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Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 27 June 2011**

**Appointment of serving Justices of Appeal as non-permanent judges
of the Court of Final Appeal and judicial manpower situation**

Purpose

This paper provides background information on appointment of non-permanent judges to the Court of Final Appeal ("CFA") by the Legislative Council ("LegCo") under Article 73(7) of the Basic Law ("BL 73(7)"). It also gives a brief account of the discussions relating to appointment of serving Justices of Appeal as non-permanent judges of CFA and the manpower situation in the judiciary.

Background

Judicial appointment under relevant provisions of BL and the Hong Kong Court of Final Appeal Ordinance (Cap. 484)

2. BL 48(6) confers on the Chief Executive ("CE") the power and function to appoint judges of the courts at all levels in accordance with legal procedures. In accordance with BL 88, judges shall be appointed by CE on the recommendation of an independent commission, namely, the Judicial Officers Recommendation Commission ("JORC").

3. In the case of the appointment of judges of CFA and the Chief Judge of the High Court, BL 90 provides that CE shall, in addition to following the procedures prescribed in BL 88, obtain the endorsement of LegCo. Subject to the endorsement of LegCo, CE shall report such appointment to the Standing Committee of the National People's Congress for the record. BL 73(7) correspondingly confers on LegCo the power and function to endorse the appointment of CFA judges and the Chief Judge of High Court. Such procedure is also stipulated in section 7A of the Hong Kong CFA Ordinance.

Appointment of non-permanent judges to CFA

4. The CFA is the final appellate court in Hong Kong hearing both civil and criminal appeals. It consists of the Chief Justice of CFA ("CJ") and the permanent judges. Non-permanent judges may be invited to sit. There are two lists of non-permanent judges, namely, the list of non-permanent Hong Kong judges, and the list of judges from other common law jurisdictions. The maximum number of non-permanent judges is 30. At present, there are 19 non-permanent judges comprising six non-permanent Hong Kong judges and 13 non-permanent common law judges.

5. When hearing and determining appeals, CFA is constituted by five judges, namely, CJ (where he is not available to sit, he designates a permanent judge to preside), three permanent judges (where a permanent judge is not available, CJ nominates a non-permanent Hong Kong judge to sit in his place), and one non-permanent Hong Kong judge or one non-permanent common law judge. From 1997, apart from very few exceptions, the "fifth judge" has invariably been drawn from the list of non-permanent common law judges to hear a substantive appeal.

6. Section 12(3) of the Hong Kong CFA Ordinance provides that a person shall be eligible to be appointed as a non-permanent Hong Kong judge if he is -

- (a) a retired Chief Judge of the High Court;
- (b) a retired Chief Justice of CFA;
- (c) a retired permanent judge of 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.

Procedure for endorsement of appointment of judges by LegCo under BL73(7)

7. After publication of its Report on Process of Appointment of Judges in September 2002, the Panel on Administration of Justice and Legal Services ("the Panel") recommended the following procedure for endorsement of appointment of judges by LegCo under BL 73(7) which was endorsed by House Committee ("HC") on 16 May 2003 and 28 May 2004 -

- (a) the Administration advises HC of the acceptance by CE of the recommendation of JORC and provides sufficient information on the recommended judicial appointee(s) to LegCo (this should take place before CE makes any public announcement of his acceptance of the recommendation);
- (b) it would be for HC to decide whether or not a subcommittee should be appointed;
- (c) the subcommittee, if appointed, discusses the matter as soon as possible;
- (d) the subcommittee reports its deliberation to HC;
- (e) the Administration gives notice of a motion to seek the endorsement of LegCo of the recommended appointment;
- (f) the motion is moved, debated and voted on at a Council meeting; and
- (g) if the motion is passed by the Council, CE makes the appointment.

8. The Panel also recommended that in seeking LegCo's endorsement of a judicial appointment under BL73(7), the information provided by the Administration should include as many as possible the items contained in the questionnaire set by the Senate Judiciary Committee in the United States and the application form for appointment as Justice of the High Court in the United Kingdom (Appendices II and III to LC Paper No. CB(2)2448/08-09(01) issued on 7 September 2009). In this connection, the Judiciary had agreed that in future appointment exercises, JORC would be asked to consider the appropriate information that should be supplied to CE, to enable CE to supply sufficient information to LegCo.

