



THE
LAW SOCIETY
OF HONG KONG
香港律師會

The Law Society thank the Panel on Administration of Justice and Legal Services (“**AJLS**”) for their kind invitation to consider the “*Procedure for Endorsement of Removal of Judges by the Legislative Council on Article 73(7) of the Basic Law*”, and seeking our comments on the recommended procedures contained in paragraph 8 of the L/C paper No. CB(2)/03/04 dated 27 January 2004, (“**the L/C Paper**”).

The Law Society previously provided a report upon “*Mechanism(s) for Handling Complaints Against Judges and Judiciary Staff*”, which was published in November 2002. A copy of that Report is attached (and referred to in this text as “**the November 2002 Report**”). The purpose of resubmitting the November 2002 Report derives from the issues which we raise herein.

The Law Society’s November 2002 Report was intended to suggest a remedy for dealing with complaints against Judges and Judiciary staff, without recourse to the Draconian option of the removal of a Judge. The present proposals of the AJLS do not deal with addressing complaints against Judges (and makes no reference to Judiciary staff at all), but concentrates upon the ultimate sanction of the removal of Judges.

It may be construed that the procedure outlined in paragraph 8 of the L/C Paper is the “plateau” of a process which has been started much earlier, but in relation to which there is nothing mentioned in the L/C Paper. Thus, we address those exigencies first below. (In the following text we refer to “**the process**”, being that which includes making a complaint through to the sanction of removal of a Judge. In bold, we refer to various “**Levels**” of this process).

1. A complaint in respect of a Judge, and we refer to Article 89 of the Basic Law, will, one assumes, relate to a Judge’s “*inability to discharge his or her duties, or from misbehaviour...*”.

To whom is such a complaint to be made ? To members of the legal profession, be they solicitors or barristers, a potential starting point would be the Chief Justice of the Court of Final Appeal, (the “**CJ**”), but that is not clear.

However, to a layman (who may not have access to a solicitor or barrister, even assuming that any solicitor or barrister would wish to act in a matter relating to a complaint about a Judge, which is a moot point in any event), where do they start ?

2. It is important to identify to whom such a complaint is addressed or made, and how. Presumably the complaint will be investigated by the party which receives the complaint, be this the CJ or otherwise. If we assume that, for the sake of argument, the complaint is made to a member of LegCo, then this could constitute **Level 1** of the overall process. The member of LegCo or whomsoever received the complaint will (one might assume) refer the matter to the CJ, and presumably he will consider the matter : **Level 2**.
3. The CJ, by virtue of Article 73(7) of the Basic Law, is then vested with appointing a tribunal to consider the complaint in relation to a Judge. Unless we are mistaken, there are no terms of reference available for such a tribunal at present, save and except that for complaints against all Judges, save as against the CJ himself, the tribunal must consist of not fewer than three local Judges. In respect of a complaint concerning the CJ, the tribunal must consist of not fewer than five local Judges.

Further, if complaint is being made about the CJ, it begs the question as to whom, in his stead, a complaint should be made. The Secretary for Administration ? The Chief Executive ?

4. The tribunal, when convened, constitutes **Level 3** in the process. However, various questions arise in relation to such a tribunal. Not only is it unclear as to the terms of reference the tribunal will enjoy, but should there be additional members on the tribunal such as laymen in addition to the “*not fewer than three [or five] local Judges*”. We can see some merit at least two lay members, one being a member of LegCo, being additionally invited members of that tribunal for reasons we explain below, (when addressing the recommended procedures contained in paragraph 8 of the L/C Paper).
5. Is the tribunal to adopt procedures akin, for example, to those of the Law Society Disciplinary Proceedings ? Does a *prima facie* case to answer have to be found in relation to the complaint in question against a Judge before the tribunal is convened ? This might constitute **Level 3** in the process in which case the actual hearing before

the tribunal becomes **Level 4**. Is the Judge to be legally represented or represented at all ? Are witnesses to be called ? The whole concept of the tribunal is, again to the best of our knowledge, unexplored.

6. Assuming that the tribunal is properly convened and reaches a decision, etc., what are the possibilities of an appeal or a Judicial review of the decision of that tribunal ? Again, to the best of our knowledge, this matter has not been determined either. It lends itself to a possibility of **Level 5** in the complaints procedure.
7. If we assume that the foregoing issues are resolved and a tribunal, having considered the matter, makes a recommendation, (which is not appealed or judicially reviewed or if it is, the appeal or judicial review being unsuccessful), then, and only then, one arrives at the “plateau” process which is described in paragraph 8 of the L/C Paper. Each of the seven steps described in the L/C Paper as recommended procedures are considered hereafter.

