

**Legislative Council  
Panel on Administration of Justice and Legal Services**

**Appointment of Serving Justices of Appeal as  
Non-permanent Judges of the Court of Final Appeal  
and  
Judicial Manpower Situation  
in the Court of Final Appeal and Other Levels of Court**

**PURPOSE**

This paper seeks to provide the relevant information and the Judiciary's view on the following two issues:

- (I) Appointment of serving Justices of Appeal of the Court of Appeal of the High Court as non-permanent Hong Kong judges of the Court of Final Appeal; and
- (II) Judicial manpower situation at the Court of Final Appeal and other levels of court.

The above two issues were referred to the Panel on Administration of Justice and Legal Services by the Legislative Council Subcommittee on Proposed Senior Judicial Appointments for follow-up.

**I. APPOINTMENT OF SERVING JUSTICES OF APPEAL OF THE COURT OF APPEAL OF THE HIGH COURT AS NON-PERMANENT HONG KONG JUDGES OF THE COURT OF FINAL APPEAL**

**The Court of Final Appeal**

2. The Court of Final Appeal ("CFA") is the final appellate court in Hong Kong. The CFA hears appeals in civil and criminal matters and may confirm, reverse or vary the decision of the lower courts.

3. The CFA consists of the Chief Justice and the permanent judges<sup>1</sup>. Non-permanent judges may be invited to sit. There are two lists of non-permanent judges –

- (a) the list of non-permanent Hong Kong judges (“HKNPJs”); and
- (b) the list of judges from other common law jurisdictions (“CLNPJs”).

Section 10 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) (“the Ordinance”) sets a ceiling of 30 on the total number of persons holding office as non-permanent judges. At present, there are 17 non-permanent judges comprising six HKNPJs and 11 CLNPJs (Enclosure 1).

Encl. 1

#### Composition of the Court

4. In accordance with section 16 of the Ordinance, the CFA is constituted by five judges when hearing and determining appeals, as follows –

- (a) the Chief Justice or a permanent judge designated to sit in his place;
- (b) three permanent judges nominated by the Chief Justice; and
- (c) one HKNPJ or one CLNPJ selected by the Chief Justice and invited by the Court (“5<sup>th</sup> judge”). Please note here that since 1997 and apart from very few exceptions, the 5<sup>th</sup> judge has invariably been drawn from the list of CLNPJs.

Where the Chief Justice is not available to hear an appeal, he designates a permanent judge to preside. However, in this event, the CFA must still consist of five judges. This is of course also the position when, for any reason, a permanent judge cannot sit: an additional judge must be invited to sit on the CFA in order to make the requisite five judges.

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<sup>1</sup> At present, there are three serving permanent judges.

5. Thus, in any appeal where the Chief Justice or a permanent judge is not available to sit, an additional judge must be invited to sit. Here, a HKNPJ must be nominated to sit in place of the permanent judge (only HKNPJs can be invited to sit and not CLNPJs: see section 16(4) of the Ordinance).

#### The Need for the CFA to Invite HKNPJs to Sit

6. Under section 6(2) of the Ordinance, the Chief Justice is the head of the Judiciary and is charged with its administration. Having regard to his administrative duties, it is not practicable for the Chief Justice to sit in all the CFA cases. In addition, having regard to the need to avoid possible conflict of interest, the Chief Justice does not hear any appeals from those cases in which Madam Justice Maria Candace YUEN, Justice of Appeal (the spouse of the Chief Justice) has sat. Accordingly, a HKNPJ needs to be nominated by the Chief Justice to sit when the Chief Justice is not available to hear an appeal under the statute (please refer to paragraphs 4 and 5 above).

7. In addition, there are occasions where a permanent judge, for any reason, cannot sit in a particular appeal. For example, having regard to the need to avoid possible conflict of interest, Mr Justice Bokhary PJ does not hear any appeals from those cases in which Mrs Justice Bokhary, Judge of the Court of First Instance (the spouse of Mr Justice Bokhary) has sat.

8. Moreover, occasions may arise when the fundamental principle requiring the court to be, and to be seen to be, impartial may operate to disqualify the Chief Justice or a permanent judge from sitting in the appeal.

