

CONSULTANCY REPORT :
SYSTEM FOR THE DETERMINATION
OF JUDICIAL REMUNERATION

THE HON SIR ANTHONY MASON AC KBE

FEBRUARY 2003

TABLE OF CONTENTS

Chapter		Page
1	Introduction	1 – 4
2	Judicial Service Pay System in Hong Kong	5 – 12
3	Judicial Independence – A Constitutional Principle	13 – 26
4	Judicial Remuneration – Positions in Various Jurisdictions	27 – 46
5	Recent Reviews of Systems of Judicial Remuneration	47 – 55
6	Recommendations	56 – 63

CHAPTER ONE

INTRODUCTION

1.1 The purpose of this study commissioned by the Hong Kong Judiciary is to facilitate it in undertaking a review of the current system of determining remuneration and conditions of service for judges and judicial officers.

1.2 The scope of the study is as follows:

1.2.1 The study shall provide a comprehensive description of the current systems of pay and conditions of service for judges and judicial officers in a number of overseas jurisdictions. For this purpose:

The current systems of pay and conditions of service for judges and judicial officers shall include:

- (a) the institutional structure and mechanism for determining pay and conditions of service and their review and revision from time to time;
- (b) the methodology by which levels of pay and conditions of service are determined, including the criteria for such determination such as the linkage or reference to public sector or private sector pay or economic indicators;
- (c) the methodology by which levels of pay and conditions of service are reviewed and revised from time to time.

The number of overseas jurisdictions shall include:

- (a) Australia [The Federal Judiciary, and the States; if there are significant discrepancies among the systems of the States, then 2 or 3 States such as New South Wales and Victoria];
- (b) Canada (relating to those appointed by the Federal Government);
- (c) England;
- (d) New Zealand;
- (e) Singapore; and
- (f) The United States of America (The Federal Judiciary).

1.2.2 The study shall set out the various models for the determination and revision of pay and conditions of service for judges and judicial

officers emerging from the results of the study referred to in 1.2.1 above.

1.2.3 The study shall set out the existing system for the determination and revision of pay and conditions of service for judges and judicial officers in Hong Kong.

1.2.4 The study shall identify possible options and make recommendations for the future determination and revision of pay and conditions of service for judges and judicial officers in Hong Kong.

1.3 This report has been commissioned following the introduction in July 2002 of the new Accountability System in Government. Before the introduction of that System, there was a close relationship between judicial remuneration and civil service remuneration.

1.4 Under the new System, the Principal Officials of the Government are no longer civil servants but political appointees, appointed on the nomination of the Chief Executive for a term of not more than 5 years. They receive substantial salaries but do not receive pensions and a number of benefits received by civil servants.

1.5 The Administration is also conducting a comprehensive review of the civil service pay and policy system. The review will consider the introduction of new features such as performance pay which has been applied in the assessment of civil service remuneration in other jurisdictions but has generally not been applied in the assessment of judicial remuneration.

1.6 The implementation of these changes and possible changes will have a substantial impact on the close relationship which has traditionally existed between judicial and civil service remuneration and the methodology by which judicial remuneration has been assessed.

1.7 In undertaking this exercise, it has been necessary not only to take account of the changes already referred to and the current systems of judicial remuneration in other jurisdictions, but also to safeguard the fundamental constitutional principle of judicial independence which directly affects such matters as judicial remuneration, the mode of determining judicial remuneration and reduction in judicial remuneration.

1.8 As the structures and the methodology for determining judicial remuneration in other jurisdictions have been significantly influenced by requirements flowing from the principle of judicial independence, the report sets out the history and content of the principle. It goes, almost without saying, that

compliance by Hong Kong with accepted requirements of judicial independence is of the utmost importance.

1.9 The structure of this Report is as follows:

- 1.9.1 Chapter Two describes the Judicial Service Pay System in Hong Kong. This Chapter, subject to minor amendments made by me, was provided by the Hong Kong Judiciary. Although this Chapter might conveniently follow the discussion of judicial independence and immediately precede the description of the systems in other jurisdictions, the Chapter sets out in detail the changes which have occasioned this study. For this reason the Chapter follows this introduction.
- 1.9.2 Chapter Three considers the fundamental constitutional principle of judicial independence and examines the relevant jurisprudence which applies this principle to the remuneration of judicial officers.
- 1.9.3 Chapter Four provides a comparison of the different systems for determining judicial remuneration in the United Kingdom, Australia (at the Commonwealth level and in the States of New South Wales and Victoria), New Zealand, United Kingdom Canada, the United States of America and Singapore. The Chapter describes the institutional structure by which judicial remuneration is assessed and reviewed and the background to the current system in each jurisdiction. This background is particularly relevant as current structures are often the result of previous experiences of failure. The Chapter summarises the composition and the methodology of the body which makes the assessment of judicial remuneration, including the factors it takes into account. It also describes how the assessment is implemented. Where appropriate, the legislative basis of the system is noted, as is any legislative or constitutional requirement that judicial remuneration not be reduced during the time that a judge holds his or her commission.
- 1.9.4 Chapter Five discusses the recent comprehensive reports reviewing judicial remuneration in the United Kingdom and Australia (Commonwealth) in which important issues have been examined.
- 1.9.5 Chapter Six sets out recommendations for reform which the Hong Kong Judiciary may wish to consider. These recommendations are based upon the principles outlined in Chapter Three and the experience of the overseas systems described in Chapters Four and Five.

1.10 This report does not examine the adequacy of the present scale of judicial remuneration in Hong Kong. That is a matter which stands outside the scope of this study.

1.11 I wish to acknowledge the valuable assistance which has been given to me by the authorities in the jurisdictions which have been surveyed in this Report. I acknowledge particularly the assistance given to me by the Hong Kong Judiciary and the Lord Chancellor and his Department. The Lord Chancellor, Lord Irvine of Lairg, and Sir Hayden Phillips GCB, Permanent Secretary of the Lord Chancellor's Department, made time available to discuss various issues with me, as did Mr Michael W Blommer, Assistant Director, Legislative Affairs, Administrative Office of the United States Courts, Mr Steven M Tevlowitz, Assistant General Counsel, and Sir David Williams, Member of the Senior Salaries Review Body (UK). These discussions illuminated my understanding of important issues.

1.12 I also acknowledge the invaluable contribution to this Report made by Ms Anne Twomey, LLM (Public Law) ANU, LLB (Hons) University of Melbourne, Lecturer, University of Sydney Law School, in her capacity as research assistant.

CHAPTER TWO

JUDICIAL SERVICE PAY SYSTEM IN HONG KONG

Organisation of Judiciary

2.1 The Judiciary of the Hong Kong Special Administrative Region is headed by the Chief Justice and served by judges and judicial officers¹ at different levels comprising:

- (a) the Court of Final Appeal, the highest appellate court in Hong Kong;
- (b) the High Court which comprises the Court of Appeal and the Court of First Instance;
- (c) the District Court; and
- (d) the Magistrates' Courts and Tribunals.

Overview of Civil Service System

2.2 As the remuneration and conditions of the judicial service have traditionally been closely related to those of the civil service, it is convenient, first, to give an outline of the civil service pay system.

2.3 The Hong Kong civil service is made up of about 175,000² civil servants in about 400 grades and within those grades over 1,000 ranks.

2.4 Three independent bodies advise the Administration on matters relating to civil service pay and conditions of service:

- (a) the Standing Committee on Directorate Salaries and Conditions of Service advises on matters affecting directorate civil servants;
- (b) the Standing Commission on Civil Service Salaries and Conditions of Service advises on matters affecting non-directorate civil servants; and
- (c) the Standing Committee on Disciplined Services Salaries and Conditions of Services advises on matters affecting members of the disciplined services.³

¹ Judicial Officers are those serving in Magistrates' Courts and Tribunals as well as the registrars and masters of the High Court and District Court.

² As at December 2002, the establishment is approximately 176,000 and the strength is approximately 170,000.

³ The disciplined services consist of the following: Police Force, Independent Commission Against Corruption, Immigration Department, Correctional Services Department, Customs and Excise Department, Fire Services Department and Government Flying Service.

2.5 The following is a description of the Administration's policy on civil service pay adjustments. The policy is that adjustment should be considered annually and that changes should be broadly in line with pay adjustments in the private sector. To this end, a survey of private sector pay trends ("the survey") is carried out annually. The survey produces three gross Pay Trend indicators (PTI), one each for the upper, middle and lower salary bands. Each gross PTI represents the weighted average pay adjustments for all surveyed employees within the respective salary band. The payroll costs of civil service increments are then deducted from the gross PTIs to produce net indicators.⁴ The net indicators provide the basis for considering the size of the annual pay adjustment for the civil service. Other factors taken into account by the Administration include increases in the cost of living, the state of the economy, budgetary considerations, the Staff Sides' pay claims and civil service morale. Since 1974 when the survey was first carried out, there were a few occasions when the Administration did not follow the net pay indicators due to economic downturn.

2.6 However, from statements made by the Administration in January 2003, it appears likely that the private sector pay trends survey for 2002-2003 will not be carried out and that a survey of pay levels in the private sector will be carried out instead.

2.7 The Administration is conducting a comprehensive review of the civil service pay policy and system.⁵ Covering all civil service directorate and non-directorate grades, the review focuses on a number of areas, such as replacing fixed pay scales with pay ranges, the pay adjustment system, introduction of performance-based pay and simplification and decentralisation of pay administration, having regard to the civil service pay practices in Australia, Canada, New Zealand, Singapore and the United Kingdom.

Judicial Service Pay System

Institutional Structure

2.8 Matters pertaining to the pay and conditions of service for judges and judicial officers are subject to the advice of the Standing Committee on Judicial Salaries and Conditions of Service ("the Judicial Committee").

⁴ This adjustment is made to take into account annual increments normally available in certain ranks in the civil service but inapplicable to the private sector.

⁵ The judicial service is not covered by this review.

2.9 Established in December 1987, in recognition of the independent status of the Judiciary and the need for the pay and conditions of service for judges and judicial officers to be dealt with separately from those of civil servants, the Judicial Committee has the following terms of reference:

- (a) To keep under review the structure, i.e. the number of levels, and the pay rates appropriate to each rank of judicial officer together with the other conditions of service of judicial officers, and to make recommendations to the Chief Executive; and
- (b) To conduct an overall review, when it so determines. In the course of this, the Committee should accept the existing internal structure of the Judiciary and not consider the creation of new judicial offices. If, however, the Committee in an overall review discovers anomalies, it may comment upon and refer such matters to the Chief Justice.

2.10 The Judicial Committee consists of a chairman and four members who are appointed by the Chief Executive. In recent years, it was composed of a lawyer, an accountant and three business persons, with the Chairman⁶ being one of the business persons. The members also serve on the Standing Committee on Directorate Salaries and Conditions of Service. The three advisory bodies on civil service pay and conditions of service and the Judicial Committee are served by a common secretariat staffed by civil servants.

2.11 Submissions to the Judicial Committee can be initiated by either the Administration or the Judiciary. If the proposal is made by the Judiciary, there is normally a note added to the discussion paper setting out the Administration's position, and vice versa.

2.12 The Judicial Committee is an advisory body. Final decisions are made by the Administration and the Executive Council where necessary. Pay revisions and other changes to pay structure and conditions of service where additional expenditure is involved require approval by the Finance Committee of the Legislative Council.

Mechanism for Determination and Review of Pay

2.13 In the First Report of the Standing Committee on Directorate Salaries and Conditions of Service published in 1964, the Judiciary and government departments were put into various groups. Government departments apart from the Legal Department were divided into three groups according to a number of grading factors and a salary scale was assigned to each group. The Judiciary and the Legal

⁶ The Chairman has retired since 1 April 2002 and the position is presently vacant.

Department were put into a fourth group as it was considered inappropriate to apply to them the grading factors applicable to the other groups.

2.14 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.

Annual Pay Adjustment

2.15 Following the establishment of the Judicial Committee in December 1987, in 1988 the Administration advised the Finance Committee of the Legislative Council that the salaries for judges and judicial officers would be subject to an annual review separate from that carried out in respect of the civil service. But, 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 and have been approved by the Executive Council and the Finance Committee for implementation together with the pay adjustments for civil servants.

Pay Adjustments in Recent Years

2.16 In 1998 the net pay indicator for the upper band showed an increase of 6.03%. But the Administration decided that due to economic downturn, directorate officers at D3 and above on the Directorate Pay Scale in the civil service (within the upper band) should receive no increase whilst those below D3 (also within the upper band) should receive the 6.03% increase. On the advice of the Judicial Committee, this was applied to the judicial service. This meant that District Court Judges and above received no increase whilst judicial officers below District Court Judge level received the pay increase of 6.03%. The Judicial Committee took the view that any proposals to review the salary structure and pay adjustment mechanism for judges and judicial officers could be considered but that prior to the establishment of an alternative system, the arrangement of adjusting judicial salaries in line with salaries of civil servants which has in practice been adopted since 1989, should continue to be followed.

2.17 In 1999 and 2000, civil service and judicial salaries were frozen having regard to the pay trend survey results. In 2001, the salaries of directorate civil servants and judges and judicial officers were increased by 4.99%.

2.18 In 2002, the Administration decided to reduce civil service pay by 4.42% for the upper salary band with effect from 1 October 2002 (and by lower percentages for

the lower bands). The reduction was effected by legislation. The pay reduction was not applied to judges and judicial officers. In making this decision, the Administration noted that the Chief Justice had commissioned a consultancy and would be making a proposal on the establishment of a new institutional structure and mechanism as well as the appropriate methodology for the determination and revision of the pay and conditions of service of judges and judicial officers. The Administration stated that when the new institutional structure, mechanism and methodology were in place, an assessment would be made within that structure as to whether the pay reduction for civil servants in 2002 should also be applied to judges and judicial officers and, if so, as from what date.

