We note that, during the past few years, the Judiciary has contributed to sector-wide efforts to reduce public expenditure without compromising the quality of justice. Similar to the Executive, the Judiciary has endeavoured to cope with the budgetary constraints by re-engineering, organizational restructuring and re-prioritizing. In delegating further authority to the Judiciary regarding the creation of judicial posts, it is for consideration whether additional safeguards should be enshrined in relevant documents to specify the scope of such authority. The Audit Commission will continue to keep a watchful eye on the Judiciary, in the same manner as for other public organizations.

Mechanism

Comparison with the Civil Service

3.9 Chapter 2 of the Mason Report already depicts in some detail the judicial service pay system in Hong Kong. One of the distinct features of the current system is an informal “peg” between the salaries of senior civil servants and judges and judicial officers. This peg is described at length in Chapter 8 of Professor Chen’s report, in particular, paragraphs 8.04 to 8.07. There is little to be gained by repeating the background facts here.

3.10 However, three new developments in the past few years, namely, the introduction of the Accountability System in Government in July 2002, the reductions of civil service pay by legislation and the possible introduction of performance pay to the civil service pay system, have cast

doubts on the desirability and practicability in maintaining the traditional link between judicial and civil service pay systems.

3.11 After careful consideration, we have recommended in Chapter 2 that the pay reduction for civil servants should not be applied to judges and judicial officers. In fact, we are of the opinion that the opportunity should be taken to de-link or unpeg judicial remuneration from the civil service pay. A new mechanism for determining judicial remuneration should instead be established with a view to avoiding further disputes on why judicial salaries had not followed the reduction of civil service pay under the existing system.

3.12 In considering the issue of de-linking, we are aware that the proposal might create other problems in relation to the comparisons with the private sector. We shall come back to this point later. We have also debated on the notion that civil service pay points could remain a good reference for determining judicial salaries. In this regard, as Professor Chen has also pointed out in his research, some kind of informal pegging with civil service pay can help depoliticise the issue and judges would not be seen to be discriminated or favoured under the system.

3.13 Notwithstanding the above, we have come to the conclusion that while some reference to civil service pay is beneficial, pegging is not appropriate. De-linking the judicial remuneration from that of the civil service will not only strengthen the perception of judicial independence but also provide the necessary safeguard and reassurance to judges and judicial officers, as far as future movements of judicial remuneration are concerned.

3.14 Our conclusion has also taken into account the fact that the rationale for adopting direct comparison with the civil service is no longer justified because –

- (a) judges and judicial officers now largely came from the private sector, unlike previously when many were promoted through the ranks or recruited within the legal sectors of the civil service;
- (b) judges do not take part in the collective bargaining process which the Administration has established with the civil service unions and staff associations; and
- (c) judges at District Court and High Court have to renounce their right to return to private practice in Hong Kong after leaving the Judiciary. Consent may be given by the Chief

Executive, although in practice this has not been granted. In the case of judges of the Court of Final Appeal, there is in addition a statutory prohibition against return to private practice in Hong Kong which is absolute (i.e. irrespective of consent from the Chief Executive).

3.15 In a more recent development, we have noted the judgment of the Court of Final Appeal, which confirmed that the civil service pay reductions effected by legislation were consistent with the relevant provisions of the Basic Law, including Article 100. It is noteworthy that Article 93 of the Basic Law, which is related to judicial pay, closely mirrors Article 100, which concerns the civil service. It may appear that a reduction of judicial salaries by legislation in line with the civil service pay cuts would not contravene the Basic Law. However, consistent with our view that judicial remuneration should be de-linked from civil service pay, we **recommend** that the pay reductions for civil servants must **not** be automatically applied to judges and judicial officers. We also **recommend** that the judicial pay should be frozen at the current level and that the civil service pay trend in recent years be noted and taken into account, alongside other relevant factors, in reviewing judicial remuneration in the future.

3.16 We have explored whether the freeze should apply to incumbent judges and judicial officers only. Given the small population of serving judges and judicial officers, the limited intake of new blood in recent years and the importance of collegiate spirit within the cadre, we consider it appropriate to retain a single pay scale for all judges at any one time. In other words, new recruits will also be remunerated based on the prevailing pay scale as applicable to serving judges.

