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Panel on Administration of Justice and Legal Services

Background brief for the meeting on 28 May 2007

Budgetary arrangement and resources for the Judiciary

Purpose

This paper gives an account of the past discussion of the Panel on the budgetary arrangement and resources for the Judiciary and related issues.

Background

Consultancy Report on "System for the Determination of Judicial Remuneration"

2. In May 2002, the Judiciary commissioned Sir Anthony Mason to undertake a consultancy study with a view to recommending the appropriate system for the determination of judicial remuneration in Hong Kong. Following the completion of the Consultancy Report on "System for the Determination of Judicial Remuneration" in February 2003, the Chief Justice established a Working Party comprising 15 judges from all levels of court to advise and for that purpose to consult all judges.

3. On 23 April 2003, on the basis of the Working Party's advice, which was based on the judges' overwhelming support, the Chief Justice had put forward to the Chief Executive the Judiciary's proposal that the recommendations and views contained in Sir Anthony Mason's Consultancy Report should be adopted as the appropriate system for the determination of judicial remuneration in Hong Kong. A summary of the recommendations and views contained in the Consultancy Report is in **Appendix I**.

4. On 26 May 2003, the Panel had a preliminary discussion on some of the recommendations in the Consultancy Report at its meeting. The Administration advised the Panel that it had yet to form a view on the Judiciary's proposal which raised some points of principle and required careful examination. The Panel agreed to follow up the matter in due course.

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5. In 2002-03, all directors of bureaux were required to achieve a saving of 1.8% in the operating expenditure on the existing and new or improved services as planned

in 2003-2004, and an additional saving of 1% each year from 2004-2005 to 2006-2007.

6. The Chief Justice had made reference to budgetary constraints of the Judiciary in his speeches made at the Ceremonial Opening of the Legal Year in 2003, 2004 and 2005. In his speech made on 17 February 2005, CJ reiterated that despite budgetary constraints, the quality of justice must not be compromised and must be maintained. However, the inevitable consequence of budgetary constraints over a long period of time would be the lengthening of waiting times at all levels of court. When the waiting times were considered to be unacceptable, the question of providing additional resources to the Judiciary would have to be raised and addressed by the Administration and the Legislature.

7. The subject of budgetary arrangement and resources for the Judiciary was first discussed at the AJLS Panel meeting on 24 February 2003. It was then followed up at a number of meetings between 2003 and 2006.

8. In the course of discussion, the Panel also considered the Research Report on "Budgetary arrangements for overseas judiciaries" (RP02/03-04) prepared by the Research and Library Services Division of the LegCo Secretariat in November 2003. The Report examined the budgetary arrangements in the United States, the United Kingdom and Canada, and compared them with the budgetary arrangements for the Judiciary in Hong Kong.

Discussion of the Panel

Concerns/suggestions of the Panel

9. Members of the Panel expressed the following views -

- (a) there should be better protection of the Judiciary's budgetary arrangement to ensure that judicial independence would not be subject to executive influence, and the Judiciary should be provided with adequate resources to administer justice without undue delay;
- (b) the arrangement for the Administration to set savings targets to be achieved by the Judiciary and to determine the approved provisions for the Judiciary in the annual resource allocation exercise should be reviewed; and
- (c) while the Government should draw up and introduce budgets and final accounts under Article 62(4) of the Basic Law, there was scope under the Basic Law for the Administration to provide greater flexibility and autonomy for the Judiciary to prepare its budget.

10. The Panel agreed at its meeting on 23 May 2005 that the Administration and the Judiciary Administration be requested to consider the following suggestions –

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- (a) the Administration should not unilaterally impose savings targets set for bureaux and departments on the Judiciary, but should consult the Judiciary as to what savings targets would be compatible with the proper administration of justice;
- (b) the Judiciary should have autonomy to prepare its own budget on the basis of objective yardsticks, such as existing resources, projected needs, workload and staff remuneration. Members pointed out that in the United States, the bulk of the funds allotted to individual courts were determined by formulas which were developed by the judiciary as an objective means for determining the workload and resource needs of the judiciary;
- (c) the Administration should formally adopt as a rule of practice that the budgetary proposals of the Judiciary would not normally be reduced;

Judicial remuneration

- (d) judicial remuneration should be protected by statute in line with other jurisdictions in which judicial independence was given constitutional importance, as recommended in Sir Anthony Mason's Consultancy Report; and
- (e) the Administration should, in due course, consider the establishment of a consolidated fund to cater for specific resource needs of the Judiciary, e.g. the payment of judicial remuneration. Members considered that a continuing security for the payment of remuneration was a necessary element in safeguarding judicial independence. Members pointed out that in the United Kingdom, judicial remuneration was paid out of a consolidated fund which was not subject to parliamentary authorisation, any government appropriation process or budget legislation.