Current Levels of Pay and Conditions of Service

2.19 Judges of the District Court and above⁷ have security of tenure until the retirement age of 65. This security is protected by the Basic Law and by statute. Judges at these levels may be appointed, at their choice, on pensionable terms or agreement terms. Their security of tenure by law is not affected by their choice. The main difference is that those on agreement terms receive no pension but receive a gratuity every three years. However, judges at these levels are required as part of their terms of employment to give an undertaking to the Chief Executive not to return to practice as a barrister or solicitor in Hong Kong without his consent. In practice, this consent is not sought or given. Additionally, the judges of the Court of Final Appeal are disqualified by statute from returning to practice.

2.20 This prohibition on return to practice by a retired judge is a feature which distinguishes the arrangements in Hong Kong governing the appointment and retirement of judges from the arrangements in a number of other jurisdictions. It means that upon appointment as a judge, a barrister or solicitor sacrifices the right to return to the local profession and earn a professional income on retirement.

2.21 Magistrates joining the Judiciary after 30 November 1998 are initially appointed on a 3-year contract. If they successfully complete a second 3-year contract, they may apply for employment either on the terms of 3 linked contracts of 3 years each or on permanent and pensionable terms.

2.22 Judges and judicial officers are remunerated under a separate pay scale, namely, the Judicial Service Pay Scale (JSPS). Other than special magistrates and magistrates in their first two years of service, the levels of pay of judges and judicial officers have equivalents in the civil service Directorate Pay Scale.

⁷ Except for the registrar and masters in the High Court.

The New Accountability System in the Government

2.23 Because the pay and conditions of service of the judicial service have been related closely to those of the civil service, the introduction in July 2002 of the new Accountability System in the Government will have a substantial impact on that relationship.

2.24 The Basic Law provides for the appointment of Principal Officials of the Government. Between 1997 and 2002, the Principal Officials were all serving civil servants. With effect from 1 July 2002, a new Accountability System has been introduced under which most of the Principal Officials are now political appointees. Their terms of office will not exceed the 5 years' term of the Chief Executive who nominates them for appointment. This is in contrast to civil servants on pensionable terms who enjoy security until retirement, usually at the age of 60.

2.25 A new remuneration package has been formulated for these political appointees. The remuneration is substantially in cash, with few fringe benefits. For example, the salary of the Chief Secretary for Administration is increased by 52%, from \$227,450 to \$345,850 per month.⁸ But his annual leave entitlement is reduced from 55.5 days to 22 days and, apart from an official residence and medical coverage, he is no longer eligible for other fringe benefits which the Chief Secretary previously enjoyed as a civil servant, such as retirement benefits. The Administration stated that the new remuneration package, which was determined with the benefit of a study by Hay Group Limited, is similar to the previous remuneration in terms of total cost and that it also reflects the median value of a substantial percentage of the total remuneration of the private sector chief executive officers surveyed.

2.26 These political appointees head Government Bureaux and departments staffed by civil servants usually headed by a Permanent Secretary.

2.27 Before the introduction of the new Accountability System, salaries in the judicial service had equivalents in the civil service Directorate Pay Scale.

2.28 After the introduction of the Accountability System:

- (a) Judges at the Court of First Instance and below still have equivalents to the civil service Directorate Pay Scale as before. The salary of a Judge of the Court of First Instance is set at JSPS 16, the equivalent of D8 on

⁸ In January 2003 this amount was reduced to \$297,510.

the Directorate Pay Scale, i.e. the level of a Permanent Secretary (who works under a Principal Official who is now a political appointee). The pay scale of a District Court Judge is identical to that of a D3 officer in the Civil service. And for the lowest ranks, Special Magistrates are remunerated at JSPS 1-6 and Magistrates at JSPS 7-10B, JSPS 10 being equivalent to D1, i.e. the first pay point on the Directorate Pay Scale for civil servants.⁹

- (b) But for judges above the Court of First Instance, there are now no equivalents in the civil service. This is because the previous equivalents in the civil service Directorate Pay Scale are now political appointees with a remuneration package different from that of the civil service. For example, the salary of the Chief Justice was previously the same as the salary of the Chief Secretary for Administration, set at the highest points of JSPS 19 on the Judicial Service Pay Scale and D10 on the civil service Directorate Pay Scale respectively. This was to maintain parity in remuneration between the heads of the civil service and the head of the Judiciary. But the Chief Secretary is now a political appointee who is not on civil service terms.

Other Relevant Points

2.29 The following points are also relevant to the subject under study:

- (a) Under Article 93 of the Basic Law, judges and judicial officers serving before the establishment of the Hong Kong Special Administrative Region "may all remain in employment and retain their seniority with pay, allowances, benefits and conditions of service no less favourable than before". Civil servants enjoy similar protection under Article 100 of the Basic Law.
- (b) Judges and judicial officers do not, however, otherwise enjoy protection under the Basic Law or statute from reduction of remuneration. As will appear, constitutional or statutory protection of that kind is generally regarded as an essential element of judicial independence.
- (c) There is no standing statutory appropriation in Hong Kong from general revenue of money to meet judicial remuneration. Instead, the annual Appropriation Ordinance appropriates the total amount for expenditure by the "Judiciary" (including the amount necessary to meet judicial remuneration). This practice stands in contrast with the

⁹ As a result of the reduction in the civil service pay in 2002 which was not applied to the judicial service, the pay on various points on the Directorate Pay Scale in the civil service are now slightly lower than the equivalents in the Judicial Service Pay Scale.

practice in other jurisdictions such as the United Kingdom, Australia, Canada, New Zealand and Singapore, where there is a standing statutory appropriation to meet judges' remuneration.

- (d) The statutory minima of years of previous legal practice for High Court and District Court appointments are 10 years and 5 years respectively. However, in practice, appointments have tended to be of persons with considerably greater seniority. Furthermore, although no statutory minimum presently exists for magistrates, they too tend to be appointed from the ranks of practitioners who have had a number of years of professional experience.

CHAPTER THREE

JUDICIAL INDEPENDENCE – A CONSTITUTIONAL PRINCIPLE

3.1 This Chapter discusses the jurisprudence which has developed in relation to the identification and application of the principle of judicial independence, so far as it applies to the protection of the remuneration of judges and judicial officers. The chapter outlines the history of the principle in the United Kingdom and then considers express constitutional protection in the United States, the mixture of express and implied protection that applies in Australia and the judicial development of implied constitutional protection in Canada.

3.2 Judicial independence is an essential attribute of a properly functioning judicial system and of constitutional government as well as a safeguard of individual liberty. Without an independent judiciary, the fair and neutral administration of justice cannot be ensured.

3.3 The principle of judicial independence has various aspects. In so far as relevant to this study, it is sufficient to state it in these terms. In essence, it involves the capacity of judges to adjudicate fairly, free from direction, control, pressure or influence by the legislative or executive arms of Government or by any other source. To protect judicial independence, it is necessary to ensure that the judges' remuneration package is and continues from time to time to be sufficient and that it is properly protected from reduction and erosion.

3.4 Direct reduction of judicial remuneration is an obvious violation of judicial independence. An indirect reduction of judicial remuneration is also a violation of judicial independence.

3.5 Further, the allocation of adequate resources is essential for the functioning of an independent Judiciary. Where the judiciary budget is cut by an amount equivalent to a reduction in judicial remuneration had a general reduction in public sector remuneration applied directly, this would require that certain legitimate items of expenditure be cut instead of a reduction in judicial remuneration. In these circumstances, the allocated resources of the Judiciary would be inadequate and would adversely affect the proper functioning of the courts. Such a budget cut would be objectionable on this ground.

3.6 The independence of the judiciary is a fundamental principle which is incorporated expressly, or impliedly, in most constitutions. It may be implied through the constitutional imposition of the separation of powers, or as part of the historical context of a Constitution.¹

3.7 In Hong Kong, the Basic Law incorporates a separation of powers. It fully recognises the principle of judicial independence and the institution of an independent Judiciary. The Judiciary in Hong Kong comprises courts and tribunals at various levels to which the principle of judicial independence has been regarded as applicable.

Judicial independence - United Kingdom

3.8 At common law, a judge held his office at the pleasure of the Crown, except where, as in the case of the Chief Baron,² his commission was otherwise expressed. The vulnerability of the judges was clearly exposed when King James I dismissed Sir Edward Coke in 1616 and King Charles I subsequently dismissed two Chief Justices and suspended a Chief Baron of the Exchequer from office. Although in 1642 Charles I was compelled to agree to the appointment of judges "during good behaviour", in 1668 King Charles II reintroduced appointment "during pleasure". Subsequently, King James II removed no less than 13 judges from office during his reign of four years, in each case for failing to do his will.

3.9 After the abdication of James II and the succession of King William III, the Act of Settlement 1701 altered the common law. Section III of the Act provided:
"The judges' commissions be made [during good behaviour] and their salaries ascertained and established; but upon the address of both houses of parliament it shall be lawful to remove them."

3.10 It has been said:
"The object of all this was to protect the Judges not from Parliament, but from the arbitrary and uncontrolled discretion of the Crown. The legal result was that the Crown could only interfere with a Judge either (1) for misbehaviour, or (2) if the House of Parliament desired it. This obviously did not decrease

¹ See, for example, *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3; 150 DLR (4th) 577, where the Canadian Supreme Court relied upon both the separation of powers and the reference in the preamble to the *Constitution Act 1867* to the establishment of 'a Constitution similar in principle to that of the United Kingdom', as support for the principle. See also *Cooper v Commissioner of Income Tax for the State of Queensland* (1907) 4 CLR 1304, where the High Court of Australia interpreted a Queensland constitutional provision in the light of prior Imperial legislation and constitutional principles to conclude that judicial remuneration may not be diminished.

² 4 Coke's Institutes 117.

the control of Parliament (see Anson's Law and Custom of the Constitution, Part 2, The Crown (2nd ed) at p. 214 ll 5-6)."³

3.11 However, over time it has been accepted that the independence of the judges extends to freedom from interference by the legislature as well as the executive in the discharge of the duties of their judicial office.

3.12 In 1760 the Commissions and Salaries of Judges Act⁴ made explicit what may have been implicit in the Act of Settlement. It secured the payment of the judges' salaries without reduction so long as the judge's commission continued and remained in force. The Act did not apply to colonial judges.

3.13 The Colonial Leave of Absence Act of 1782 (Burke's Act)⁵ conferred on colonial governors in council power to remove, on specified grounds, any colonial officer holding office by letters patent, subject to appeal to the Privy Council. Burke's Act was repealed in 1964.

3.14 More recently, the Courts Act 1971 and the Supreme Court Act 1981, ss 12(1) and (3), have expressly provided that the salaries of Circuit Judges and Supreme Court Judges respectively "may be increased but not reduced".

Express constitutional protection – United States of America

3.15 Background: While the Commissions and Salaries of Judges Act applied in the United Kingdom,⁶ it did not apply to the colonies. Objection was taken to this in the United States and the complaint was recorded in the Declaration of Independence that the King had made judges dependent on his will alone, for the tenure of their offices and the amount and payment of their salaries.

3.16 As a result, Article III of the United States Constitution provides that judges of the Supreme Court and inferior courts are to hold offices during good behaviour, and will, at stated times, receive for their services a compensation which will not be diminished during their continuance in office. At the time the Constitution was drafted, it was argued by some that increases in judicial remuneration should also be prohibited, as the prospect of increased remuneration could be used as a form of financial manipulation. Others argued that the effect of inflation could then make judicial remuneration inadequate resulting in the resignation and reappointment of

³ *McCawley v The King* (1918) 26 CLR 9 at 58-59 per Isaacs and Rich JJ.

⁴ 1 Geo. III c. 23, s.III which was enacted to further implement the Act of Settlement.

⁵ 22 Geo. III c. 75.

⁶ 1 Geo III Ch 23, s.III (1760).

judges, which in itself was more likely to encroach upon judicial independence. The result was that diminution of a judge's remuneration was prohibited, but the possibility of increasing that remuneration was left open.

3.17 Inflation: In 1977, federal judges brought an action to recover additional compensation on the grounds that Congress had not increased their salary during a period of inflation. It was argued that the failure to increase judicial salaries in line with inflation resulted in the diminution of judicial compensation contrary to Art. III of the Constitution. In *Atkins v United States*⁷ the United States Court of Claims dismissed the claim. The Court observed that indirect, non-discriminatory reductions of judicial remuneration, which do not amount to an assault upon the independence of the judiciary, fall outside the protection of Art. III.⁸ The Court concluded that inflation, which is generally experienced by the public, is a non-discriminatory burden.⁹ Accordingly, failure to increase judicial salaries to account for the effects of inflation does not amount to a breach of Art. III.

3.18 Indirect diminution of judicial remuneration: Another issue considered by the United States courts is whether the imposition of taxation upon judges diminishes their compensation contrary to Art. III. In *Evans v Gore*¹⁰ the Supreme Court held that income tax amounts to an indirect diminution of the remuneration of a judge and that Congress could not impose a new tax upon an existing judge.

3.19 In *O'Malley v Woodbrough*¹¹ however, the Supreme Court held that Congress could enact a law which applied income tax to judges appointed after the law came into effect. Frankfurter J, for the majority, observed:

To subject [judges] to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.¹²

3.20 The diminution of salary by the imposition of income tax was indirect and non-discriminatory. As the tax applied generally to citizens, there was no breach of Art. III.

⁷ *Atkins v United States* 556 F 2d 1028 (1977).

⁸ *Atkins v United States* 556 F 2d 1028 (1977), per the Court at 1045.

⁹ *Atkins v United States* 556 F 2d 1028 (1977), per the Court at 1047.

¹⁰ *Evans v Gore* 253 US 245 (1920). It was overruled by the Supreme Court in *United States v Hatter* 532 US 557 (2001).

¹¹ *O'Malley v Woodbrough* 307 US 277 (1938).