Discussions on appointment of serving Justices of Appeal as non-permanent judges of CFA

9. In accordance with the procedure for LegCo to endorse judicial appointment under BL 73(7), HC formed a Subcommittee on Proposed Senior Judicial Appointments at its meeting on 16 April 2010 to consider the appointment of Mr Justice Geoffrey MA Tao-li as CJ; and Mr Justice Robert Tang Ching, Mr Justice Frank Stock and Mr Justice Michael John Hartmann as non-permanent Hong Kong judges to CFA.

10. While the Subcommittee was supportive of the proposed appointment of the three non-permanent Hong Kong judges to CFA, some members expressed grave concern that serving Justices of Appeal of the Court of Appeal of the High Court were being made non-permanent judges of CFA. They considered that the arrangement of allowing the same pool of judges to sit in both courts could give the public the impression that they were denied a real appeal in CFA and would erode public confidence in the administration of justice even though these non-permanent Hong Kong judges would not hear appeals from cases in which they had sat. Members noted that the legal profession has raised similar concern that such dual roles of judges would diminish their confidence in a fresh look being given to the case on appeal.

11. The Judiciary Administration ("JA") explained that the appointment of serving Justices of Appeal as non-permanent Hong Kong judges was provided for under the Hong Kong CFA Ordinance and in line with existing policy. Such appointment was made before in 1997. JORC noted that it was unsatisfactory to have only three non-permanent Hong Kong judges in CFA all of whom resided outside Hong Kong and this posed some operational difficulties for the Court. It was considered necessary to increase the number of non-permanent Hong Kong judges to allow greater flexibility in dealing with the heavy caseload of CFA. JORC considered that the three serving Justices of Appeal were suitable for appointment as non-permanent Hong Kong judges. JA further advised that CJ foresaw that the three recommended appointees would hear only a small number of CFA cases. In the some 40 cases of substantive appeals handled by CFA each year, CJ would sit in about half of them. The existing three non-permanent Hong Kong judges who were retired judges would be nominated to sit in most of the remaining cases. It was envisaged that the three recommended appointees would be required to sit in no more than 10 CFA cases in total each year.

12. While appreciating the need for flexibility in appointing a Justice of Appeal as a non-permanent Hong Kong judge in CFA, some members reiterated that it was highly undesirable to have as many as three judges serving concurrently in the Court of Appeal and CFA. They pointed out that 10 cases was no small number in relation to the total caseload of 40 in CFA. Moreover, apart from substantive appeals, a non-permanent Hong Kong judge could also be nominated to sit in the Appeal Committee in place of a permanent judge to hear applications for leave to appeal. These members were of the view that the crux of the problem was the relatively small number of permanent judges in CFA, and more resources should be provided to the Judiciary to allow more judges to be appointed.

13. The Subcommittee agreed to refer the policy issues of appointing serving Justices of Appeal as non-permanent judges of CFA and of judicial manpower situation in CFA and other levels of courts to the Panel for follow up.

Discussions on judicial manpower situation and related matters

14. Issues relating to judicial manpower situation were discussed at the meetings of the AJLS Panel held on 26 and 29 May, 2008; 13 Jan, 30 March and 27 April 2009 respectively. The main issues raised by members are summarised in the ensuing paragraphs below.

Manpower situation at various levels of courts

15. At the Panel meeting on 26 May 2008, the Administration briefed members on its proposal of creating judges and judicial officers posts – creation of one Justice of Appeal, five judges of the Court of First Instance ("CFI"), one Principal Family Court Judge upgraded from District Judge, one District Judge and one Deputy Registrar/District Court; offset by the deletion of one Principal Magistrate post.