Responses of the Administration

11. At the Panel meeting in July 2005, the Administration responded to the Panel's suggestions relating to budgetary arrangement as follows –

- (a) the Administration agreed to implement a revised budgetary arrangement, i.e. to consult the Judiciary on its overall resource requirements, prior to the setting of government budgetary targets;

- (b) the Administration did not agree that there should be a rigid bar on reduction of the Judiciary's budgetary provision, as it could not rule out the need for downward adjustments to the Judiciary's funding provision having regard to overall economic constraints; and
- (c) the funding for the Judiciary formed part of the Government's overall expenditure and was subject to the annual appropriation by LegCo and separate approvals by LegCo's Finance Committee or the Financial Secretary under the Public Finance Ordinance (Cap. 2). The Administration did not see the need for a separate fund which was exempted from the LegCo appropriation process to cater for the Judiciary's resource requirements.

12. As regards the Judiciary's proposal to adopt the recommendations and views contained in Sir Anthony Mason's Consultancy Report, the Administration advised that in January 2004, the then Chief Executive had asked an independent body, the Standing Committee on Judicial Salaries and Conditions of Service, to make recommendations to him on the appropriate institutional structure, mechanism and methodology for the determination of judicial remuneration and in particular, to make recommendations on whether the proposal of the Judiciary based on the Consultancy Report should be accepted. The Standing Committee had yet to report to the Chief Executive.

Revised budgetary arrangement

13. At the meeting on 27 March 2006, the Panel was briefed on the revised arrangement for the preparation of the Judiciary's draft Estimates for 2006-2007. The Panel was advised that -

- (a) under the revised budgetary arrangement, the Judiciary had submitted to the Administration its resource requirements for 2006-2007 in August 2005, prior to the Administration drawing up the operating expenditure envelope for the Judiciary. The draft Estimates for 2006-2007 for the Judiciary would provide adequate resources for the implementation of measures to shorten the waiting times at different levels of court;
- (b) the Judiciary considered that the revised budgetary arrangement was working satisfactorily, and
- (c) the Administration would extend the revised arrangement as a standing practice for future Estimates.

14. The Panel reiterated that the Judiciary should have autonomy to determine its budget on the basis of some objective yardsticks or predetermined formulae. The Judiciary Administration and the Administration advised that they were open to any suggested measures within the parameters of the Basic Law. However, as the revised budgetary arrangement had just been in place and had worked satisfactorily,

they would continue to monitor the situation closely before considering whether any further measures were necessary. The Panel requested them to consider whether there was further scope to improve the budgetary arrangement for the Judiciary and revert to the Panel in the 2007-2008 session.

Latest position

15. The Panel will follow up the relevant issues at the coming meeting on 28 May 2007, including the suggestions made by the Panel in paragraph 10 (b), (d) and (e) above.

Relevant papers

16. A list of the relevant papers is in the **Appendix II** for members' easy reference. These papers are available on the LegCo website (<http://www.legco.gov.hk>).

Council Business Division 2
Legislative Council Secretariat
25 May 2007

**Summary of
the recommendations and views
contained in the Consultancy Report (Chapter 6)**

- (1) **Recommendation 1: Legislation should be enacted prohibiting absolutely any reduction in judicial remuneration.**

Constitutional or legislative prohibition of reduction is an essential element of judicial independence. The prohibition is absolute in Australia, New Zealand, Singapore, England and Wales and the United States of America. In addition, other major jurisdictions (with a common law tradition or elements) which have an absolute prohibition include India, Ireland, Malaysia, the Philippines and South Africa. The presence of an absolute prohibition in all such major jurisdictions means that it is a widely accepted safeguard for the protection of judicial independence. Its rationale is that the principle of judicial independence is so fundamental that any risk of its jeopardy must be avoided.

The case for it is stronger in Hong Kong. In Hong Kong, retired judges at District Court level and above are prohibited from returning to private practice and are therefore more dependent on their remuneration than judges in jurisdictions where no such prohibition exists.

There are objections to any qualified prohibition such as one providing for agreement by a majority of judges of a relevant court; or one which provides for a waiver by the judges of a prohibition against reduction. The principal objection is that this 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.

(See paras 6.3 to 6.10).

- (2) **Recommendation 2:** Provision should be made by Ordinance for a standing appropriation to meet the payment of judicial remuneration.