¹² *O'Malley v Woodbrough* 307 US 277 (1938), per Frankfurter J at 282.

3.21 In 2001, the issue of whether a new tax could be applied to an existing judge was revisited in *United States v Hatter*.¹³ The Supreme Court overruled *Evans v Gore* and confirmed that Art. III does not forbid Congress to enact a law imposing a non-discriminatory tax on judges, whether or not those judges were appointed before or after the tax law in question was enacted or took effect. In that case two taxes were at issue: a Medicare tax which applied in a non-discriminatory manner and was held to apply validly to existing judges; and a Social Security tax which had the effect of singling out judges so that they were forced to participate in the social security system and pay more tax, while other federal employees either had a choice to participate, or were required to participate but at no extra cost. The Court held that the application of the Social Security tax to federal judges was forbidden by Art. III.

3.22 Direct diminution of judicial remuneration: Congress had enacted legislation which linked judicial salaries to automatic increases in the salaries of other officials. However, Congress took action on a number of occasions to stop these increases. This action was challenged in *United States v Will*.¹⁴ The Supreme Court noted that in the case of two particular years, the law preventing the increase came into force before the increased remuneration vested in the judges. In these cases there was no breach of Art. III. However, in the case of two other years, the law preventing the increase came into force after the increase had come into effect, so the laws amounted to the diminution of judicial compensation and were in breach of Art. III.

3.23 The Government argued that the reduction of judicial salary was valid because it did not discriminate against judges. The reduction also applied to officials in the legislative and executive branches. Burger CJ, writing for the Court, concluded that where there is a direct reduction, the Constitution makes no exceptions for ‘non-discriminatory’ reductions.¹⁵ So a direct reduction of judicial salaries will be invalid even when it is non-discriminatory in its application.

3.24 Subsequently, in *Williams v United States*,¹⁶ it was argued that even where legislation blocking cost of living increases comes into effect before the increase vests, the legislation is invalid because it diminishes judicial compensation below the level that the law had previously entitled the judge to expect. This argument was

¹³ *United States v Hatter* 532 US 557 (2001).

¹⁴ *United States v Will* 449 US 200 (1980).

¹⁵ *United States v Will* 449 US 200 (1980), per Burger CJ at 226.

¹⁶ *Williams v United States* 240 F 3d 1019 (2001).

rejected by the United States Court of Appeals on the basis of the authority in *Will*. The Court reaffirmed that as long as the blocking legislation is passed by the Congress and approved by the President before the salary increase takes effect, it will be valid. The United States Supreme Court denied a writ of certiorari on 4 March 2002, with Breyer, Scalia and Kennedy JJ expressing their dissent on the basis that the case should be distinguished from *Will* and that there was a real issue to be determined.

3.25 Comment: In summary, there is no obligation on the Congress to increase salaries in accordance with inflation, but once such an increase vests, it cannot be revoked. While taxation may amount to an indirect diminution of judicial remuneration, new taxes may validly be applied to existing and future judges as long as the tax applies in a non-discriminatory manner. Direct reduction of judicial salaries is prohibited even if it is non-discriminatory.

Express and Implied Protection – Australia

3.26 Background: At the Commonwealth level, s.72 of the Australian Constitution protects the judicial independence of Justices of the High Court and the federal courts in two ways. It provides that they shall not be removed except by the Governor-General in Council, on an address from both Houses of Parliament on the ground of proved misbehaviour or incapacity. And it expressly prohibits the diminution of the remuneration of Justices of the High Court and federal courts during their continuance in office. Although this provision does not expressly apply to the States, it may be perhaps arguable that as the Commonwealth Constitution provides for the vesting of federal jurisdiction in State Courts, State Courts must be comprised of an independent judiciary, and that this requires the protection of the remuneration of judges from diminution during their term of office.¹⁷

3.27 Express and implied protection at the State level: The *Australian Constitutions Act No. 2 1850 (Imp)*¹⁸ provided for the governance of the colonies of New South Wales, Tasmania, South Australia and Victoria. Section 18 provided that it was not lawful for the Governor and Legislative Council of these colonies, by any Act, to "make any diminution in the salary of any judge to take effect during the continuance in office of any person being such judge at the time of the passing of such Act". The *Australian Constitutions Act No. 2 1850* also permitted the colonies to enact their own constitutions. This occurred in 1855.

¹⁷ Similar principles were applied by the High Court in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

¹⁸ 13 and 14 Vic. c. 59.

3.28 Section 40 of the *Constitution Act 1855 (NSW)*¹⁹ provided for judicial remuneration but reverted to the earlier wording of the *Commissions and Salaries of Judges Act 1760 (Imp)*.²⁰ It provided that salaries fixed by Act of Parliament shall be paid and payable to every judge for the time being so long as their commissions should continue and remain in force. No express reference was made to the prohibition of the diminution of a judge's salary. This provision was later transferred to legislation concerning the Supreme Court of New South Wales during a statutory consolidation exercise. Section 29(2) of the *Supreme Court Act 1970 (NSW)* still provides that the remuneration payable to each judge 'shall be paid to the judge so long as the judge's commission continues in force'. It does not directly prohibit the diminution of judicial remuneration.

3.29 However, in *Cooper v Commissioner of Income Tax for Queensland*²¹ the High Court interpreted the equivalent Queensland provision as meaning that a judge's salary may not be diminished during the continuance of a judge's commission. Griffith CJ considered that the words 'shall be paid' have the effect of prohibiting 'any reduction or diminution of the salary of a judge during his term of office' and that the word 'payable' has the effect of a permanent appropriation of the necessary money from the Consolidated Revenue Fund.²² Barton J considered the English origins of the provision and concluded that it was intended to protect judicial independence and that reduction of judicial salary, by statute, is therefore excluded.²³

3.30 The use of a 'standing' or 'permanent' appropriation was of importance. In Victoria in 1877-8 there was a constitutional crisis when the Legislative Council blocked the bill for the ordinary appropriations necessary to support the Government. The Government could not pay its public servants or its County Court judges, and so dismissed them.²⁴ Unlike Justices of the Supreme Court of Victoria, the County Court judges, at that time, held their office during Her Majesty's pleasure. The Supreme Court of Victoria dismissed a challenge to the validity of their dismissal.²⁵

¹⁹ 18 and 19 Vic. c. 54, Schedule 1.

²⁰ 1 Geo. III c. 23, s.III.

²¹ *Cooper v Commissioner of Income Tax for Queensland* (1907) 4 CLR 1304.

²² *Cooper v Commissioner of Income Tax for Queensland* (1907) 4 CLR 1304, per Griffith CJ at 1315

(Isaacs J agreeing at 1329). See also O'Connor J at 1322-3.

²³ *Cooper v Commissioner of Income Tax for Queensland* (1907) 4 CLR 1304, per Barton J at 1319.

²⁴ A Todd, *Parliamentary Government in the Colonies*, 2nd ed., 1893, pp.724-40

²⁵ *R v Rogers; ex parte Lewis* (1878) 4 VLR (L) 334. See also the concerns of the Governor concerning the validity of the dismissal: United Kingdom, *Sessional Papers of the House of Commons*, 1878, Vol 56, p. 825.

3.31 It follows that the permanent appropriation of the remuneration of judges in New South Wales and Queensland afforded them additional protection and supported their independence from the Executive.

3.32 Today, legislative provisions protecting judicial remuneration and tenure can be found in either State Constitutions or other Acts of Parliament. Provisions concerning the tenure and removal of judges are more likely to be found in Constitution Acts,²⁶ than provisions concerning remuneration.²⁷

3.33 Taxation: In *Cooper*, the High Court considered whether the imposition of income tax on a judge impermissibly diminishes his or her salary. The Court held that it did not.²⁸ Barton J observed that a general tax which applies to the whole community cannot be seen as an attempt to affect the independence of judges.²⁹

3.34 More recently, the Commonwealth Parliament imposed an additional tax upon the superannuation of high income earners. Government legal advisers were concerned that the imposition of such a tax, to the extent that it affected judicial pensions, might be in breach of s.72 of the Constitution. Accordingly, existing federal judges were excluded from the application of the tax.

3.35 However, the tax applied to any judges (State as well as federal) appointed in the future. In *Austin v. Commonwealth*³⁰, the High Court of Australia held by majority that the legislation was invalid on the ground that it cast a particular disability or burden upon the activities of the State in its constitutional functions. While the case turned on an issue of federalism, not on protection of judicial independence, the judgments refer to the North American decisions on that topic. Although the majority judgments do not rely upon them, Kirby J, in dissent, calls them in aid.

3.36 Express protection where services not rendered: In contrast to the general provisions protecting the remuneration of Justices of the Supreme Court, s.29 of the *District Courts Act* 1858 (NSW) provided that District Court Judges should be paid

²⁶ *Constitution Act* 1902 (NSW) s.53; *Constitution Act* 1975 (Vic) s.77(1); *Constitution Act* 1934 (SA) ss 74-75; *Constitution Act* 1867 (Qld) ss 15-16; *Constitution Act* 1899 (WA) ss 54-55; *Supreme Court (Judges' Independence) Act* 1857 (Tas) s.1.

²⁷ *Supreme Court Act* 1952 (NSW) s.29; *Constitution Act* 1975 (Vic) s.82; *Supreme Court Act* 1935 (SA) s.12; *Supreme Court Act* 1995 (Qld) s.227 and *Constitution Act* 1867 (Qld) s.17; *Judges Salaries and Pensions Act* 1950 (WA) s.5; *Supreme Court Act* 1887 (Tas) s.7.

²⁸ *Cooper v Commissioner of Income Tax for Queensland* (1907) 4 CLR 1304, per Griffith CJ at 1316 (Isaacs J agreeing at 1329); per Barton J at 1319-20; per O'Connor J at 1323; and per Higgins J at 1333-4.

²⁹ *Cooper v Commissioner of Income Tax for Queensland* (1907) 4 CLR 1304, per Barton J at 1319-20.

³⁰ [2003] HCA 3, 5 February, 2003.

‘an annual salary not less than £1000, which sum shall not be diminished during the continuance of such person in the office of District Court Judge’. The question arose in *Meymott v Piddington*³¹ whether a judge’s remuneration could be reduced when he had declined to perform his services as a judge. Judge Meymott apparently had not been ready and willing to perform his services as a judge and the Government reduced his salary accordingly. He sued for the balance of the £1000 guaranteed him by s.29. In its defence the Government argued that the judge had not provided services in exchange for the salary and that it had had to engage another barrister to perform his duties. It sought to set off its claim against the judge’s salary.

3.37 A majority of the Supreme Court upheld the protection provided in s.29 and concluded that it gave no right to the Government to reduce the judge’s salary, regardless of his performance. Their Honours concluded that the only remedy for the failure of a judge to perform his duties is removal from office.³² The Court again emphasized the principle of judicial independence as inherited from England and deriving from the Act of Settlement. Sir James Martin CJ concluded:

[I]t is to secure the independence of the Judges that their salaries have been fixed, and that the Legislature has said that those salaries shall not be diminished. It seems to me that the Government is absolutely prohibited from reducing the salaries of those Judges for any cause whatever. If it has the power of reducing at all, it may make the salaries less by any sum up to the whole amount, and it will virtually be in the power of the Government to say whether a Judge shall be paid at all or not... This is not the way to deal with misbehaviour on the part of the Judges – the only way is to remove them.³³

3.38 Faucett J reached the same conclusion,³⁴ and Hargrave J dissented. While accepting the importance of judicial independence, he noted that the salaries of judges are not given as a mere honorarium, but are payment for the performance of services. He considered that a judge is unable to demand payment for services he refuses to perform.³⁵

3.39 Comment: Although there has been little litigation in Australia concerning judicial remuneration, courts have been inclined to interpret existing provisions in the light of Australia’s English heritage and have reinforced the principle of judicial independence. While the High Court in *Cooper’s* case did not consider that a

³¹ *Meymott v Piddington* Knox 306.

³² *Meymott v Piddington* Knox 306, per Martin CJ at 312-3; and per Faucett J at 315.

³³ *Meymott v Piddington* Knox 306, per Martin CJ at 312-3.

³⁴ *Meymott v Piddington* Knox 306, per Faucett J at 315.

³⁵ *Meymott v Piddington* Knox 306, per Hargrave J at 313.

general measure of taxation applicable to all breached the requirements of judicial independence, the Commonwealth Government and Parliament have remained cautious about imposing extra taxes which affect judicial remuneration and pensions.

Implied constitutional protection – Canada

3.40 Background: The principle of judicial independence in Canada is in large measure an unwritten principle. The Canadian Constitution contains some express provisions that touch on judicial independence. Section 100 provides that salaries, allowances and pensions of the judges of superior district and county courts, subject to two exceptions, and of certain admiralty courts, "shall be fixed and provided by the Parliament of Canada". The Canadian Charter of Rights and Freedoms, in s.11(d), also refers to the independence of the judiciary, when giving a criminal defendant the right to a fair trial before an independent and impartial tribunal. The constitutional provisions are by no means comprehensive.

3.41 Nevertheless, the Canadian Supreme Court has identified a broader constitutional principle of judicial independence.

3.42 Unwritten constitutional principle: Lamer CJC stated the Canadian position in these terms:

Notwithstanding the presence of s.11(d) of the *Charter* and ss 96-100 of the *Constitution Act 1867*, I am of the view that judicial independence is at root an *unwritten* constitutional principle, in the sense that it is exterior to the particular sections of the *Constitution Acts*. The existence of that principle, whose origins can be traced to the *Act of Settlement 1701* is recognized and affirmed by the preamble to the *Constitution Act 1867*. The specific provisions of the *Constitution Acts 1867-1982* merely "elaborate that principle in the institutional apparatus which they create or contemplate".³⁶

3.43 Section 11(d) of the Canadian Charter provides that any person charged with an offence has the right 'to be presumed innocent until proven guilty according to law in a fair and public hearing by an *independent and impartial tribunal*' [emphasis added]. In a series of cases, the Supreme Court has interpreted this provision in the light of the general implication of judicial independence, so as to protect judicial remuneration.