Comparison with the Private Sector

3.17 Whilst it is possible to compare judicial pay with the pay of private sector legal practitioners, there are certain problems with this approach. The responsibility and working conditions of judges and judicial officers are different from that of private legal practitioners. Furthermore, unlike the judicial pay system which is founded on the principles of stability and progression, private sector pay varies significantly depending on expertise, fields of practice, the economic climate and demand and supply. At the upper end, the highest earning lawyers would earn significantly higher incomes than judges but their work is in certain respects different from judicial work and hence direct comparison is impossible. Comparisons made at the lower end of private sector pay might not be entirely relevant either as judges and judicial officers are not recruited from this group. Therefore, it would be important to understand

the differences before making comparisons, though, since the Judiciary draws from the private sector, private sector earnings should be one of the relevant factors.

3.18 Leaving aside the relevance and accuracy of the private sector data to be collected, private sector pay tends to be more volatile as it fluctuates in response to market trends, and as such should not be taken as a basis to adjust judicial remuneration. We do not consider that the community would like to see an unstable judicial pay system. Whether in principle or in practice, private sector pay cannot be the sole benchmark for determining judicial pay.

Balanced Approach

3.19 Having considered the strengths and weaknesses outlined above, we **recommend** a balanced approach taking into account a basket of factors including but not limited to private sector and public sector remuneration.

3.20 In recommending a new approach, we are conscious of the fact that the Judiciary has not encountered any apparent recruitment and retention problems in recent years. In fact, the Judiciary has achieved a measure of success in attracting private legal practitioners to join the Bench at senior levels. At present, 30 (or 81%) out of 37 judges serving at Court of First Instance and above joined the Judiciary at District Court level and above. As the current remuneration package is sufficient to enable the Judiciary to recruit and retain legal practitioners of suitable calibre for the respective ranks, we consider it appropriate to take the existing parity as a reference for determining judicial remuneration in the future.

3.21 We **recommend** the following –

- (a) In advising on the level of judicial remuneration, the Judicial Committee or its successor should have regard to a basket of factors, including –
 - (i) private sector pay levels and trends;
 - (ii) the responsibility, working conditions and workload of judges vis-à-vis those of lawyers in private practice;
 - (iii) the benefits and allowances enjoyed by judges and judicial officers;

- (iv) the retirement age of judges and judicial officers and their retirement benefits;
 - (v) recruitment and retention in the Judiciary;
 - (vi) public sector pay as a reference;
 - (vii) cost of living adjustments;
 - (viii) the general economic situation in Hong Kong; and
 - (ix) prohibition against return to private practice in Hong Kong.
- (b) A mechanism should be introduced for the collection and analysis of the earnings of private legal practitioners for references with a view to checking whether the judicial pay is kept broadly in line with the movements of private sector earnings over time. In this connection, benchmark studies should be conducted every three to five years. A pilot survey should be carried out as soon as possible to establish the existing relativity with the private sector income, which will form the basis for future pay comparisons. In future benchmark studies, data will be collected to show whether the pay relativities are widening or narrowing over time. The proposed methodology of such surveys will be discussed in paragraphs 3.24 to 3.26.
- (c) During the intervening years between two benchmark studies, annual reviews should be conducted to see whether and how the judicial pay should be adjusted. These reviews should make reference to readily available pay trend information from the Government, professional bodies and the private sector.

Pay Relativities within the Judiciary

3.22 The pay relativities among judges and judicial officers reflect their respective status, responsibility and experience level. There is a need to keep the position under review and the Judiciary is best placed to do it.

Fringe Benefits

3.23 Apart from salaries, judges are also entitled to a range of fringe benefits and allowances. We do not see any immediate need for any adjustment, but will keep the situation under review.

Methodology

3.24 With the assistance of our consultant, we have given consideration to alternative approaches to conduct benchmark studies on private sector earnings. We **recommend** that the Judicial Committee, or the independent statutory body to be established in the future, may consider collecting information on private sector earnings in consultation with the Judiciary and the legal profession. Possible methods include conducting surveys and compiling relevant information on the earnings of senior counsel and applicants for judicial appointments.

3.25 The private sector data will indicate the broad range of relativities between the judicial pay and the earnings in the private sector. They will also show the overall trend of private sector earnings. The comparison with private sector earnings will focus on three recruitment ranks in the Judiciary, namely Magistrates, District Judges and the Judges of the Court of First Instance. The pay for other levels of judges and judicial officers will be determined by internal relativities.

3.26 The data on the private sector earnings will not be translated into precise figures for determining the levels of judicial salaries. By conducting benchmark surveys and compiling relevant information on a regular basis, the changes in the pay relativities between selected judicial positions and the corresponding private sector legal positions will be systematically recorded. The data will facilitate the Judicial Committee or its successor in monitoring the private sector pay trends and considering whether and how adjustments to judicial pay should be made.

Way Forward

3.27 We will proceed with conducting a pilot benchmark survey in the last quarter of 2005.