9. Therefore, it is operationally essential to have a sufficient number of HKNPJs to cope with the workload of the CFA. In the past three years from 2008 to 2010, of the 20 stints of CFA sittings, each normally lasting for about a month or so, a HKNPJ was invited to sit in 14 of them (i.e. 70%).

#### **Considerations in Appointing Serving Justices of Appeal as HKNPJs**

##### Provision by Statute

10. Section 12(3) of the Ordinance provides that a person shall be eligible to be appointed as a HKNPJ if he is –

- (a) a retired Chief Judge of the High Court;
- (b) a retired Chief Justice of the CFA;
- (c) a retired permanent judge of the CFA;
- (d) a Justice or retired Justice of Appeal; or
- (e) a barrister who has practised as a barrister or solicitor in Hong Kong for a period of at least 10 years,

whether or not he is ordinarily resident in Hong Kong.

11. The appointment of serving Justices of Appeal as HKNPJs is therefore expressly provided for in the Ordinance (paragraph 10(d) above).

#### The Policy

12. With regard to section 12(3)(d) of the Ordinance, it has been the Judiciary's established policy to appoint suitable persons, whether serving or retired Justices of Appeal who possess the required judicial and professional qualities to the CFA, when there is operational need to do so.

13. In this regard, concerns have been raised as to whether there may be a perception issue of blurring the distinction between the CFA and the Court of Appeal by allowing serving Justices of Appeal to be appointed as HKNPJ to sit in the CFA. The Judiciary is of the view that there is no real cause for concern.

14. First, it has to be borne in mind having regard to the fact that the CFA is a collegiate Court of five judges, that in hearing substantive appeals, a HKNPJ is only one out of the five.

15. Next, in nominating a HKNPJ to sit in any appeal, the Chief Justice would bear in mind the following factors:-

- (a) As much as possible, it is important that in any event, the operation of the Court of Appeal should not be adversely affected. Accordingly, where a HKNPJ is required, in practice, the Chief Justice will continue to select HKNPJs who are retired judges. The cases in which serving Justices of Appeal are selected to sit will therefore be limited;

(b) Even where it is contemplated that a HKNPJ could be invited to sit, it will be important to be sensitive to any perception of bias or embarrassment. Of course, a judge will not be able to sit in any appeal from a decision of the Court of Appeal of which he was a member. But there are other situations where it will not be appropriate for the Chief Justice to select him to sit. For example:

- (i) In the event the CFA is asked to resolve conflicting decisions in previous cases of the Court of Appeal of which the judge was a member; or
- (ii) Where the judge has written a leading decision in a previous case and the correctness of the decision in that case is before the CFA .

16. The Judiciary is of the view that given suitable and adequate safeguards, there should be no objection as a matter of policy and principle for serving Justices of Appeal to be appointed as HKNPJs to sit in the CFA.

#### Operational Requirements and Efficiency

17. There are distinct advantages, both operational and otherwise, for serving Justices of Appeal to be included in the list of HKNPJs.

18. First, these judges will have expertise in different areas of the law. Given the diverse range of the type of case heard by the CFA, this factor constitutes (in the view of the Chief Justice) a definite advantage in the effective operation of that court.

19. Secondly, there are strong operational aspects which ought to be highlighted:-

- (a) At present, all three HKNPJs who are retired judges reside outside Hong Kong. Although they are retired, in practice, their availability for CFA sittings is limited as they have other commitments (including judicial duties in other jurisdictions);
- (b) Operationally, it is not practical to bring them out to Hong Kong for less than one month; and

- (c) Further, where a HKNPJ is brought from outside Hong Kong (for one month or more), the arrangement may not always be an optimal one because, inevitably, the Chief Justice may wish to sit in some of the cases during that period. In this situation, if fewer cases were to be arranged for the HKNPJ during his stint, this may not represent the most efficient use of resources.

20. These factors just highlighted would not apply to HKNPJs who are serving Justices of Appeal. Being judges residing in Hong Kong, their availability to sit will provide much flexibility in dealing with the caseload of the CFA (and this particularly so in urgent cases). This greater flexibility will also enable the Chief Justice to be relieved in urgent situations where his immediate attention to important administrative duties is required.

21. For these reasons, the availability of HKNPJs who are serving Justices of Appeal is desirable and would certainly be conducive to the effective operation of the CFA.