³⁶ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3; 150 DLR (4th) 577, per Lamer CJC (L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ concurring), at 617.

3.44 The application of the principle to judicial remuneration: In *Valente v The Queen*³⁷ the Canadian Supreme Court held that s.11(d) of the Charter mandated a guarantee of financial security which is necessary for individual judges to be truly independent. Judicial salaries must be secured by law and not subject to arbitrary interference by the executive.

3.45 The following year, in *Beauregard v Canada*,³⁸ the Supreme Court rejected a constitutional challenge to a federal pension scheme for superior court judges. It was argued that the introduction of the new scheme resulted in a reduction in judicial salary. While the Court did not accept in fact that there was a reduction, it suggested that a ‘non-discriminatory’ reduction in judicial remuneration would not be unconstitutional.

3.46 This suggestion was carried further in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*.³⁹ The case involved challenges to the reduction of judicial remuneration in a number of provinces. In this case the Supreme Court set out the constitutional constraints implied by judicial independence, and imposed obligations upon the legislature to establish an independent system for the assessment of judicial remuneration. Lamer CJC said:

[133] *First*, as a general constitutional principle, the salaries of provincial court judges can be reduced, increased or frozen, either as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds, or as part of a measure which is directed at provincial court judges as a class. However, any changes to or freezes in judicial remuneration require prior recourse to a special process, which is independent, effective and objective, for determining judicial remuneration, to avoid the possibility of, or the appearance of, political interference through economic manipulation. What judicial independence requires is an independent body, along the lines of the bodies that exist in many provinces and at the federal level to set or recommend the levels of judicial remuneration. Those bodies are often referred to as commissions... Governments are constitutionally bound to go through the commission process. The recommendations of the commission would not be binding on the executive or the legislature. Nevertheless, though these recommendations are non-binding they should not be set aside lightly, and if the executive or the legislature chooses to depart from them, it has to justify its decision – if need

³⁷ *Valente v The Queen* [1985] 2 SCR 673; 24 DLR (4th) 161.

³⁸ *Beauregard v Canada* [1986] 2 SCR 56; 30 DLR (4th) 481.

³⁹ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3; 150 DLR (4th) 577

be, in a court of law. As I explain below, when governments propose to single out judges as a class for a pay reduction, the burden of justification will be heavy.⁴⁰

The test for justifying departure is the standard of rationality.

3.47 Lamer CJC's second principle was that under no circumstances is it permissible for the judiciary to engage in negotiations over remuneration with the executive or the legislature. He noted that salary negotiations are 'indelibly political because remuneration from the public purse is an inherently political issue'.⁴¹

3.48 The Chief Justice's third principle concerns a base level of remuneration: [135] *Third*, and finally, any reductions to judicial remuneration, including *de facto* reductions through the erosion of judicial salaries by inflation, cannot take those salaries below a basic minimum level of remuneration which is required for the office of a judge. Public confidence in the independence of the judiciary would be undermined if judges were paid at such a low rate that they could be perceived as susceptible to political pressure through economic manipulation, as is witnessed in many countries.⁴²

3.49 As a consequence of this judgment, judicial remuneration commissions have been set up in all provinces, as well as at the federal level.

3.50 The most recent major case on the subject is *Mackin v New Brunswick (Minister of Finance)*.⁴³ The Province of New Brunswick had abolished the system of supernumerary judges, under which judges of retirement age could opt to continue as a judge, bearing approximately 40% of a judicial workload, for full salary. This system was replaced by the establishment of a panel of retired judges who were to be paid on a per diem basis. The legislation was challenged on the ground that it reduced financial benefits available to judges and had not been approved by an independent body.

3.51 A majority of the Court, L'Heureux-Dubé, Gonthier, Iacobucci, Major and Arbour JJ, held that the legislation was constitutionally invalid.⁴⁴ They noted that

⁴⁰ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3; 150 DLR (4th) 577, per Lamer CJC at 637.

⁴¹ *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3; 150 DLR (4th) 577, per Lamer CJC at 637-8.

⁴² *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3; 150 DLR (4th) 577, per Lamer CJC at 638.

⁴³ *Mackin v New Brunswick (Minister of Finance)* [2002] SCC 13.

⁴⁴ Binnie and Le Bel JJ dissented.

the independence of the judiciary is essential in maintaining public confidence in the judicial system.⁴⁵ That independence must not only exist in fact, but be seen to exist. This requires the institutionalization of legal mechanisms of the essential characteristics of judicial independence, namely financial security, security of tenure and administrative independence.⁴⁶ The majority stressed the importance of the three principles set out by Lamer CJC in *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*.

3.52 The majority found that the system of supernumerary judges constituted an economic benefit for the judges, who had planned their economic and financial affairs with reference to it. They concluded that ‘there is no distinction in principle between a straight salary cut and the elimination of offices that offer a clear economic benefit’. Both raise political issues and could be seen as interference with the independence of the judiciary by means of financial manipulation.⁴⁷ Accordingly, such a change had to pass through the ‘institutional filter of an independent, effective and objective body’ to ensure that the relationship between the judiciary and the executive and legislative branches is depoliticized.⁴⁸

3.53 Comment: The Canadian Supreme Court has held that the reference of all matters concerning judicial remuneration to an independent body is a constitutional requirement, and that although the executive and the legislature are not bound by its recommendations, they must justify any diversion from them on the basis of rationality. As will appear, the Canadian reference of matters relating to judicial remuneration to an independent body is consistent with the practice that has been adopted in the United Kingdom, Australia and New Zealand. That practice is also consistent with the principle, now increasingly accepted, that direct negotiation by the judiciary with other branches of government over judicial remuneration is open to manipulation and incompatible with judicial independence.

3.54 On the other hand, the Canadian view that, subject to prior recourse to an independent body, judicial salaries can be reduced unilaterally as part of an overall economic measure affecting the salaries of officials paid from public funds finds no support in the United States, the United Kingdom, Australia, New Zealand and Singapore where the prohibition against reduction of judicial remuneration is absolute.

⁴⁵ *Mackin v New Brunswick (Minister of Finance)* [2002] SCC 13, per Gonthier J at [38].

⁴⁶ *Mackin v New Brunswick (Minister of Finance)* [2002] SCC 13, per Gonthier J at [40].

⁴⁷ *Mackin v New Brunswick (Minister of Finance)* [2002] SCC 13, per Gonthier J at [68].

⁴⁸ *Mackin v New Brunswick (Minister of Finance)* [2002] SCC 13, per Gonthier J at [69].

3.55 The Canadian approach is discussed and criticised in the course of the consideration in Chapter Six of the question whether there should be an absolute or qualified prohibition against reduction in judicial remuneration.

CHAPTER FOUR

JUDICIAL REMUNERATION - POSITIONS IN VARIOUS JURISDICTIONS

UNITED KINGDOM

4.1 Legislative Basis - Section 12 of the *Supreme Court Act* 1981 (UK) provides for the remuneration of Judges of the Supreme Court. Section 18 of the *Courts Act* 1971 (UK) provides for the remuneration of Circuit judges.

4.2 Salaries payable under s.12 of the Supreme Court Act 1981 to Judges of the Supreme Court, other than the Lord Chancellor, are charged on and payable out of the Consolidated Revenue Fund.¹ Salaries payable to Circuit judges under s.18 of the Courts Act 1971 are also charged on and payable under the Consolidated Revenue Fund.²

4.3 Background - As noted in Chapter 2 of this report, s.III of the *Act of Settlement* 1701 requires that the judges' salaries be ascertained and established, while the *Courts Act* 1971 and the *Supreme Court Act* 1981, expressly provide that the salaries of Circuit judges and Supreme Court Judges "may be increased but not reduced".

4.4 Before 1825, judges' income derived from fees and the sale of offices. Between 1825 and 1965, the pay of the higher judiciary was fixed by statute; an Act of Parliament was needed to alter salaries. Between 1965 and 1973 pay was fixed by Order in Council which required an affirmative resolution of both Houses of Parliament. Thereafter, various statutory provisions gave the Lord Chancellor and the Secretary of State for Scotland the right to increase, but not to reduce, all judicial salaries (Report No. 51, Twenty-fourth Report on Senior Salaries, vol. 2, para. 1.3).

4.5 Body that sets remuneration - In May 1971, the United Kingdom Government appointed the Review Body on Top Salaries to advise on the remuneration of key public servants including the judiciary. In July 1993 the

¹ Section 12(5)

² Section 18(2)(a)

Government renamed the body The Review Body on Senior Salaries and revised its terms of reference. The terms of reference were revised again in 1998.

4.6 The Review Body was established by executive appointment; it has no statutory backing. It consists of eleven members including the Chairman, Sir Michael Perry GBE. The Secretariat is provided by the Office of Manpower Economics. The Committee is divided into sub-committees, one of which is the Judicial Sub-Committee. The Judicial Sub-committee has consisted of three members: Mr Michael Beloff QC (Chairman), Mr George Staple CB, QC, Solicitor and Professor Sir David Williams QC DL, formerly Vice-Chancellor of Cambridge University. On the expiration of Mr Beloff's term of appointment, Mr David Clayman (formerly Managing Director Esso UK Plc, and the longest serving member of the Review Body) was appointed Chairman. The Judicial Sub-committee prepares a report on judicial salaries which is then considered by the entire Committee before it finalises its report.

4.7 The Review Body judicial remit covers around 1,850 individuals in over 70 categories of post covering the whole of the United Kingdom. For salary purposes they are divided into nine salary groups, the members of each group receiving the same salary. The Review Body undertakes an annual review of salary levels. In addition to the annual review, the Review Body from time to time undertakes a fundamental review of the salary structure to assess whether it remains appropriate and whether each post is correctly placed on the salary groupings. In 2000 the Judicial Sub-committee was asked to carry out such a review. The results of that review were published in the Committee's Report No. 51, vol. 2. Detailed reference to that Report will be made in Chapter 5 because it highlights fundamental issues which arise in connection with judicial remuneration and because it deals comprehensively and instructively with these issues.

4.8 Factors taken into account - The current terms of reference of the Review Body provide:

" In reaching its recommendations, the Review Body is to have regard to the following considerations:

- the need to recruit, retain and motivate suitably able and qualified people to exercise their different responsibilities;
- Government policies for improving the public services including the requirement on departments to meet the output targets for the delivery of departmental services;
- the funds available to departments as set out in the Government's departmental expenditure limits; and

- the government's inflation target.

In making recommendations, the Review Body shall consider any factors that the Government and other witnesses may draw to its attention. In particular it shall have regard to:

- differences in terms and conditions of employment between the public and private sector and between the remit groups, taking account of relative job security and the value of benefits in kind;
- changes in national pay systems, including flexibility and the reward of success;
- job weight in differentiating the remuneration of particular posts; and
- the need to maintain broad linkage between the remuneration of the three main remit groups, while allowing sufficient flexibility to take account of the circumstances of each group.

The Review Body may make other recommendations as it sees fit:

- to ensure that, as appropriate, the remuneration of the remit groups relates coherently to that of their subordinates, encourages efficiency and effectiveness, and takes account of the different management and organisational structures that may be in place from time to time;
- to relate reward to performance where appropriate;
- to maintain the confidence of those covered by the Review Body's remit that its recommendations have been properly and fairly determined; and
- to ensure that the remuneration of those covered by the remit is consistent with the Government's equal opportunities policy.

The Review Body will take account of the evidence it receives about wider economic considerations and the affordability of its recommendations."

4.9 Frequency of determination – Annual

4.10 Method of determination – The Review Body receives written and oral evidence, conducts job evaluation exercises, undertakes earnings surveys, and considers international material and literature. It considers all the evidence and the above factors, before reaching its recommendations.

4.11 Consultation – Consultation is undertaken with representatives of affected groups.

4.12 Implementation – The Review Body makes recommendations to the Government. Its reports are tabled in the Parliament. It is up to the Government to decide whether to implement its recommendations. If so, money must be appropriated by Parliament.

4.13 Guarantee of no reduction of salary – Act of Settlement 1700 (Imp), *Courts Act* 1971 (UK): s.18(2)(d); *Supreme Court Act* 1981 (UK): s.12(3); *Administration of Justice Act* 1973 (UK): s.9(3). The prohibition against reduction is absolute.

AUSTRALIA – FEDERAL JUDGES

4.14 Legislative basis – Section 72(iii) of the Australian Constitution provides that federal judges shall receive such remuneration as the Parliament may fix, but it ‘shall not be diminished during their continuance in office’.

4.15 Section 12 of the *High Court of Australia Act* 1979 (Cth) provides that the Chief Justice and other Justices of the High Court shall receive salary, annual allowances and travel expense allowances at such respective rates as are fixed from time to time by the Parliament. Section 13 is a standing appropriation of such salaries and allowances from the Consolidated Revenue Fund.

4.16 Section 9 of the *Federal Court of Australia Act* 1976 (Cth) and s.25 of the *Family Law Act* 1975, make the equivalent provisions in relation to judges of the Federal Court and the Family Court, respectively.

4.17 Background – From 1901 to the 1950s, there were few increases in judicial remuneration. Remuneration was set by Act of Parliament. From the 1950s to 1973, judicial remuneration was increased on a more regular basis, still through legislation. In 1973 the Commonwealth Remuneration Tribunal was established. It

was originally required to be chaired by a judge, but this requirement was removed in 1992.

4.18 While the Tribunal made ‘determinations’ in relation to the remuneration of public servants, it initially only ‘advised’ on judicial remuneration because s.72(iii) of the Constitution provides that judicial remuneration shall be fixed by the Parliament. There was a concern that the use of a Tribunal may therefore be unconstitutional. This concern has since been dismissed, and the *Remuneration Tribunal Act 1973 (Cth)* was amended in 1989 so that the Tribunal now ‘determines’ judicial remuneration (subject to disallowance by either House of the Parliament).