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- (a) *“The Administration advises the House Committee of the Chief Executive’s acceptance of the recommendation of the tribunal appointed by the Chief Justice of the Court of Final Appeal on the removal of a Judge and provide sufficient information on the recommendation to LegCo (this should take place before the Chief Executive makes any public announcement of his acceptance of the recommendation)”*.

The tribunal does not, apparently, make a **decision**, but makes a **recommendation**. We presume that there will be Findings of Fact by the tribunal, constituting their ‘decision’ upon any complaint in relation to a Judge who displays an inability to discharge his or her duties, or from misbehaviour, and that the recommendation deriving therefrom must relate to the removal of the Judge.

The Chief Executive’s “acceptance” of the recommendations of the tribunal constitutes **Level 6** of the process.

Presumably, the Chief Executive can refuse to accept the recommendations of the tribunal as to the removal of a Judge or otherwise, and presumably in such circumstances, the matter proceeds no further. It is not clear.

However, to reach a decision, the Chief Executive will have to consider the matter in any event and ergo **Level 6** in the process.

The Chief Executive then, one assumes, apprises the Administration that he has accepted the recommendation of the tribunal. Whilst we are not entirely sure what “*the Administration*” constitutes, as it is not defined, for the present purposes, we assume this to be the Office of the Chief Secretary for Administration or alternatively, the LegCo Civil Service. The decision of the Chief Executive will then be advised to the House Committee of LegCo.

It is unclear as to the extent to which the House Committee will review the recommendations of the tribunal themselves, at this stage, but this could constitute **Level 7** in the process.

Moreover, the reference to the House Committee of the acceptance by the Chief Executive of the recommendations of the tribunal has to take place before the Chief Executive makes any public announcement of his acceptance of the recommendation.

We are somewhat at a loss to understand how that public announcement can or should occur when the matter still has to be dealt with (upon the procedures recommended in the L/C paper), by the House Committee, a subcommittee of the House Committee and subject to the final endorsement of LegCo.

Without extending the ambit of this paper by investigating and considering the procedures of LegCo, surely it is inappropriate for the Chief Executive to make any announcement, “*of his acceptance of the recommendation of the tribunal*”, save and except that if an announcement is required to satisfy some parliamentary-style convention, that it is blandly stated that the matter (described as a recommendation of the tribunal, but nothing more) has been referred to LegCo, preferably without naming the Judge in question.

It would be counter-productive for the Chief Executive to announce his acceptance of the recommendation of the tribunal if, in turn, LegCo, for whatever reason (through the subcommittee or otherwise), do not endorse the recommended removal. As importantly, it places the errant Judge in an extremely invidious position. It is manifest prejudice and appears lacking in natural justice.

- (b) *“The House Committee refers to the matter to a subcommittee for discussion”.*

We wonder whether there should be a standing subcommittee of the House Committee to determine such a matter if indeed, in practical terms, such a subcommittee needs to be convened in any event ? The consideration by a subcommittee constitutes **Level 8** in the process.

- (c) *“The subcommittee discusses the matter as soon as possible”.*

With respect, this is rather open-ended. Surely, the subcommittee should discuss the matter within a clearly delineated period of time, certainly as by the time the matter reaches this stage (as against the foregoing potential factual backdrop), many months, possibly years, could have elapsed.

The terms of reference of this subcommittee are not described, and we wonder how far, if at all, theirs will be an *ex parte* decision, without the unfortunate Judge being in a position to argue the matter from his or her perspective.

Alternatively, is the subcommittee only to deliberate upon *“the recommendation of the tribunal”* ? In the further alternative, is the subcommittee to deliberate upon the Chief Executive’s acceptance of the tribunal’s recommendation ? Is the subcommittee at liberty to call before it salient parties on issues which trouble them ? It is not clear.

- (d) *“The subcommittee reports its deliberation to the House Committee”.*

We are not entirely at ease with the use of the word *“deliberation”* in this context. Surely, deliberation would only constitute a précis of a debate, rather than a conclusion or finding or indeed endorsement of the recommendation of the tribunal, the Chief Executive’s acceptance of the tribunal’s

recommendation or otherwise. To understand “deliberation” in this context, the terms of reference of the subcommittee needs to be explained somewhat more fully. However, this referral to the House Committee will constitute **Level 9** of the process.

- (e) *“The Administration gives notice of a motion to seek the endorsement of LegCo of the recommended removal”.*

Again, we assume that “*the Administration*” means either the office of the Chief Secretary or the LegCo Civil Service.