#### In Practice

22. Serving Justices of Appeal have been appointed as HKNPJs on two occasions in the past, in July 1997 and September 2010.

23. In July 1997, three then serving Justices of Appeal were appointed as HKNPJs, namely, Sir Noel Plunkett POWER, Mr. Gerald Paul NAZARETH and Mr. John Barry MORTIMER. (Sir Noel Power passed away in November 2009 whereas the latter two continued to serve as HKNPJs after their retirement and are still serving.) For a number of years after 1997, the CFA had three serving Justices of Appeal as HKNPJs. Their sitting on the CFA, as required from time to time, gave rise to no difficulties for the CFA and the Court of Appeal.

24. In September 2010, three serving Justices of Appeal were appointed as HKNPJs, namely, Mr. Justice Robert TANG Ching, Mr. Justice Frank STOCK and Mr. Justice Michael John HARTMANN (“Mr. Justice Hartmann”). So far, only Mr. Justice Hartmann has sat in CFA appeals (two cases in October 2010). This also gave rise to no difficulties for the CFA and the Court of Appeal.

## **Conclusion**

25. The Chief Justice is of the view that the existing provision under section 12(3)(d) of the Ordinance gives no cause for concern as a matter of principle and policy; and that the existing arrangement of appointing serving Justices of Appeal as HKNPJs has enhanced the operations of the CFA and should continue.

## **II. JUDICIAL MANPOWER SITUATION IN THE COURT OF FINAL APPEAL AND OTHER LEVELS OF COURT**

### **Overview of the Situation**

26. In assessing the judicial manpower situation at all levels of court, the Judiciary takes the view that the following considerations are relevant:

- (a) The establishment, strength and vacancy positions at the various levels of court;
- (b) The requirement and availability of temporary judicial manpower; and
- (c) The short-term and long-term approaches to the provision of adequate and suitable judicial manpower at the various levels of court.

27. The Judiciary has reviewed the judicial manpower situation at all levels of court recently, and concluded that:

- (a) The current establishment of the judicial manpower can be regarded as being generally sufficient to cater for the operational needs of the Judiciary, having regard to its prevalent workload;
- (b) There are a number of judicial vacancies arising from elevation of Judges and Judicial officers (“JJOs”) to higher levels of court and retirements. A new round of recruitment exercises will be launched with a view to identifying suitable candidates to fill these vacancies;

- (c) It is operationally necessary to appoint deputy JJOs to fill the gaps in the interim before substantive appointments are made and to help reducing waiting times where there are upsurge in workload;
- (d) There are some pressure points in judicial manpower, particularly in the High Court in the interim pending the filling of the vacancies substantively. The problems are however considered to be temporary, and there should be no cause for great concern; and
- (e) The Judiciary will, however, continue to keep the judicial manpower situation at all levels of court under constant review, and will take any appropriate action if it is considered necessary to do so.

## **Establishment, Strength and Vacancy Positions at Various Levels of Court**

### ***Recent Enhancement of Judicial Establishment***

28. In July 2008, the establishment of JJOs at various levels of court was substantially enhanced upon obtaining the approval of the Legislative Council Finance Committee to create a net addition of seven JJO posts – creation of one Justice of Appeal post, five Judges of the Court of First Instance (“CFI Judges”) posts, one Principal Family Court Judge (“PFCJ”) post upgraded from a District Judge (“DJ”) post, one DJ post and one Deputy Registrar, District Court post; offset by the deletion of one Principal Magistrate post.

29. As at 1 June 2011, the establishment of JJOs stood at 189<sup>2</sup> (Enclosure 2). The Judiciary takes the view that this establishment can be regarded as being generally sufficient for its operational needs having regard to its prevalent workload.

### ***Impact of Retirement and Elevation to Higher Levels of Court***

30. Against the establishment of 189 JJOs, there are 151 substantive JJOs and 38 vacancies at various levels of courts. These vacancies have arisen mainly due to the retirement and elevation of a number of JJOs. The

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<sup>2</sup> Excluding the Permanent Judge post created for a non-permanent judge of the CFA.



situation at the various levels of court is outlined briefly in the following paragraphs.

### **The CFA**

31. The CFA has the full strength of one Chief Justice and three permanent judges (excluding the post created for a non-permanent judge of the CFA).