4.19 In 1988, the Tribunal recommended a large increase in judicial remuneration, due to the comparatively low levels of judicial remuneration at the Commonwealth level. It had become difficult to fill judicial offices and some judges had left office to return to the bar. The Government rejected the increase and there was significant public controversy about the remuneration of the judiciary.

4.20 In 2001-2 the Tribunal undertook a major review of the remuneration of judicial and related offices. The review was published in November 2002. It is discussed in detail in Chapter 5. The Government’s response to the review has not yet been announced.

4.21 Body that sets remuneration – The body which sets judicial remuneration is the Remuneration Tribunal - *Remuneration Tribunal Act 1973 (Cth)*: s.7. The Tribunal is comprised of three members appointed by the Governor-General on a part-time basis (s.4). The term of appointment is for no more than five years, but a member can be re-appointed. Members of Parliament, judges, public servants and other holders of public offices may not be members. Currently the tribunal is comprised of two business people and the Chief Executive of the Australian Stock Exchange (who was formerly head of the NSW Premier’s Department and Auditor-General in Victoria).

4.22 A member may be removed from office by the Governor-General for misbehaviour or mental or physical incapacity (s.9). The Tribunal makes determinations of the remuneration of Members of Parliament, Ministers, senior public servants, other public office holders and federal judges (s.7).

4.23 Factors taken into account – In its ‘Statement on 2001 Review of Judicial and Related Offices’ Remuneration’, the Tribunal made the following statement of the factors which it takes into account:

- **Judicial Independence:** In considering issues such as the level and appropriateness of remuneration, the Tribunal is mindful of the need to preserve the principle of judicial independence in the federal justice system.
- **Recruitment and Retention:** Judicial remuneration should be sufficient to attract and retain people appropriately qualified to serve as judges. The Tribunal found no evidence of difficulty in either recruiting or retaining judges since its 2000 review, noting that 11 appointments were made to the Federal and Family Courts and the Federal Magistrates Service in that period.
- **Workload and Related Factors:** In providing salary increases to judicial office holders, the Tribunal looks at factors such as the workloads being dealt with by the courts and how these may have varied from previous periods or may be expected to vary in the future. Any efficiency initiatives taken by the courts may also be relevant.
- **Remuneration comparisons:** The relativities of remuneration between judicial and related office holders within the federal jurisdiction and relativities between federal and other jurisdictions are considered. The Tribunal also takes into account remuneration levels in the corporate and government sectors and compares these to the remuneration arrangements applying to judicial and related office holders. As a reference point, it also has regard to increases in incomes reported throughout Australia for advocates at the Bar (where this information is available).

There is an informal agreement between Federal and State Attorneys-General that the rate of base salary for State Supreme Court Judges will be fixed up to a maximum of 85% of that paid to High Court Judges. That agreement has generally been maintained and was endorsed by the 2000 meeting of the Judicial Remuneration Co-ordination Group.
- **Economic Circumstances:** Remuneration growth as measured by indices such as the Wage Cost Index (WCI), along with broader economic indicators, provides a barometer of remuneration growth in the general community.

4.24 Frequency of determination - The recent practice of the Tribunal has been to make an annual determination. In addition, it may undertake a comprehensive review from time to time, as it has done during 2001-2002.

4.25 Method of determination – The Tribunal may inform itself in such manner as it considers fit. It may receive written and oral submissions. The Tribunal is not required to conduct proceedings in a formal manner and is not bound by the rules of evidence (s.11). In fact, the Tribunal receives written submissions from courts and judges. On occasions it has conducted interviews with representatives of courts. It considers the information it has received and takes into account the factors listed above in making its determination.

4.26 Consultation – In making its 2001 determination and in undertaking its major review in 2001-2, the Tribunal consulted with ‘stakeholders’ including:

- the Commonwealth Government;
- the four Courts of the Federal jurisdiction;
- a number of individual office holders affected by the determination;
- State and Territory remuneration tribunals with responsibilities for judicial salaries in other jurisdictions; and
- some State Bar Associations.

4.27 Implementation – The Tribunal’s determinations are ‘disallowable instruments’, which must be tabled before both Houses of the Federal Parliament and may be disallowed ("disapproved") by either House (s.7(8)). The determination, in relation to judicial officers, does not take effect until after the period during which it may be disallowed has finished. Standing appropriations permit payment of salaries and allowances once they come into effect.

4.28 Guarantee of no reduction of salary – Section 72(iii) of the Australian Constitution provides that the remuneration of a federal judge (including a Justice of the High Court) shall not be diminished during continuance in office.

NEW SOUTH WALES – STATE JUDGES

4.29 Legislative basis – Section 29 of the *Supreme Court Act 1952* (NSW) provides that the Justices of the Supreme Court are entitled to be paid remuneration in accordance with the *Statutory and Other Offices Remuneration Act 1975* (NSW).

4.30 All remuneration payable to the holder of a judicial office by virtue of a determination that is in force is payable out of the Consolidated Fund which is appropriated accordingly.³

4.31 Background – Prior to 1975, judicial remuneration was set by Act of Parliament. Between 1951 and 1955, judicial salaries were adjusted automatically by reference to changes in the basic wage, but the system proved inadequate.

4.32 The Statutory and Other Offices Remuneration Tribunal was established in 1974. It makes determinations which are subject to disallowance. In 1982, instead of disallowing a determination, the Parliament enacted legislation to override it: *Remuneration (Special Provisions) Act 1982* (NSW), on grounds of economic restraint. On the whole, however, the Tribunal's determinations come into effect without interference.

4.33 Body that sets remuneration – The Statutory and Other Offices Remuneration Tribunal sets judicial remuneration - *Statutory and Other Offices Remuneration Act 1975* (NSW): s.13. The Tribunal is comprised of a person (who is not an executive office holder or retired judge) appointed by the Governor, and assisted by three assessors. One assessor is the Secretary of the Department of Industrial Relations, one is the Director-General of the Premier's Department and the third is a person appointed by the Governor on the nomination of the Minister, who has special knowledge relating to salaries payable to persons engaged in commercial, banking, insurance, industrial or other activities at executive or management level. In exercising the Tribunal's powers, the Tribunal is to be assisted by the assessors and take into consideration their views and recommendations (s.7(2)).

4.34 The Tribunal Member vacates his or her office if the Member becomes bankrupt or a mental patient, is convicted of an indictable offence, resigns, or is removed from office (s.8(1)). The Governor may remove the Member from office for any cause which seems to the Governor to be sufficient (s.8(2)). The current

³ Statutory and Other Offices Remuneration Act 1975, s.11(3).

Tribunal Member is a former head of the Premier's Department and current head of a number of government boards and authorities.

4.35 The function of the Tribunal is to make determinations of the salary and some allowances of senior public servants, holders of statutory positions and judges.

4.36 Factors taken into account – The factors that the Tribunal takes into account include:

- changes in workloads (including increases in jurisdiction and productivity increases through more efficient administration);
- the nexus of a maximum salary of 85% of that of a High Court Justice (but an extra amount is added to account for different conditions);
- comparison with remuneration of others (including public sector and private sector salary increases); and
- economic indices and budgetary outlook.

4.37 Method of determination – Submissions are put to the Tribunal by the Government, relevant judicial officers and other interested persons. The Tribunal considers this material in the light of the above factors.

4.38 Consultation – The Tribunal may invite submissions from office holders, Ministers, members of statutory bodies and Departments of the Government and any other persons.

4.39 Implementation – The Tribunal makes reports to Ministers of its determination. The report is required to be tabled in Parliament. Either House may pass a resolution disallowing it. (ss 18 – 19A). If not disallowed, it takes effect.

4.40 Frequency of determination - Annual.

4.41 Commonwealth/State Agreement as to relativities - At a Special Premiers Conference in 1990 it was agreed that arrangements would be pursued to co-ordinate future increases in judicial remuneration, with a maximum remuneration standard to be set. It was later agreed that the base salary for Supreme Court Judges would be a maximum of 85% of that paid to High Court Justices.

4.42 The Commonwealth and State Tribunals continue to consult on an informal basis before making decisions on judicial salaries. Consultation is subject to the tribunals remaining independent.

4.43 Guarantee of no salary reduction – Section 21(1) of the *Statutory and Other Offices Remuneration Act 1975* (NSW) provides that a determination does not operate so as to reduce the rate at which remuneration is payable to the holder of a judicial office.

VICTORIA – STATE JUDGES

4.44 Legislative basis – Section 82 of the *Constitution Act 1975* (Vic) provides that the Justices of the Supreme Court (including the Court of Appeal) shall be paid a salary of a specified amount or such higher amount certified by the Attorney-General under the *Judicial Remuneration Tribunal Act 1995* (Vic). Allowances are also to be adjusted under that Act.

4.45 Background – Judicial remuneration was set by Parliament until 1980, when the function was delegated to the Attorney-General. The Attorney-General was required to apply certain criteria in assessing judicial remuneration, including reference to awards of the Australian Conciliation and Arbitration Commission, and later the determinations of the Commonwealth Remuneration Tribunal.

4.46 A review of judicial remuneration was carried out in 1992 by the Hon. Xavier Connor QC. It recommended the creation of a three member independent tribunal to determine judicial remuneration annually, subject to disallowance by both Houses of Parliament.

4.47 In 1995 the Judicial Remuneration Tribunal was established. Its recommendations were often overridden by the Government, leading to controversy. The *Judicial Remuneration Tribunal Act 1995* has recently been the subject of major amendments enacted in March 2002. These amendments provide for the making of ‘determinations’ which may be disallowed by either House of Parliament.

4.48 Body that sets remuneration – The Judicial Remuneration Tribunal sets judicial remuneration in Victoria – *Judicial Remuneration Tribunal Act 1995* (Vic): s.4. The Tribunal is comprised of three members, appointed on a part-time basis by the Governor-in-Council on the recommendation of the Attorney-General. A person is not eligible for appointment if he or she is or has been a State or Commonwealth judge or a person who holds an office of profit under the Crown (except the Commissioner for Public Employment).

4.49 A Tribunal member holds office for a term not exceeding 5 years, but is eligible for re-appointment (s.6). A Tribunal member's office becomes vacant if the member becomes bankrupt, is convicted of an indictable offence, or resigns. The Governor-in-Council may remove a member for misconduct, neglect of duty or physical or mental incapacity (s.7). The current Tribunal was appointed in July 2002 and comprises a former Commonwealth Attorney-General, a Professor of Law and a former Public Service Commissioner.

4.50 The functions of the Tribunal are to: (a) make determinations of salaries and allowances for judicial office holders, including adjustments; and (b) make recommendations to the Attorney-General concerning leave, long service leave, travel entitlements, reimbursement of work related expenses, the provision of motor vehicles for private use, pensions and superannuation for judicial office holders (s.11). The Attorney-General may also refer matters relating to salaries, allowances or conditions of service of judicial office holders to the Tribunal for an advisory opinion.

4.51 Factors taken into account – In making a determination or a recommendation, or giving an advisory opinion, s.12(1A) of the *Judicial Remuneration Tribunal Act 1995* (Vic) requires the Tribunal to consider:

- the importance of the judicial function to the community;
- the need to maintain the judiciary's standing in the community;
- the need to attract and retain suitably qualified candidates to judicial office;
- movements in judicial remuneration levels in other Australian jurisdictions;
- movements in the following indicators –
 - the Consumer Price Index;
 - average weekly ordinary time earnings;
 - executive salaries, including those executives in the Victorian Public Service
- improvements in operational efficiency;
- work value changes;
- factors relevant to Victoria including –
 - current public sector wages policy;
 - Victoria's economic circumstances;
 - the capacity of the State to meet a proposed increase in judicial salaries, allowances or conditions of service;
 - any other relevant local factors; and

- relativities between Victorian courts and tribunals.

4.52 Method of determination – The Tribunal may inform itself in such manner as it thinks fit and may receive written or oral statements. It is not required to conduct formal proceedings and is not bound by rules of evidence (*Judicial Remuneration Tribunal Act 1995* (Vic): s.12). The Tribunal may appoint persons to assist it in its inquiry (s.12(2)). The Tribunal considers the evidence it has received in light of the above factors and makes its determinations and recommendations.

4.53 Frequency of determination - Annual.

4.54 Consultation – The Tribunal receives submissions from the Government and representatives of the relevant judicial groups.

4.55 Implementation – The Tribunal is required to report to the Attorney-General at intervals of between one and two years. Reports are to be gazetted within 21 days of their receipt (*Judicial Remuneration Tribunal Act 1995* (Vic): s.13). The Attorney-General must table any report within ten sitting days of receiving it. A ‘determination’ (on salaries or allowances) cannot be varied by the Government – it can only be disallowed by resolution of a House within 15 sitting days of being tabled (s.14A(1)). If it is not disallowed, the Attorney-General is required to give effect to the determination (s.14A(2)). The Attorney-General can, however, decide not to accept or to vary a ‘recommendation’ (concerning conditions of employment of judges). If so, the Attorney-General must table reasons for doing so within 10 sitting days after the report is tabled (s.14). The Attorney-General must issue a certificate implementing the recommendations, except insofar as the Attorney-General does not accept them or varies them (s.15(1)). Sub-section 82(7) of the *Constitution Act 1975* (Vic) is a standing appropriation for salaries and allowances payable under s.82 as adjusted by the Attorney-General according to a certificate.

4.56 Guarantee of no salary reduction – Sub-section 82(6B) of the *Constitution Act 1975* (Vic) provides that neither judicial salaries nor the aggregate value of allowances can be reduced while a judge’s commission remains in force.

NEW ZEALAND

4.57 Legislative basis – Sub-section 9A(1) of the *Judicature Act 1908* (NZ) provides that there shall be paid to the Chief Justice, the President of the Court of

Appeal, the Judges of the Court of Appeal and the Judges of the High Court, salaries and allowances as determined by the Higher Salaries Commission, and such additional allowances, being travelling allowances or other incidental or minor allowances, as may be determined from time to time by the Governor-General.