16. Some members expressed concerned about the increase of the workload for judges in recent years. They pointed out below manpower situation of the High Court -

- (a) Court of Appeal - due to the insufficient number of Justices of Appeal in recent years, only about 42% of the cases from 2004 to 2007 were heard by divisions constituted solely by Justices of Appeal in the Court of Appeal. In order to maintain reasonable waiting times for cases heard in the Court of Appeal, 58% of the cases from 2004 to 2007 were heard by divisions containing one and/or two Judges of CFI. As Judges of CFI were not substantive Justices of Appeal, there were evident disadvantages for them to hear appeal cases; and
- (b) CFI - the deployment of Judges of CFI as additional judges of the Court of Appeal had led to a corresponding reduction in judicial manpower in CFI. The waiting times for criminal and civil fixture cases at CFI had greatly exceeded the respective target waiting times of 120 days and 180 days in the past few years. In addition, Judges of CFI were also engaged in non-judicial work under various statutory functions at that time (namely the Electoral Affairs Commission, the Securities and Futures Appeal Tribunal and the

Clearing and Settlement Systems Appeal Tribunal). As a result, against an establishment of 27 Judges of CFI, about 23.2 posts were actually deployed for judicial work;

17. These members expressed concern whether the arrangement for judges of the CFI to sit as additional judges of the Court of Appeal would result in more appeals being lodged with CFA when such appeals were dismissed by the Court of Appeal, given their lesser experience in handling appeals. They also pointed out that the workload for judges and judicial officers had increased in recent years as judges were often required to spend more time to explain legal proceedings to unrepresented litigants to ensure the equality of arms.

18. JA advised that administrative measures such as deployment of Deputy Judges and Temporary Deputy Registrar had been employed to meet the operational needs of the courts, which was considered unsatisfactory in the long term. There was a need to strengthen the establishment of the various levels of courts to keep waiting times within target without having to rely too heavily on temporary judicial resources. JA advised members that the workload of a judge was heavy as he had other tasks to perform apart from sitting in court. Judges had to read a lot of documents to prepare for trials and to prepare judgement after a trial. The staffing proposal sought to create the necessary permanent posts so that there would be less reliance on temporary judicial resources.

19. At the request of the Panel, JA provided additional information on the caseloads, average waiting times and average numbers of judges and judicial officers sitting at High Court, District Court including Family Court and Magistrates' Court from 2005 to 2007 (**Appendix I**). The staffing proposal was approved by the Finance Committee in July 2008.

20. At the Panel meeting on 30 March 2009, JA further provided a paper on "Caseload and manpower situation of the District Court", setting out the caseload and average waiting times for cases in the District Court from 2006 to 2008 and the manpower situation of the District Court at that time. The information paper provided by JA is in **Appendix II**.

21. To facilitate consideration of the issue on appointment of temporary/deputy judges and judicial officers, JA was also requested at the meeting to provide further information relating to the engagement and deployment of temporary judicial resources. Information on the "Establishment and manpower position of judges and judicial officers as at 1 April 2009" and the "Percentages of judicial resources provided by non-substantive judges and judicial officers in handling judicial work at various levels of court" subsequently provided by JA at the Panel meeting on 27 April 2009 are in **Appendix III**.

Members noted that as at 1 April 2009, the establishment of judges and judicial officers stood at 189 and the strength at 153, with 36 vacancies.

Effectiveness of the listing system in the High Court

22. At the Panel meetings on 26 and 29 May 2008, some members expressed concern about the effectiveness of the listing system in the High Court. These members considered that JA should introduce measures to improve the effectiveness of the listing system so that court time and the time and expertise of judges could be utilised in an optimum manner. The listing system should be flexible to ensure that the judges' diaries was utilised as fully as possible and judges had sufficient time to write judgements, especially after the trial of a complicated case.

23. JA responded that the workload of judges was indeed heavy. The Judiciary was operating an effective listing system in the High Court and had been making continuous improvements as appropriate. The Chief Judge of the High Court, assisted by the Listing Judges and a team of listing officers in JA, was responsible for ensuring that judges would have reasonable time to prepare for cases and write judgments, particularly for long and complicated cases. In practice, the listing officers would prepare all the groundwork on listing matters, and seek directions from the Listing Judges and the Chief Judge of the High Court accordingly. The Chief Judge also held regular meetings with the listing officers to receive reports on the listing position and resolve problems which had arisen. In the event that the trial of a case ran much longer than expected, the Chief Judge would give direction to listing officers who would make arrangement to relieve the judge concerned of other cases assigned to him.