32. Having regard to the prevalent caseload including the projected caseload from the volume of applications for leave to appeal, and with a sufficient number of HKNPJs providing the needed flexibility in deployment, the Chief Justice is of the view that there should not be any undue difficulty coping with the CFA caseload with the existing establishment and manpower for the CFA.

### **The High Court**

#### *(i) The Court of Appeal*

33. The Court of Appeal has an establishment of 11 judicial posts, comprising the Chief Judge of the High Court (“CJHC”) post and 10 Justices of Appeal posts including the Justice of Appeal post which was added in July 2008 (“the new post”). Since September 2008 when the new post was filled, the Court of Appeal had the full complement of Judges for two years until September 2010, when the then CJHC was appointed the Chief Justice.

34. The CJHC vacancy has recently been substantively filled on 20 June 2011. Prior to this, for about 10 months between September 2010 and June 2011, a Vice President of the Court of Appeal was appointed to act in the office of the CJHC. In addition, the past six months in 2011 saw the departure of three Justices of Appeal through retirement. Two CFI Judges have since been elevated to fill two of the vacancies, and the third (and the only existing) vacancy will be dealt with in due course.

35. As a result, the availability of judicial manpower at the Court of Appeal has been affected for the past year or so, and this has resulted in slightly lengthening of the waiting times. The Chief Justice is however confident that the manpower position of the Court of Appeal will be able to resume full strength after the new CJHC settles in his new position and the third Justice of Appeal vacancy is filled. Further, once the available posts in the Court of First Instance have been filled (see below), there will be more

flexibility when the Court of Appeal on occasion requires additional judges from that level of court.

(ii) The Court of First Instance

36. The Court of First Instance has an establishment of 32 CFI Judges, including the five CFI Judge posts which were added in July 2008. At present, there are five CFI Judge vacancies, which have arisen since February 2011 from the retirement of the Judges, their elevation to the Court of Appeal and in one case, through his having died in office.

37. Given these vacancies, coupled with the fact, as indicated above, that some CFI Judges have to be asked to sit as an additional judge of the Court of Appeal, the availability of judicial manpower at the Court of First Instance has been affected considerably in the interim. This has in turn led to lengthening waiting times in both the civil and criminal fixture lists. While this can be partially alleviated by the appointment of temporary judicial manpower, ultimately the solution lies in the maintenance of the full establishment of judges (as to which an open recruitment exercise will be initiated in the near future).

**The High Court Masters' Office, District Court, Family Court and Lands Tribunal**

(i) The High Court Masters' Office

38. The High Court Master's Office has an establishment of 10 judicial posts comprising one Registrar post, four Senior Deputy Registrar ("SDR") posts and five Deputy Registrar ("DR") posts. At present, there are seven vacancies (four SDR and three DR vacancies).

39. Since 2000, the Judiciary has adopted a flexible and effective cross-posting policy by deploying judicial personnel between the High Court Masters' Office and the District Court. The Judiciary has indeed ceased to conduct open recruitment for DRs since then. Instead, DJs are subject to cross-posting as DRs to perform the duties of the High Court Masters' Office. This cross-posting arrangement enables DJs to acquire civil experience at the Masters' Office.

40. The Judiciary has recently reviewed the need for conducting separate recruitment exercises for DRs. The Judiciary has come to the view that the cross-posting arrangement has worked well owing to the flexibility of

the arrangement. It should be noted here that the movements of DRs within the Judiciary are limited due to the constraints of the rank structure. On the other hand, there is much more flexibility in the deployment of judicial manpower as between the High Court Masters' Office and District Court. The Judiciary therefore intends to continue to effect cross-posting of DJs as DRs and not to directly recruit individuals as DRs.

41. The Judiciary considers that the existing establishment for the High Court Masters' Office appropriate. To fill the vacancies in the High Court Masters' Office, the Judiciary intends to take the following actions:

- (a) To fill the SDR vacancies substantively by elevation of suitable JJOs within the Judiciary; and
- (b) To recruit the equivalent number of DJs and to cross-post substantive DJs to take up appointment as DRs.

(ii) *The District Court, Family Court and Lands Tribunal*

42. A total of 36 judicial posts are provided for hearing cases in the District Court, Family Court and Lands Tribunal. At present, there is one vacancy, which has arisen from the retirement of a DJ. The total number of vacancies which may be filled (including vacancies/consequential vacancies in the High Court Masters' Office) is therefore eight.