4.58 Section 9A(1) of the *Judicature Act* 1908 provides that the salaries and allowances payable to High Court Judges, as determined by the Higher Salaries Commission, are to be paid ‘out of public money, without further appropriation than this section’.

4.59 Background - Prior to 1985, the Higher Salaries Commission made recommendations to the Minister for Justice and it was up to the Government to decide whether to implement them. This was changed in 1985 so that the Higher Salaries Commission makes the actual determination, which can only be overturned by legislation.

4.60 Body that sets remuneration – The Higher Salaries Commission sets judicial remuneration. It is established by the *Higher Salaries Commission Act* 1977 (NZ). It is comprised of three members appointed by the Governor-General by Order in Council. Its members serve a term not exceeding three years, but may be reappointed. A member may be removed by the Governor-General for disability, bankruptcy, neglect of duty or misconduct, proved to the satisfaction of the Governor-General.

4.61 The Higher Salaries Commission is currently comprised of an actuary who has experience in the insurance and superannuation industries, the Chief Executive Officer of Radio New Zealand, and a solicitor who practices in the area of commercial law, financial and investment services and superannuation.

4.62 Section 12 provides that the Commission is to determine the salaries of Members of the House of Representatives, senior public servants, senior university officials, senior local authority officers and doctors and dentists who are employed by the Health Service. Section 12B provides that it is to determine the salary and principal allowances of various judicial officers. It also makes recommendations with regard to government superannuation.

4.63 Factors taken into account – Section 18 of the *Higher Salaries Commission Act* 1977 requires the Commission to have regard in particular to the following criteria:

- (1) the need to achieve and maintain fair relativity with the private sector in the levels of rates of salaries; and
- (2) the criteria specified in sections 9 to 12 of the *State Services Conditions of Employment Act 1977*, as far as applicable and with the necessary modifications, as if every reference therein to the State services included a reference to service in the statutory office.

4.64 Further, in having regard to external comparability, the Commission is required to take into account conditions of service (including tenure and superannuation rights, allowances, benefits and other emoluments whether in money or not), enjoyed by or received by the persons whose salaries are under review and those enjoyed by or received by the persons or members of the group of persons whose salaries and conditions of employment are, in the opinion of the Commission, comparable with those of the persons or members of the group of persons whose salaries are under review.

4.65 In determining allowances, the Commission is required to have regard to the requirements of the positions concerned.

4.66 Method of determination – The Commission undertakes major surveys of the remuneration of chief executive officers and senior staff of both private and public sector organizations. It also holds meetings with interested parties to discuss the submissions it has received. It then considers the submissions and other research material, and the factors that it must or may take into account, before making its determination.

4.67 Frequency of determination - Annual.

4.68 Consultation – Section 21 provides that any person or body may make a written submission to the Commission. Representatives of persons affected by the determination may also make oral submissions to the Commission if they so choose. Section 32 also provides for consultation with affected bodies after a determination is made, if it considers that the remuneration set by the Commission will or may tend to lead to unreasonable disparities or inappropriate relativities with remuneration determined by the Commission.

4.69 Implementation - The determination of the Commission takes effect according to its tenor: *Higher Salaries Commission Act 1977*, s.14.

4.70 Guarantee of no reduction of salary – Section 24 of the *Constitution Act* 1986 provides that the salary of a Judge of the High Court shall not be reduced during the continuance of the judge’s commission. Sub-section 6(2) of the *District Courts Act* 1947 makes the same provision for District Court Judges. Section 24 of the *Higher Salaries Commission Act* 1977 also provides that the remuneration of a judicial office holder shall not be reduced below the remuneration that he or she is lawfully receiving.

CANADA

4.71 Legislative basis – Section 100 of the *Constitution Act* 1867 (Can) provides that the salaries, allowances and pensions of the Judges of the Superior, District and County Courts and of the Admiralty Courts in cases where the judges thereof are for the time being paid by salary, shall be fixed and provided by the Parliament of Canada.

4.72 Section 53(1) of the Judges Act 1985 provides that salaries, allowances and annuities payable under the Act shall be paid out of the Consolidated Revenue Fund.

4.73 Background – Prior to 1982, judicial remuneration was reviewed by advisory committees. A commission was established in 1982 to make recommendations to the government every three years about judicial remuneration, but its recommendations were often ignored.

4.74 In the 1990s, three provincial governments passed legislation reducing the remuneration of provincial judges. This action was challenged in the courts, in some cases by defendants arguing that judges were not independent, and in other cases by the judges themselves. These cases were determined by the Canadian Supreme Court in *Reference: Re Remuneration of Judges of the Provincial Court of Prince Edward Island* [1997] 3 SCR 3; (1997) 150 DLR (4th) 577. The Court held that the legislature and government are under a constitutional obligation to refer questions relating to judges’ benefits (including increases, decreases, or freezes) to an independent commission. The government was not obliged to accept the recommendations of the commission, but if it did not do so, it must be able to justify its decision before a court on the basis of rationality. Further, the Court held that negotiations between the judiciary and the legislature or executive about judicial remuneration were prohibited, and that judicial remuneration may not be reduced below the level required by the status, dignity and responsibility of the office of

judge. The Federal Government and all Provinces have since established independent commissions.

4.75 Body that sets remuneration – The Judicial Compensation and Benefits Commission was established in 1999 - *Judges Act* 1985 (Can): s.26. It is required to complete an inquiry into judicial remuneration every four years (and is hence sometimes referred to as ‘The Quadrennial Commission’). Its members are appointed by the Governor in Council. One member is to be nominated by the Minister of Justice, one member is to be nominated by the Judiciary, and the Chair is to be nominated by the other two members (s.26.1). Each member holds office during good behaviour and may be removed for cause by the Governor in Council at any time. A member’s term of office is four years, and a member can be re-appointed for one further term.

4.76 At its establishment in 1999, the Tribunal was comprised of a Queen’s Counsel who was the former Chief Executive Officer of Hydro-Quebec, a barrister who was Past President of the Advocates’ Society, and the director of a public policy institute who has a doctorate in economics and was formerly Deputy Minister of Finance.

4.77 Factors taken into account – Section 26(1.1) of the *Judges Act* 1985 (Can) requires the Commission to consider:

- the prevailing economic conditions in Canada, including the cost of living and the overall economic and current financial position of the federal government;
- the role of financial security of the judiciary in ensuring judicial independence;
- the need to attract outstanding candidates to the judiciary;
- any other objective criteria that the Commission considers relevant.

4.78 Method of determination – The Commission considers information provided in submissions from interested parties and in response to questions asked by the Commission. The Commission also undertakes independent research and seeks expert advice. The members discuss the issues and the evidence and draw from it their conclusions and recommendations.

4.79 Consultation – An advertisement seeking public submissions is published in major newspapers. The Chair writes to provincial and territorial Ministers of Justice and Attorneys-General and to law societies seeking submissions or comments. In its

first inquiry, the Commission received submissions from 20 parties, including the Canadian Judges Conference and the Canadian Judicial Council. A public hearing was also held.

4.80 Implementation – The Commission makes recommendations to government, but it is up to the Government to decide to implement them, and the Parliament to pass the necessary legislation. The Minister for Justice must table the Commission’s report in the Parliament within ten sitting days of receiving it (*Judges Act* 1985 (Can): s.26(6)). The report must then be referred to a parliamentary committee, established for the purposes of considering it. The parliamentary committee may receive evidence and hold hearings, but must report back to the Parliament within 90 sitting days (s.26(6.1) – (6.2)). The Minister of Justice must respond to the Commission’s report within 6 months of receiving it (s.26(7)).

4.81 The Commission’s recommendations of 31 May 2000 were accepted by the Government and legislation to implement them was passed in June 2001.

4.82 Guarantee of no salary reduction – There is no express constitutional or legislative guarantee, however the Supreme Court has implied a degree of constitutional protection from the Canadian Constitution (and the Charter of Rights and Freedoms – especially s.11(d)).

UNITED STATES OF AMERICA

4.83 Legislative basis – Art. III of the United States Constitution provides that Judges of the Supreme Court and inferior courts created by Congress are to hold offices during good behaviour, and will, at stated times, receive for their services compensation which will not be diminished during their continuance in office.

4.84 Background – The protection of the independence of judges can be traced back to the Declaration of Independence which complained that the King had made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries.

4.85 As a result of early controversy attached to the raising of remuneration for congressmen, judicial remuneration has been linked to that of executive officers and Members of Congress (initially as a matter of practice, but later expressly in the *Ethics Reform Act* 1989.) The intention was to remove controversy, but the effect appears to have been to extend controversy and to limit judicial remuneration.

4.86 In 1967, Congress passed the *Federal Salary Act 1967* which established the Commission on Executive, Legislative and Judicial Salaries, known as the Quadrennial Commission. It was composed of persons from the private sector nominated by the President of the United States, the Speaker of the House of Representatives, the President of the Senate and the Chief Justice of the Supreme Court.

4.87 Its recommendations were rarely implemented, and it was abolished in 1989 by the *Ethics Reform Act 1989*, which provided for its replacement by a Citizens' Commission on Public Service and Compensation. The Commission is to be comprised of six members appointed by the leaders of the three branches of government and five to be selected from the public at large, to be drawn by the Administrator of General Services at random from voter registration lists (2 USCS s.352(1) and (4)). A person cannot serve as a member of the Commission if he or she is an officer of the Federal Government, or a registered lobbyist, or a parent, sibling, spouse, child or dependent relative of such persons. Section 352(3) provides that the persons appointed by the three branches of government shall be selected without regard to political affiliation and should be selected from among persons who have experience or expertise in such areas as government, personnel management, and public administration.

4.88 The Commission never came into being because no funds were appropriated for its operation, and neither the President nor Congress nominated its members. Accordingly, there is no independent body which reviews and proposes adjustments to judicial salaries.

4.89 In 1975, Congress enacted the *Executive Salary Cost-of-Living Adjustment Act 1975*, to provide automatic adjustments to executive salaries in response to changes in the cost of living and judicial salaries are linked to these automatic adjustments. The adjustments are based on changes in the Employment Cost Index, but cannot result in the diminution of the remuneration of a judge while the judge holds office (28 USCS s.461(a)). However, Congress has regularly acted to prevent the application of cost-of-living increases. Some were re-instated after the Supreme Court held in *United States v Will* 449 US 2000 (1980) that increases which had vested before Congress acted to revoke them could not be validly repealed because of the guarantee in Article III.

4.90 In the latter part of 2002, Congress took steps to ensure that, as from 1 January 2003, Art. III judges, along with members of Congress, the President's cabinet and sub-cabinet will receive a 3.1% increase in remuneration.

4.91 Body that sets remuneration – Congress.

4.92 Guarantee of no salary reduction – Art. III of the United States Constitution.

SINGAPORE

4.93 Legislative basis – Art. 98(6) of the Singapore Constitution provides that 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. Sub-section 2(1) of the *Judges' Remuneration Act* provides that there shall be paid to the Judges of the Supreme Court such annual pensionable salaries as the Minister may determine. Sub-section 2(2) provides that the judges shall also receive such pensionable and non-pensionable allowances and privileges as the Minister may determine (but not less than those of a public officer receiving the same pensionable salary).

4.94 Body that sets remuneration – The Minister.

4.95 Performance bonus pay – Singapore, unlike other major jurisdictions, has a performance pay bonus system. The bonus of the Chief Justice is decided by the Prime Minister. The Chief Justice decides the bonus of the other judges in the Supreme Court. In practice the Chief Justice has awarded across-the-board bonuses to both Judges of Appeal and to all judges and judicial commissioners of five months' bonus each per year (but four months each in the recession year of 2001) except on one occasion when one of the judges was awarded one month less than the others.

4.96 In the case of the lower Judiciary (District Judges and Magistrates) the bonus payable to each officer is dependent on the bonus scale (minimum to maximum) applicable to his grade within the Singapore Legal Service, and the number of months within his scale to be awarded to each officer is recommended by his Head of Department, and finally approved or amended by the Special Personnel Board of the Legal Service Commission which is chaired by the Chief Justice.

4.97 Factors taken into account – The Government takes into account comparison with the private sector, the need for competitive salaries to recruit and maintain a high standard of public officers and to avoid corruption, and the sacrifice involved in public service

4.98 Method of determination – Benchmarks are set, comparing positions with equivalent private sector positions, and discounting private sector salaries by one-third to achieve the relevant public sector benchmark. Relative percentages are to be maintained throughout the structure for the payment of judges, civil servants and Ministers.

4.99 Frequency of determination - Annual. Judges, judicial commissioners and civil servants can expect National Wage Council (NWC) adjustments, as long as the economy grows. Annual salary reviews coincide with NWC adjustments in July. The reviews factor in NWC adjustments and any interim salary changes which have taken place since the last general revision. General revisions take place at 5 year intervals.

4.100 Implementation – The Minister makes his or her determination by way of an order which is published in the Gazette (*Judges' Remuneration Act* (Sing): s.2(1)). A standing appropriation provides for the payment of such remuneration (*Constitution Act* (Sing): art. 98(6)).

4.101 Guarantee of no salary reduction – Article 98(8) of the Singapore Constitution provides that the remuneration and other terms of office (including pension rights) of a Judge of the Supreme Court shall not be altered to his disadvantage after his appointment.

4.102 In October 2001, the Supreme Court Judges totalling ten and comprising the Chief Justice, two Justices of Appeal and seven judges agreed to waive their constitutional protection and accepted salary reductions in line with salary reductions in the public sector.

CHAPTER FIVE

RECENT REVIEWS OF SYSTEMS OF JUDICIAL REMUNERATION

5.1 Both the United Kingdom and Australia have recently completed substantial reviews of the systems for the remuneration of judges in those countries. As these reviews address issues of relevance to Hong Kong, they are discussed in detail in this Chapter.