The House Committee (or the subcommittee on behalf of the House Committee) will, presumably, have reported to the Administration, which promulgate the Notice of Motion.

[At this stage, we refer to the recommendation, which we make above, that a member of LegCo might usefully sit on the tribunal (per Article 89 of the Basic Law) “*consisting of not fewer than three local Judges*” as one of two lay persons, and presumably the same member of LegCo could move the motion, having some knowledge of the matter, before LegCo, although not being able to vote on the matter].

- (f) *“The motion is moved, debated and voted on at a Council Meeting”.*

This constitutes **Level 10** in the process.

- (g) *“If the motion is passed by LegCo, the Chief Executive removes the Judge”.*

This is **Level 11** in the process.

Conclusion

Earlier in this Report, we referred to the recommended procedures for the endorsement of removal of Judges by LegCo as described in the L/C Paper as constituting the “plateau” of a complaints process. It is not by any means clear as to how a complaint is elevated to this “plateau” and this we address above. However, concerning the “plateau” itself, there appear to us to be the following ten stages involved :

- (i) The recommendation of the tribunal is considered by the Chief Executive.
- (ii) If the Chief Executive accepts the recommendation of tribunal, he reports to the Administration.
- (iii) The Administration advises the House Committee.
- (iv) The House Committee refers the matter to a subcommittee.
- (v) The subcommittee considers the matter.
- (vi) The subcommittee reports to the House Committee.
- (vii) The House Committee reports to the Administration.
- (viii) The Administration gives notice of a motion to LegCo.
- (ix) LegCo debates and votes on the issue and, if the motion is passed by LegCo.
- (x) The Chief Executive removes the Judge.

There are ten steps in the “plateau” process and several (at least four, possibly more) steps prior to that. We can perceive little or no justification in terms of fairness to the errant Judge, nor in terms of the time to be attributed to consideration of the matter, etc. for such a tortuous process.

In practical terms, whilst it is more than likely that a Judge would have resigned long before this process is exhausted, surely it would be appropriate for the process to be made less onerous ?

If the Chief Executive accepts the recommendation of the tribunal, the House Committee need hardly form a subcommittee in relation to the matter and surely the Administration could move a Notice of Motion to seek the endorsement of LegCo without the House Committee considering the matter nor indeed a subcommittee. What benefit, in real terms, is there to anybody in adopting this administrative diversion ?

The Law Society would propose an alternative procedure for the endorsement of the removal of Judges by LegCo under Article 73(7) of Basic Law as follows :

- (a) In the event that a tribunal appointed by the CJ makes recommendations as to the removal of a Judge, then the recommendations of the tribunal will be conveyed to the Chief Executive, who may either accept or deny those recommendations.
- (b) In the event that the Chief Executive accepts the recommendations of the tribunal appointed by the CJ on the removal of a Judge, then he will report accordingly to the Administration.
- (c) The Administration will give Notice of Motion to seek the endorsement of LegCo upon the recommended removal.
- (d) The motion is moved, debated and voted upon at a Council Meeting.
- (e) If the motion is passed by LegCo, the Chief Executive will thereafter remove the Judge.

We regret that the procedures for the endorsement of the removal of Judges as proposed in the L/C Paper is the subject of criticism on our part, but there remain many grey areas in the process generally, and the “plateau” forming the subject matter of the L/C Paper appears to be a somewhat convoluted methodology, prone to duplication of endeavour, procedural uncertainty, as well as the common concerns of expense and delay.

One issue which will be of some considerable importance to a Judge whom finds himself the subject of this process is expense. For these purposes, if we assume that the Judge remains employed by the Hong Kong Government, the Judge is being investigated in the performance of his / her duties. This raises the question as to who bears responsibility for the legal costs incurred by the Judge in question ? If it is borne in mind that legal representation of the Judge at the tribunal may be required, and at any appeal or judicial review of a tribunal’s recommendation, and thereafter very possibly in relation to a potential appearance or representation before any subcommittee of the House Committee of LegCo, the legal costs incurred could be substantial. If the Judge is expected to meet such legal expenses himself, this could constitute a sufficient disincentive in its own right for the Judge, the subject of the

process contemplated, not to proceed to defend himself or herself, and occasioning his or her resignation.

We trust, however, that the issues we raise are of practical benefit to all parties concerned in considering the matter going forward. In particular, we would request that further consideration be given to the 'initial complaints process', without which we fear that the matter becomes one of illusory legislative benefit, incapable of achieving that which is intended.

The Law Society of Hong Kong
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