43. The Judiciary considers the present judicial establishment and manpower of the District Court, Family Court and the Lands Tribunal acceptable. The more pressing area comes from the Family Court in the recent months. The Chief Justice takes the view that by re-deploying judicial resources between District Court and Family Court, coupled with the engagement of additional temporary judicial resources, the manpower position of the District Court, Family Court and the Lands Tribunal is acceptable for the time being.

**The District Court Masters' Office, the Magistrates' Courts and Specialized Courts and Tribunals**

(i) *The District Court Masters' Office*

44. The District Court Master's Office has an establishment of four judicial posts comprising one Registrar post and three Deputy Registrar posts.

At present, four Magistrates are cross-posted to take up the duties of the Masters of the District Court.

45. Under the cross-posting policy which has been well established since 1988, the Judiciary deploys Principal Magistrates and Magistrates to the District Court Masters' Office to sit as Registrar (for Principal Magistrates) or as Deputy Registrars (for Magistrates). The cross-posting policy permits the Judiciary to exercise greater flexibility in the cross-posting of judicial officers between various courts. The Judiciary intends to continue with this cross-posting policy.

(ii) *The Magistrates' Courts, Specialized Court and Other Tribunals*

46. A total of 92 magisterial posts or equivalent, comprising the Chief Magistrate, 11 Principal Magistrates or equivalent, 69 Magistrates or equivalent and 11 Special Magistrates posts, are provided for hearing cases in the Magistrates' Courts, Specialized Courts and other Tribunals<sup>3</sup>. Against the present strength of 72, there are currently 20 vacancies. The Chief Justice takes the view that the existing establishment for the Magistrates' level is satisfactory.

**The Long-term Approach: Open Recruitment**

47. The last round of open recruitment exercises for JJOs was completed during 2009-10 and 2010-11, which enabled the substantive filling of the new posts and the vacancies then existing due to retirements. As a result, 36 judicial appointments were made, comprising 11 CFI Judges, 12 DJs and 13 Permanent Magistrates. The successful recruitment of a substantial number of JJOs in the past two years has greatly enhanced the substantive judicial manpower position of the Judiciary.

48. The Chief Justice takes the view that the long-term ultimate solution to the provision of adequate and suitable judicial manpower is to launch another round of open recruitment exercise for all levels of court. In this regard, the Judiciary has already advertised for the filling of Special

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<sup>3</sup> Under the cross-posting policy which has been well established since 1988, the Judiciary deploys Principal Magistrates and Magistrates to the specialized court and other tribunals to sit as Principal Presiding Officer/Labour Tribunal and Principal Adjudicator/Small Claims Tribunal (for Principal Magistrates) or as Presiding Officers, Adjudicators and Coroners (for Magistrates). The cross-posting policy permits the Judiciary to exercise greater flexibility in the cross-posting of judicial officers between various courts.

Magistrates' vacancies in early June 2011. It is intended that open recruitment for Permanent Magistrates, DJs and CFI Judges of the High Court will be launched one by one in the following months.

### **The Short-term Approach: Engagement of Temporary Judicial Manpower**

49. Pending the filling of vacancies in the substantive posts, in order to deal with the caseload at all levels from time to time, the Judiciary takes the view that it is operationally necessary to engage temporary JJOs to help reduce waiting times. The relevant considerations are as follows:

- (a) The conduct of recruitment exercises draws heavily on judicial input and support services, in terms of both manpower and time. For practical reasons, recruitment exercises need to be spaced out and their timing planned to achieve the most cost-effective results. Accordingly, vacancies which arise in between recruitment exercises are not immediately filled (it is not practical to launch an open recruitment each time a vacancy arises). Temporary judicial resources are thus needed to deal with the vacancies that arise;
- (b) Caseloads fluctuate and are beyond the Judiciary's control. Past experience shows that to meet the full range of operational requirements and maintain waiting times at reasonable levels, the Judiciary needs to engage and deploy temporary judicial resources at times to cope with increased workload; and
- (c) The engagement of serving JJOs (who are seen to have potential) or qualified legal practitioners in private practice who are considered suitable as deputy/temporary/acting JJOs, do provide opportunities to gain judicial experience at the relevant levels of court. This arrangement both enables the Judiciary to assess the suitability of the deputy/temporary/acting JJOs for substantive judicial appointment in future and in addition provides these persons with experience of the Judiciary to enable them to make an informed choice in the event they contemplate applying to join the Judiciary in the future.