UNITED KINGDOM

Report No. 51, vol. 2

5.2 In addition to its annual reviews, the Review Body on Senior Salaries from time to time undertakes a fundamental review of salary structure to assess whether it remains appropriate. A fundamental review was commenced in 2000 of the judicial salary structure. It was undertaken by the Judicial Sub-committee of the Review Body. The Report of this review is contained in Volume 2 of the Review Body's Report No 51, published in February 2002.

5.3 Conduct of the Review - The Report stated that the Sub-committee's conclusions with respect to the fundamental review of the judicial salary structure were based on

"a range of sources including written and oral evidence, a job evaluation exercise, surveys of relevant earnings, an examination of wider remuneration issues and other evidence, including international experience, literature by or about the judiciary and lectures by serving judges".

(Report Summary, para. 3)

5.4 The Sub-committee received over 70 written submissions and oral evidence from 60 witnesses in the course of 38 oral hearings. In order to provide an objective comparison in relation to other posts, the Sub-committee commissioned Price Waterhouse Coopers (PWC) to conduct a job evaluation exercise which informed the Sub-committee's recommendations (Report, Summary, para. 4).

5.5 The Report noted that the representatives of the individual groups within the salary structure lacked familiarity with the relevant features or functions of the comparative group (Report No. 51, para. 1.13). It was to deal with this problem that

the job evaluation exercise was commissioned (Report No. 51, para. 1.14). (References to paragraphs hereafter are to paragraphs in Report No. 51.)

5.6 PWC first undertook a familiarisation exercise to ensure that they fully understood the work of the judiciary, its process and its continuing evolution and that they had sufficient background information to enable them to design an appropriate methodology and data collection approach. In conjunction with the Judicial Sub-committee and in consultation with members of the judiciary, they designed a questionnaire and identified six discrete "factors" against which each job could be measured. The factors were: nature of cases; complexity, ambiguity and specialisation; analysis and decision-making; impact of judgments and public statements/activities; conducting proceedings and communication skills; and administration, organisation and co-ordination. Interviews were conducted with over 130 individuals representing all types of judicial posts. An interview summary was agreed for each job. The questionnaire responses were then analysed and used to arrive at a job weighting for each category of post (Report No. 51, paras 1.15 - 1.16).

5.7 The Office of Manpower Economics carried out two studies of the receipts and expenses of lawyers. The larger was a survey of barristers and advocates in private practice, the pool from which most judges are appointed. These barristers and advocates, the Report said, "may be considered the most appropriate comparators for the judges themselves". The smaller survey was an up-dating of the annual survey of pre-appointment earnings of recently appointed judges.

5.8 Judicial pensions - The Sub-committee also took account of judicial pension entitlements as pensions are a significant element in total remuneration. In this respect, the Government Actuary's Department was asked to estimate the value of the pension scheme to judges and to compare comparative pension schemes in the private sector. Consultants were commissioned to provide a second-opinion report on the Department's methodology, results and conclusions (Report No. 51, paras 1.19, 4.6).

5.9 These studies showed that the judicial pension (for which a 3 per cent contribution is made by the judiciary up to an earnings cap) forms a significant element in judicial remuneration, ranging from 25 per cent to 41 per cent of salary depending upon the age of entry into and retirement from the judiciary (Report No. 51, para. 4.7). Despite judicial dissatisfaction with the judicial pension scheme, the Sub-committee concluded that it "remains a good competitive scheme which contributes significantly to judicial remuneration" (para 4.10).

5.10 Comparison with income at the Senior Bar - The survey of pre-appointment earnings indicated that, on average, High Court judges took a drop in salary of 61 per cent and Circuit judges a drop of 10 per cent. The survey of barristers' and advocates' earnings indicated that the earnings of Queen's Counsel were around double the salary of a High Court Judge and almost three times that of a Circuit judge (Report No. 51, paras 4.4, 4.5).

5.11 Recruitment and retention of judges - The Sub-committee concluded that there were no problems of any kind relating to retention of judges (para. 4.16). While there was some evidence that leading practitioners were increasingly questioning whether they should accept judicial appointment, the Sub-committee considered that there were a number of factors rather than pay alone that were influencing this attitude (paras 4.14, 4.15) and that no acceptable or affordable increase in pay would overcome this general problem (para. 4.15). In any event, there were no significant recruitment problems (paras 4.30, 4.31, 4.35).

5.12 Guiding principles and links to the senior civil service - In making its recommendations, the Judicial Sub-committee had in mind the Review Body's terms of reference, including the need to have regard to recruitment and retention issues, the Government's departmental expenditure limits, job weight and the need to maintain broad linkage between the remuneration of the three main remit groups: the judiciary, the senior civil service and the senior members of the armed forces (Summary para. 5).

5.13 Central to the Sub-committee's consideration was the need to maintain a broad linkage across the judiciary, the senior civil service and senior military officers. Until 1994 there was parity in salary between certain key posts across the Review Body's three main remit groups. The most senior post holders in the three groups received the same pay. High Court Judges, civil service permanent secretaries and four star officers in the armed forces did as well.

5.14 However, changes in the pay systems for the senior civil service and senior military officers had led to a divergence in pay between the remit groups. The senior civil service moved to performance related pay and traditional grades had been replaced by flexible pay banding informed by job weight. Performance related pay had enabled high civil service performers to achieve greater increases in salary than judges who are paid a single rate for each salary group (para. 1.9). The additional element in civil service salaries attributable to performance related pay plays no part in the basis on which civil service pension entitlements are calculated.

5.15 Performance pay - The Sub-committee considered the possibility of applying performance related pay standards to the judiciary and concluded that "it would be unfruitful for us to pursue the issue at present". The application of such standards to the judiciary would alleviate, if not eliminate, the divergence in pay between the remit groups. It would also result in an increase in judicial pay without increasing the judicial pension entitlement. The Sub-committee's decision not to pursue performance related pay for the judiciary was related to strong judicial resistance to such a move, to a public perception that different standards of justice were being administered within a group that was structurally a unity and to considerations of judicial independence. The Committee noted in Australia performance related pay for the judiciary had been dismissed on the basis that it was considered both productive of legal controversy and damaging to judicial independence (para. 2.6).

5.16 The Sub-committee therefore recommended that the current system of judicial pay be maintained and that posts should continue to be grouped according to job weight and remunerated with a spot salary (para. 2.7).

5.17 Recommendation - On the level of pay, the Sub-committee considered that an increase of 5.4 per cent would "provide a satisfactory read-across with the senior civil service and recognise the general increase in job weight throughout the judiciary" and that a "further 2.5 per cent should be paid from April 2002 as the normal uprating.

5.18 Government's decision on the recommendation - The Government accepted the recommendation for a 7.9 per cent increase in judicial salaries but on the basis that its introduction should be staged in two phases. There was to be an increase of 3.6 per cent dating from 1 April 2002, followed by a 4.6 per cent increase from 1 April 2003. The reason for staging the increase was that the full increase in the first year was not manageable within the budget of the Lord Chancellor's Department.

5.19 Comment - The United Kingdom system and its operation are illuminating because that system is regarded as the system which has worked more satisfactorily than any other and the Review Body's consideration of basic issues has been both comprehensive and instructive.

5.20 The Review Body's Report No. 51 considers a number of important issues. First, the Review Body was required by the terms of its remit to have regard to the

need to maintain a broad linkage between judicial salaries, senior public service and military salaries. It is fair to say that the Review Body and, for that matter, the Lord Chancellor and his Department favour preservation of that broad linkage.

5.21 Secondly, there is the problem presented by performance pay, applicable to the public service, but not applied to the judiciary for reasons associated with judicial independence and performance measurement. The Review Body sought to overcome this difficulty, which had caused judicial remuneration to lag behind, by recommending a significant upgrade in judicial remuneration. This upgrade adds to the foundation base on which the judicial pension entitlement is calculated, though performance pay itself does not enter into the foundation base on which public service pension entitlements are calculated. There is an inherent problem here which remains so long as public servants receive performance pay and judges do not. It is a problem which remains unresolved as yet in the United Kingdom.

5.22 Thirdly, the factors to be taken into account by the Review Body are comprehensive. However, the qualification relating to the limitation concerning the Departmental budget is, or may be regarded, in principle as unacceptable. The qualification has a relationship with budgeting schedules in the United Kingdom. It is unsatisfactory that an impartial review of remuneration by an independent body should be constrained by particular and non-permanent budgeting limits imposed upon a Department. General budgeting constraints may influence Government's response to recommendations made by a review body. But non-permanent departmental budgeting constraints should not constrain the review body's recommendations.

AUSTRALIA

Major Review of Judicial and Related Offices' Remuneration

5.23 The Commonwealth Remuneration Tribunal commenced a major review of the remuneration of judicial and related offices in 2001. It was completed in November 2002 and published as a Statement entitled 'Major Review of Judicial and Related Offices' Remuneration'.

5.24 Conduct of the Review - The Tribunal published a Discussion Paper in July 2001 and sought submissions in response to that Paper. The Tribunal received seventeen written submissions. It also wrote to all State and Territory Attorneys-General and the Chief Justices of the State and Territory Supreme Courts to advise of the Review and invite comment.

5.25 The Tribunal consulted with public and private sector individuals, including Chief Justices and Chief Executive Officers of relevant courts, the Presidents of relevant Tribunals, and representatives of the New South Wales Bar Association. Consultation was also held with the remuneration tribunals of the States and Territories.

5.26 The Tribunal engaged a firm of executive remuneration consultants to conduct a comparative work value assessment to assist it in assessing relativities between judges and other officers within the remit of the Tribunal. The courts expressed ‘a significant degree of concern’ about this exercise and the ‘capacity of remuneration consultants to understand and examine judicial functions’. Accordingly, the Tribunal decided that it would exclude judges and judicial officers from the exercise (para. 4.3.1).

5.27 Guiding principles - The Tribunal took into account the five guiding principles used for the last review in 1994. They are: independence, recruitment and retention, workload and related factors, comparative remuneration data and economic circumstances. In addition, the Tribunal considered the application of flexible remuneration options which are now more common for senior private and public sector offices. This included consideration of the applicability of ‘performance pay’ and a move towards a ‘Total Remuneration’ approach, which allows certain entitlements to be cashed out by officers. The Tribunal noted, however, that constitutional provisions and the need to safeguard the independence of the judiciary meant that such arrangements would be unsuitable for judicial offices.

5.28 Constitutional issues – One view expressed to the Tribunal was that judicial remuneration had been diminished, contrary to the Commonwealth Constitution, through inflation, political interference (through governmental refusal to implement previously recommended increases in remuneration) and the application of additional taxes such as the superannuation surcharge. The Tribunal obtained legal advice and concluded that there had been no breach of the Constitution (para. 3.3.2). The Tribunal rejected the submission that judges should be compensated for the effect of the superannuation surcharge on their retirement income. The Tribunal concluded that it is not appropriate that compensation should be provided for general taxation measures applicable to the whole community (para. 6.4.2). It noted, however, that there is outstanding litigation on the issue.

5.29 Wage fixing principles and relevant markets – The Tribunal is required to have regard to Australian Industrial Relations Commission Principles of Wage Determination and the decisions of National Wage Cases. According to these principles, where parties are unable to bargain (as is the case in relation to judges), consideration is to be given to the relevant market in which the wage-earners operate. The Family Court argued that the ‘relevant market’ was the senior Bar, and that judicial remuneration should be related to earnings at the Bar.

5.30 The Tribunal concluded that it was only required to ‘have regard’ to such principles, and that the weight that it should give such principles was for it to determine. Further, the Tribunal rejected the conclusion that the ‘relevant market’ is the senior Bar. While the senior Bar may be the principal market from which judges are drawn, the ‘relevant market’ is the market in which persons function, not the market in which they previously worked (para. 3.3.4).

5.31 The Tribunal also noted that consideration must be given to the fact that the judicial office holder has moved from the private sector to the public sector (involving recognition of the concept of public service), has acquired tenure (rather than having to compete for work in the marketplace), has an elevated status, and has valuable employment conditions (para. 5.4.4). All these factors may affect the remuneration applicable. The Tribunal observed that judges hold senior public offices in one of the branches of government, and their remuneration may also be compared with senior offices in other branches of government, such as the Executive or the Legislature, in which lawyers have also historically had a significant presence. Thus ‘the “market” represented by the other branches of government should be considered along with that of the Judiciary’ (para. 5.4.4).

5.32 Economic issues – The Tribunal considered economic data such as the Consumer Price Index, Average Weekly Earnings and increases in Executive Remuneration. The Tribunal noted that since the previous review in 1994, judges’ remuneration has slipped behind that of the wider community. While it is approximately 4% above inflation, it is approximately 11.5% behind overall movements in Average Weekly Earnings and approximately 20% behind increases in Executive Remuneration and remuneration for senior executive service officers of the public service.

5.33 Performance and productivity – The Tribunal noted the significant contribution of the courts to the Australian economy. It also stated that it had taken into account the changing nature of judicial work, the development of judicial training programs, the increasing frequency with which litigants in person come

before the courts and the public education initiatives of the courts. Productivity and efficiency had been improved through new case management systems, innovative work practices and the use of new technology. This was also taken into account.

5.34 Performance pay – The Tribunal gave consideration to the issue of whether performance pay should be introduced, and reached the following conclusion:

‘Constitutional provisions and the need to preserve clearly the independence of judicial and quasi-judicial offices prevent a move to performance assessment and performance pay for those offices. The Tribunal does not consider that either individual or organisational performance tied strictly to identifiable outcomes is appropriate to consider as an element of remuneration for judicial or quasi-judicial offices. No party seriously proposed performance recognition via remuneration for these offices’ (para. 4.4)

5.35 However, the Tribunal noted that overall achievements of courts and tribunals in developing more efficient procedures and better managing cases and hearings can be taken into account by the Tribunal in assessing remuneration generally.