Impact of non-statutory appointments of judges on judicial work

24. The Panel was briefed on the statutory and non-statutory appointments of judges for extra-judiciary functions at the meeting held on 13 January 2009. Some members expressed concern that careful consideration should be given to the need to appoint serving judges to non-statutory outside offices, in particular those which were non-judicial in nature. These members considered that the appointment of serving judges to outside work would impose additional work on the judges concerned and to a greater or lesser extent, take time away from their judicial duties which should be their primary work. Members in general agreed that there was a need for the Administration to review the policy and criteria for the appointment of serving judges to extra-judiciary functions and whether it was appropriate to have one judge taking up several outside offices. They also enquired whether there was any monitoring mechanism to ensure that judges'

judicial work, such as timelines in delivering written judgments, would not suffer because of their outside offices.

25. JA assured members that where a judge was asked to undertake work outside the Judiciary, the Judiciary was usually provided with extra resources to deal with the additional work in the form of extra judicial posts or resources for employing deputy judges. For all offices outside the Judiciary, whether or not judicial in nature, where the relevant statute provided for serving judges and other categories of persons to be eligible for appointment, such as retired judges and senior legal practitioners, the Judiciary's approach in recent years had been to request the Administration to look for a suitable person who was not a serving judge and to agree to make a serving judge available only where no other suitable person was available. This approach also applied to any non-statutory body, where the eligible persons were not legally prescribed.

26. JA further advised that the judicial work of the judge concerned would be appropriately reduced to enable him to cope with both kinds of work. Each Court Leader had a full picture of the workload of all the judges in his court who had taken up outside offices and suitable adjustments would be made if deemed necessary. There was also a mechanism for monitoring the timeliness of judges in delivering written judgments.

27. The Administration stressed that judges would only be appointed to extra-judiciary functions where it was considered necessary and appropriate to do so. Where both serving and retired judges were eligible for appointment, consideration would be given to appointing retired judges if suitable candidates could be identified.

Relevant papers

28. A list of relevant papers available on the LegCo website (<http://www.legco.gov.hk>) is in **Appendix IV**.

**Caseloads, Average Waiting Times and Average Numbers of Judges and Judicial Officers Sitting at
High Court, District Court including Family Court, and Magistrates' Courts**

	Caseload				Average Waiting Time					Average Number of Judges and Judicial Officers		
	2005	2006	2007		Target	2005 (Note 1)	2006 (Note 2)	2007		2005 (Note 3)	2006	2007
Court of Appeal of the High Court									Court of Appeal of the High Court			
criminal appeals	541	533	488	criminal-from setting down of a case to hearing	50	37	46	50	Substantive Judges	10	10	10
civil appeals	414	443	421	civil-from application to fix date to hearing	90	93	100	87	(Note 4)			
Court of First Instance of the High Court									Court of First Instance of the High Court			
criminal jurisdiction				Criminal Fixture List-					Substantive Judges	23	21	27
criminal cases	326	264	312	from filing of indictment to hearing	120	193	119	109	Deputy Judges	<u>11</u>	<u>14</u>	<u>10</u>
confidential miscellaneous proceedings	51	59	56	Criminal Running List-	90	69	66	57	Total	34	35	37
appeals from Magistrates' Courts	1,254	1,238	1,234	from setting down of a case to hearing	90	69	66	57				
civil jurisdiction	19,915	20,736	20,657	Civil Fixture List-	180	233	124	114				
				from application to fix date to hearing	90	54	64	61				
				Civil Running List-	90	71	87	91				
				from setting down of a case to hearing								
				Appeals from Magistrates' Courts-								
				from lodging of Notice of Appeal to hearing								
District Court									District Court			
criminal cases	1,349	1,199	1,240	criminal-from first appearance of defendants					Substantive Judges	16	11	15
civil cases	32,016	30,948	28,820	in District Court to hearing	100	112	117	98	Deputy Judges	<u>11</u>	<u>15</u>	<u>11</u>
				civil-from date of listing to hearing	120	120	125	58	Total	27	26	26
Family Court									Family Court			
	16,947	18,544	18,131	dissolution of marriage-from setting down of a case to hearing					Substantive Judges	3	2	3
				Special Procedure List	35	29	45	33	Deputy Judges	<u>3</u>	<u>5</u>	<u>4</u>
				Defended List (one day hearing)	110	120	115	119	Total	6	7	7
				financial applications-from filing of summons to hearing	110-140	124	101	83				
Magistrates' Courts									Magistrates' Courts			
	298,887	298,257	314,214	from plea to date of trial					Substantive Judicial Officers	48	44	37
				summons	50	94	95	95	Deputy Judicial Officers	<u>5</u>	<u>11</u>	<u>12</u>
				charge cases—					Total	53	55	49
				for defendants in custody	30-45	44	42	47				(Note 5)
				for defendants on bail	45-60	68	66	64				