## **Conclusion**

50. With the approval of the Legislative Council Finance Committee, the judicial establishment was enhanced three years ago. At present, the Judiciary considers the existing judicial establishment at various levels of court adequate for the purpose of coping with the workload.

51. As mentioned above, the Judiciary will launch recruitment exercises for all levels of court within 2011-12 and has already embarked on the recruitment exercise for Special Magistrates.

52. The Judiciary will of course continue to monitor the judicial manpower situation closely. Where vacancies exist in the interim, as indicated, temporary judicial appointments will be made so as to keep to a minimum the disruption caused by them (and, in particular, waiting times at all levels).

Judiciary Administration  
June 2011

**List of Non-Permanent Judges of the Court of Final Appeal****A. Non-permanent Hong Kong Judges**

	<b>Date of First Appointment</b>	<b>Expiry Date of Present Appointment</b>
1. Mr. Gerald Paul NAZARETH	28.7.1997	27.7.2012
2. Mr. John Barry MORTIMER	28.7.1997	27.7.2012
3. Mr. Henry Denis LITTON	14.9.2000	13.9.2012
4. The Honourable Mr. Justice Robert TANG Ching	1.9.2010	31.8.2013
5. The Honourable Mr. Justice Frank STOCK	1.9.2010	31.8.2013
6. The Honourable Mr. Justice Michael John HARTMANN	1.9.2010	31.8.2013

**B. Non-permanent Judges from Other Common Law Jurisdictions**

	<b>Date of First Appointment</b>	<b>Expiry Date of Present Appointment</b>
1. The Honourable Sir Anthony MASON	28.7.1997	27.7.2012
2. The Right Honourable the Lord HOFFMANN	12.1.1998	11.1.2013
3. The Honourable Sir Gerard BRENNAN	28.7.2000	27.7.2012
4. The Right Honourable the Lord MILLETT	28.7.2000	27.7.2012
5. The Right Honourable the Lord WOOLF of Barnes	28.7.2003	27.7.2012
6. The Right Honourable the Lord SCOTT of Foscote	28.7.2003	27.7.2012
7. Mr. Michael McHUGH	1.7.2006	30.6.2012
8. The Right Honourable Sir Thomas Munro GAULT	1.7.2006	30.6.2012
9. Mr. Murray GLEESON	1.3.2009	29.2.2012
10. The Right Honourable the Lord WALKER of Gestingthorpe	1.3.2009	29.2.2012
11. The Right Honourable the Lord NEUBERGER of Abbotsbury	1.3.2009	29.2.2012

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**Establishment, Strength and Vacancy of JJOs  
(Position as at 20 June 2011)**

<b>Level of Court</b>	<b>Establishment</b>	<b>Strength</b>	<b>Vacancy</b>
<b>Court of Final Appeal</b>	<b>4*</b>	<b>4</b>	<b>0</b>
<b>Court of Appeal</b>	<b>11</b>	<b>10</b>	<b>1</b>
<b>Court of First Instance</b>	<b>32</b>	<b>27</b>	<b>5</b>
<b>High Court Masters' Office</b>	<b>10</b>	<b>3</b>	<b>7#</b>
<b>District Court (including Family Court &amp; Member, Lands Tribunal)</b>	<b>36</b>	<b>35</b>	<b>1</b>
<b>District Court Masters' Office</b>	<b>4</b>	<b>0</b>	<b>4^</b>
<b>Magistrates' Courts/ Specialized Court/ Other Tribunals</b>	<b>92</b>	<b>72</b>	<b>20</b>
<b>Total</b>	<b>189*</b>	<b>151</b>	<b>38</b>

**Note** : \* Excluding one Permanent Judge post created for a Non-Permanent Judge of the Court of Final Appeal.

# Duties of the High Court Masters' Office are mostly taken up by District Judges deployed under the cross-posting policy.

^ Duties of the District Court Masters' Office are all taken up by Magistrates deployed under the cross-posting policy.