5.36 Flexibility in remuneration – The Tribunal expressed a preference, where appropriate, to move to a system of ‘Total Remuneration’. Under this system the total cost of employment is assessed (including base salary, superannuation and other benefits), and the office holder can take a cash equivalent for those benefits that he or she may not find useful. This system is more flexible and allows office holders to tailor their remuneration to suit their circumstances.

5.37 The Tribunal noted that this proposal received a ‘mixed response’ from members of courts and tribunals. One concern was whether such an approach was permissible under the Constitution, given the requirement that judicial remuneration be fixed and not diminished. An additional problem is that the Tribunal does not have jurisdiction in relation to judges’ pensions and long-leave, so it would not be able to make an overall assessment of ‘Total Remuneration’ or allow those parts to be cashed-out.

5.38 The Tribunal therefore concluded that a move to ‘Total Remuneration’ is not appropriate for judicial officers. (paras 4.5 and 6.5)

5.39 Determination – The Tribunal was satisfied that judicial remuneration should be increased. It made a determination that there should be an initial increase of 7% for judicial officers, effective from 1 July 2002, to be followed by second and

third increases of 5% each in July 2003 and July 2004. These latter increases are independent of the Tribunal's annual review, which will be based upon relevant economic indices.

5.40 Non-judicial officers were awarded an increase of 3.1% based upon wages growth.

5.41 The Tribunal's determination is a disallowable instrument. It may be disallowed in either House of the Commonwealth Parliament. The Commonwealth Government has not yet announced its response.

5.42 Comment – On the issue of performance pay, the conclusion has been reached once again that it is not appropriate for judicial officers.

5.43 The exclusion of judicial pensions and leave from the jurisdiction of the Tribunal has led to problems in dealing with remuneration as an overall package and has therefore limited the capacity of the Tribunal to permit the tailoring of remuneration benefits to individual circumstances.

5.44 Reliance on wage-fixing principles can be difficult because of the unique circumstances of judges. Judges are most commonly drawn from high-earning careers in the private sector. The transfer to the public sector can lead to difficulties in establishing a relevant market for the purposes of assessing remuneration. In Australia, the Tribunal recognises the relevance of links to remuneration of the holders of senior offices in the other branches of government, although this link is not as strong as in the United Kingdom.

CHAPTER SIX

RECOMMENDATIONS

6.1 This Chapter sets out the recommendations which I make for the consideration of the Hong Kong judiciary. The recommendations, in my view, are a natural and desirable development of the Judicial Service Pay System in Hong Kong as described in Chapter Two and are completely consistent with the principle of judicial independence as discussed in Chapter Three.

6.2 The recommendations have been framed in the light of the experience of the various systems for fixing judicial remuneration in the jurisdictions reviewed in Chapter Four and reflect the most recent consideration given to some of the issues by the Review Body in the United Kingdom and the Remuneration Tribunal (Commonwealth) in Australia.

Recommendation 1:

Legislation should be enacted prohibiting absolutely any reduction in judicial remuneration.

6.3 Constitutional or legislative prohibition of reduction in judicial remuneration is an essential element of judicial independence. The prohibition is absolute in all the jurisdictions reviewed in this Report except Canada. In addition to England and Wales, the United States, Australia, New Zealand and Singapore, other major jurisdictions (with a common law tradition or elements) which have absolute prohibitions include India, Ireland, Malaysia, Philippines and South Africa

6.4. The presence of the absolute prohibition in all such major jurisdictions means that it is a widely accepted safeguard for the protection of judicial independence. The rationale of an absolute prohibition is that the principle of judicial independence is so fundamental that any risk of its jeopardy must be avoided.

6.5 The prohibition is qualified in Canada (see para. 3.46). Subject to prior recourse to an independent body, it permits reduction of judicial remuneration as part of an overall economic measure which affects the salaries of all or some persons who are remunerated from public funds or as part of a measure directed at provincial judges as a class. In these respects, the Canadian position is inconsistent with the widely accepted safeguard of an absolute prohibition against reduction for the

protection of judicial independence in many jurisdictions. Further, although the independent body's recommendations are non-binding, any departure from them must be justified according to a standard of rationality. The burden will be heavy, particularly when judges are singled out as a class for a pay reduction. The principle or criterion to be applied in relation to the rationality test is uncertain. This is another fundamental weakness in the Canadian position.

6.6 The Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region in 1995 signed by the Chief Justices of the Region including Hong Kong, provides for a prohibition against reduction with a more limited qualification than the Canadian qualification. Article 31 states

“Judges must receive adequate remuneration and be given appropriate terms and conditions of service. The remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public measure *to which the judges of a relevant court, or a majority of them, have agreed.*” (emphasis supplied)

6.7 The Beijing Statement appears to contemplate that the views of a majority of judges in a particular court would bind the minority. The Beijing qualification could, if invoked, bring about different situations regarding reduction of remuneration between various levels of courts in the same jurisdiction. This would be most unsatisfactory.

6.8 But the principal objection to the Beijing qualification is that, if invoked, it would generate disagreement among the Judges on an extremely divisive issue. Cohesion and morale, which are vital elements in a well-functioning judiciary, would be set at risk by differences and disputes over the issue. The issue would also create or aggravate tension between the Executive and the Judiciary and would politicise the Judiciary.

6.9 The same objections apply to a qualified prohibition or proposal that provides for a waiver by the judges of a prohibition against reduction.

6.10 An absolute prohibition should be adopted in Hong Kong. It fully protects judicial independence and does not suffer from the flaws of the alternatives discussed above. The case for an absolute prohibition in Hong Kong is stronger than in other jurisdictions such as Canada, Australia and the United States where judges, after retiring, can return to private practice. Retired judges cannot do so in Hong Kong (see paras 2.19-2.20). Hong Kong Judges, who sacrifice higher remuneration

on appointment to the Bench, are therefore more dependent on their judicial remuneration than judges in these jurisdictions.

Recommendation 2:

Provision should be made by Ordinance for a standing appropriation to meet the payment of judicial remuneration.

6.11 In Hong Kong, judges do not have the benefit of a standing statutory appropriation to meet payment of their remuneration. They depend on an appropriation made annually in the Appropriation Ordinance.

6.12 Elsewhere in the United Kingdom, Australia, Canada, New Zealand and Singapore, a statutory standing appropriation is a necessary element in safeguarding the independence of the judges by providing continuing security for the payment of remuneration.

6.13 The absence of a statutory provision charging the judges' remuneration on, and making it payable out of, general revenue is a major weakness in the current arrangements relating to judicial remuneration in Hong Kong (see paras 3.30-3.31).

Recommendation 3:

Judicial remuneration should be fixed by the Executive after considering recommendations by an independent body

6.14 An appropriate system for assessing judicial remuneration must respect (a) judicial independence and (b) the responsibility of the Executive to draw up and introduce budgets for the expenditure of public money and the responsibility of the Legislature to examine and approve budgets and public expenditure.

6.15 Direct negotiation between the Executive and the Judiciary about judicial remuneration is inconsistent with judicial independence. For this reason, it is desirable to have an independent body which makes recommendations to the Executive for its consideration before it fixes judicial remuneration. Determination of remuneration (as opposed to recommendation) by such a body would intrude into the roles of the Legislature and the Executive.

6.16 Accordingly, judicial remuneration should be fixed by the Executive after considering recommendations made to the Executive by an independent body established for that purpose.

6.17 The Executive will then seek the necessary additional funding from the Legislature. Once the additional funding is approved, judicial remuneration at the new levels should then be covered by the standing statutory appropriation. This arrangement is consistent with the Basic Law. Under the Basic Law the Executive draws up and introduces budgets, while the power to examine and approve budgets and public expenditure is vested in the Legislature: Basic Law, Articles 62(4) and 73.

6.18 This proposed model has worked well in the United Kingdom and it builds on traditions already established in Hong Kong. It is superior to other models.

Recommendation 4:

The independent body should be established by statute.

6.19 Although the Review Body in the United Kingdom was set up by executive decision and is not statute-based, an independent body should be established with defined statutory functions and powers. There are various reasons for adopting this approach. They are:

- (1) a statutory foundation strengthens the independent character of the body;
- (2) a statutory foundation enhances the notion of structural permanence and continuity;
- (3) statute will confer appropriate powers on the body; and
- (4) statute will result in transparent definition of functions and powers.

6.20 The independent body should have power to deal with all aspects of judicial remuneration. It should have power also to commission surveys, reports, job evaluation studies and academic research (for example, those commissioned by the Judicial Sub-Committee in the United Kingdom) as it may consider appropriate, and to consult with interested parties and generally.

Recommendation 5:

The independent body's role should be confined to judicial remuneration exclusively.

6.21 A specialist body should be established to deal exclusively with judicial remuneration. The reasons are –

- (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).

Recommendation 6:

The members of the independent body should be appointed by the Executive. The statute should contain provisions relating to membership such as providing for members from the legal profession and for members possessing certain experience and expertise, those ineligible for membership, terms of office and grounds for removal.

6.22 As is the case in many jurisdictions (such as Australia at the Commonwealth level, New South Wales, Victoria, New Zealand and the United Kingdom), the members of the independent body should be appointed by the Executive. This is consistent with the position in Hong Kong in relation to the appointment of judges and judicial officers. Members of the independent commission responsible for their appointment, namely the Judicial Officers Recommendation Commission (established by statute Cap. 92) are, apart from the ex officio members, appointed by the Chief Executive.

6.23 For its effective functioning, the independent body need not be large. A body consisting of five members would be sufficient.

- (1) The Chairman should be a prominent person of high reputation, preferably with public sector experience.
- (2) There should be a barrister and a solicitor. Their knowledge of court work and conditions in the private sector will be of assistance. As with the Judicial Officers Recommendation Commission, there should be a requirement of consultation with the governing bodies of the Bar and the Law Society on the barrister or solicitor to be appointed.
- (3) Of the other two members, preferably one should have accounting experience.

Having regard to the considerations which have led to Recommendation 5 that the independent body should deal exclusively with judicial remuneration, no member of the independent body should serve concurrently as a member of any body assessing

civil service remuneration. The independent body should have a secretariat independent of the Executive and the Judiciary.

6.24 The following persons should be ineligible for membership:

- (1) Judges and retired judges. They should be excluded because, in order to maintain public confidence, it is important to avoid any actual or possible conflict of interest or perception of conflict of interest.
- (2) Persons serving in the Executive¹. They should be excluded because the Executive will receive and consider the recommendations made to it by the independent body.
- (3) Members of the Legislature. They should be excluded because they are required to consider additional funding proposals relating to judicial remuneration. Such proposals will be made by the Executive to the Legislature after the Executive has considered and decided on the recommendations made by the independent body.

6.25 Members of the independent body should be appointed for a fixed term of say 2 or 3 years and should be eligible for re-appointment.

6.26 Once appointed, they should during their term be removable by the Executive only on grounds specified in the statute, such as bankruptcy and conviction for a criminal offence.

Recommendation 7:

The methodology, that is the factors which should be considered, should be specified in the statute.

6.27 In no jurisdiction has a particular formula been specified. The prescription of a formula would be impracticable. The determination of judicial remuneration is not a science. It is ultimately a matter of judgment after having regard to a number of factors. The weighing of the factors would be a matter for the independent body.

6.28 The relevant factors should be specified in the statute. In the light of experience in other jurisdictions, the factors to be specified in the statute should be:

- (1) the maintenance of judicial independence;
- (2) the need to maintain the Judiciary's standing in the community;
- (3) recruitment and retention of judges;
- (4) changes in workload;

¹ This would include all civil servants employed by the executive branch.

- (5) relativities between different judicial offices;
- (6) comparisons with public and private sector remuneration;
- (7) broad relativities between judicial remuneration and the remuneration of Principal Officials and civil servants;
- (8) external economic factors (e.g. wage and consumer price indices);
- (9) general economic policy; and
- (10) any other matter which the independent body considers relevant.

Recommendation 8:

Performance pay and productivity bonuses should not form part of judicial remuneration.

6.29 As with the private sector, performance pay and productivity bonuses are becoming increasingly an element in public sector remuneration in many jurisdictions. In Singapore, there is a performance bonus pay system which applies to the judiciary and is administered by the Chief Justice in relation to the Supreme Court (see paras 4.95 and 4.96).

6.30 Elsewhere, in the jurisdictions surveyed in this Report, there is no provision for judicial performance pay. In the United Kingdom and Australia, it has been strongly opposed by the judiciary and rejected by the Review Body and the Remuneration Tribunal (Commonwealth) as inappropriate for the judiciary (see paras 5.15, 5.33-5.35).

6.31 There are two objections to judicial performance pay. The first is that it is inconsistent with judicial independence. Assessment may operate, or be seen to operate, as an inducement to a judge to deal with cases in such a way as to maximise the prospects of earning performance pay. The second is the difficulty of measuring judicial performance for the purpose of calculating bonus or productivity remuneration.

6.32 Because the Judiciary does not receive performance pay, there is the problem, mentioned earlier (para. 5.15), of maintaining an appropriate relativity with senior public servants and others who receive performance pay which does not form part of the base remuneration on which pension entitlement is calculated. This problem might be overcome by equating 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. Other solutions could be worked out. It is a problem for consideration by an independent body.

Recommendation 9:

The independent statutory body should adopt a procedure which is transparent and its reports containing its recommendations to the Executive should be published.

6.33 The independent body should adopt procedures which are transparent. This is important for the maintenance of public confidence in its work. Secrecy invites suspicion and criticism. And the Judiciary should support a process that is open. As is the case in many jurisdictions, the independent body should call for submissions and undertake consultation to assist it in its work.

6.34 Consistently with transparency, it should give favourable consideration to making public the submissions made to it or a summary of them. Reports to the Executive containing the body's recommendations should be made public.