(Note 1): The average waiting times in 2004 / 2005 were lengthened, especially in the High Court. Temporary judicial resources were deployed to various levels of court starting from the latter part of 2005.

(Note 2): The effects of the deployment of temporary judicial resources starting from the latter part of 2005 were evident in the improvements in the average waiting times in 2006 / 2007.

(Note 3): These figures already reflected the additional deployment of deputy Judges and Judicial Officers starting from the latter part of 2005.

(Note 4): From 2004 to 2007, about 50% of the cases each year were heard by divisions containing one Judge of the Court of First Instance, and a further 8% heard by divisions containing two Judges of the Court of First Instance.

(Note 5): Additional deputies were deployed to the Magistrates' Courts from the latter part of 2007 and early 2008. As at May 2008, there are 56 Judicial Officers (including 43 substantive and 13 deputy Judicial Officers) sitting at the Magistrates' Courts.

Panel on Administration of Justice and Legal Services

Caseload and Manpower Situation of the District Court

PURPOSE

The purpose of this paper is to provide information on the caseload and manpower situation of the District Court.

CASELOAD AND WAITING TIMES

2. The caseload for the District Court from 2006 to 2008 is as follows:

	<u>2006</u>	<u>2007</u>	<u>2008</u>
Criminal Cases	1 199	1 240	1 250
Civil Cases	30 948	28 820	28 527

3. The average waiting times for cases in the District Court are as follows:

	<u>Target</u>	<u>2006</u>	<u>2007</u>	<u>2008</u>
Criminal cases – from first appearance of defendants in District Court to hearing	100	117	98	111
Civil cases – from date of listing to hearing	120	125	58	85

4. There are a total of 10,029 interlocutory hearings in 2008. As regards the waiting time for interlocutory applications (excluding call-over), they are as follows:

- (a) for shorter interlocutory hearings (under 2 hours), the average waiting time is 40 days in 2008; and
- (b) for slightly longer interlocutory hearings (over 2 hours), the average waiting time is 66 days in 2008.

JUDICIAL MANPOWER POSITION

5. At present, there are altogether 24 judges/deputy judges sitting in the District Court, including 14 District Judges (including the Chief District Judge) and 10 Deputy District Judges. For the District Court Masters Office, there are currently four judicial officers taking up the functions of the Registrar and Deputy Registrars of the District Court.

OBSERVATIONS

6. While the caseloads have been quite stable during the past few years, it should be noted that the number of cases alone is not the only indicator reflecting the District Court's workload. The Judiciary has been monitoring the waiting times, and has taken measures to redeploy resources to reduce the waiting times whenever required.

7. The average waiting times of civil cases were kept within targets in 2007 and 2008. Upon the implementation of the Civil Justice Reform in April 2009, one additional Temporary Deputy Registrar will be deployed initially in the District Court to enhance the judicial manpower at the Registry. The situation will be reviewed regularly to decide whether additional manpower would be required on a longer-term basis.

8. The average waiting time in respect of criminal cases is slightly longer in 2008 when compared with 2007. The complexity of cases is the main contributing cause for increase of waiting time. These complex cases often involved difficult legal arguments and examination of exhibits during the trial and would take longer time to complete. As a result, the number of cases where the listed day for trial exceeded 10 days had significantly increased from 51 cases in 2007 to 77 cases in 2008, representing a 51% increase. The average listed days per case also rose 24% from 4.38 days in 2007 to 5.44 days in 2008. Consequently, the waiting time would be longer.

9. To help shorten the waiting time for criminal cases, the following measures have been introduced:

- (a) an additional criminal list has been maintained since September 2008; and

- (b) where circumstances warrant, experienced judges, who handle mainly civil cases, would be called upon to deal with plea and sentence.

With the above measures, the waiting times of criminal cases for December 2008 and January 2009 were kept within target, which are 99 days and 91 days respectively.

10. The Judiciary will continue to monitor the situation closely and will make every effort to improve the waiting times.

Judiciary Administration
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**Establishment and Manpower Position
of Judges and Judicial Officers (“JJOs”)
(As at 1 April 2009)**

Level of Court	JJOs at substantive or equivalent level ^A	Deputy/Temporary/Acting JJOs		Total Manpower	Establishment
		Internal	External		
Court of Final Appeal	4	0	0	4	4 ^B
Registrar, CFA	0	1	0	1	1
Court of Appeal, High Court	11	0	0	11	11
Court of First Instance, High Court	24	10	2	36	32
High Court Masters’ Office	5	5	1	11	9
District Court (Including Family Court and Member, Lands Tribunal)	21	14	1	36	36
District Court Masters’ Office	5	0	0	5	4
Magistrates’ Courts/ Specialized Court/ Other Tribunals	50	3	24	77	92
Total	120	33	28	181	189

Notes

- (A) Figures in this column include JJOs deployed to carry out the functions of other judicial offices at equivalent levels, such as those deployments arranged under the cross-posting policy for Magistrates to take up positions in the tribunals and District Court Registry.
- (B) Excludes one Permanent Judge vacant post which is created for a Non-Permanent Judge (“NPJ”) of the Court of Final Appeal (“CFA”). In practice, an NPJ is invited to sit in the CFA as required in accordance with Section 5 and Section 16 of the Hong Kong CFA Ordinance, Cap. 484.

Table 2

**Percentages of Judicial Resources
Provided by Non-Substantive Judges and Judicial Officers^(A)
in Handling Judicial Work at Various Levels of Court**

Level of Court	2006	2007	2008
Court of Final Appeal	0	0	0
Registrar, CFA	100%	100%	100%
Court of Appeal, High Court ^(B)	16%	36%	34%
Court of First Instance, High Court	43%	30%	35%
High Court Masters' Office	50%	53%	60%
District Court (Including Family Court and Member, Lands Tribunal)	59%	40%	42%
District Court Masters' Office	33%	33%	25%
Magistrates' Courts/ Specialized Court/ Other Tribunals	31%	29%	30%

Note : (A) Non-substantive Judges and Judicial Officers ("JJOs") include: (i) JJOs who are appointed to take up judicial positions at a higher rank in the Judiciary; and (ii) private practitioners who are appointed as deputy JJOs.

(B) For the Court of Appeal in the High Court, Judges of the Court of First Instance have been appointed to sit as additional judges of the Court of Appeal in accordance with section 5 of the High Court Ordinance, Cap.4.

**Relevant papers on appointment of serving Justices of Appeal as
non-permanent judges of the Court of Final Appeal and
judicial manpower situation**

Committee	Date of meeting	Paper
Panel on Administration of Justice and Legal Services	26.5.2008 (Item VI)	Agenda Minutes
	29.5.2008 (Item I)	Agenda Minutes
	13.1.2009 (Item VI)	Agenda Minutes
	30.3.2009 (Item III)	Agenda Minutes
	27.4.2009 (Item II)	Agenda Minutes
Subcommittee on Proposed Senior Judicial Appointment	-	Report to the House Committee meeting on 14.5.2010