The provision of such a continuing security for the payment of remuneration is a necessary element in safeguarding judicial independence. Its absence is a major weakness.

(See paras 6.11 to 6.13).

- (3) **Recommendation 3:** Judicial remuneration should be fixed by the Executive after considering recommendations by an independent body.

The Executive will then seek the necessary funding from the Legislature. Such a system would 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. This arrangement is consistent with the Basic Law and builds on traditions already established in Hong Kong.

(See paras 6.14 to 6.18).

- (4) **Recommendation 4:** The independent body should be established by statute.

A statutory foundation would strengthen its independent character and would enhance the notion of structural permanence and continuity. And statute would confer appropriate powers and would result in transparent definition of functions and powers.

(See paras 6.19 and 6.20).

- (5) **Recommendation 5:** The independent body's role should be confined to judicial remuneration exclusively.

The reasons are: (1) A specialist body would have the skills and experience appropriate to assessing this class of remuneration; (2) Judges are a discrete class and the methodology for assessment 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 para 6.21).

- (6) **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.

A body consisting of 5 members would be sufficient.

- (1) The Chairman should be a prominent person of a 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.

Members should serve for a fixed term of say 2 to 3 years and would be removable during their terms only on specified grounds such as bankruptcy and conviction for a criminal offence. No member 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.

The following persons should be ineligible for membership:

- (1) Judges and retired judges since to maintain public confidence, any actual or possible conflict of interest or perception of conflict of interest should be avoided.
- (2) Persons serving in the Executive since the Executive will be required to consider the recommendations made by the independent body.
- (3) Members of the Legislature since they are required to consider funding proposals additional to the standing appropriation.

(See paras 6.22 to 6.26).

- (7) **Recommendation 7: The methodology, that is the factors which should be considered, should be specified in the statute.**

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 to be exercised by the independent body after weighing the factors.

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;
- (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.

(See paras 6.27 and 6.28).

- (8) **Recommendation 8: Performance pay and productivity bonuses should not form part of judicial remuneration.**

The reasons are: (1) 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 maximize the prospects of earning performance pay. (2) There is the difficulty of measuring judicial performance for the purpose of calculating bonus or productivity remuneration.

Although as with the private sector, performance pay and productivity bonuses are becoming increasingly an element in public sector remuneration in many jurisdictions, apart from Singapore, there is no provision for such an element in other jurisdictions for judicial remuneration. In the United Kingdom and Australia, it has been strongly opposed by the judiciary and rejected recently by the review body in both jurisdictions as inappropriate for the Judiciary.

(See paras 6.29 to 6.31).

- (9) **Recommendation 9: The independent statutory body should adopt a procedure which is transparent and its report containing its recommendations to the Executive should be published.**

This is important for the maintenance of public confidence in its work.

(See paras 6.33 and 6.34).

Budgetary arrangement for the Judiciary

Relevant documents

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Question</u>
Panel on Administration of Justice and Legal Services	24 February 2003	Judiciary Administration's paper on "Initiatives on efficiency savings in the Judiciary" [LC Paper No. CB(2)1224/02-03(01)] Minutes of meeting [LC Paper No. CB(2)1618/02-03]
	26 May 2003	Judiciary's press release and Consultancy Report on "System for the Determination of Judicial Remuneration" [LC Paper No. CB(2)1871/02-03(01)] Administration's letter dated 20 May 2003 [LC Paper No. CB(2)2181/02-03(03)] Hong Kong Bar Association's letter dated 7 May 2003 [LC Paper No. CB(2)2181/02-03(04)] Law Society of Hong Kong's paper on "Judicial remuneration" [LC Paper No. CB(2)2231/02-03(01)] Minutes of meeting [LC Paper No. CB(2)2889/02-03]
	24 November 2003	Research report on "Budgetary arrangements for overseas judiciaries" prepared by Research and Library Services Division [RP02/03-04] Administration's paper on "Budgetary Arrangements for the Judiciary" [LC Paper No. CB(2)390/03-04(03)] Minutes of meeting [LC Paper No. CB(2)729/03-04]

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Question</u>
	--	Administration's paper on "Budgetary arrangements for the Judiciary" [LC Paper No. CB(2)1288/03-04(01)]
Legislative Council	8 December 2004	Official Record of Proceedings of the Council on Hon Margaret NG's question on "The closure and merger of Magistrates' Courts"
Panel on Administration of Justice and Legal Services	25 April 2005	Judiciary Administration's written response on "Closure and merger of Magistrates' Courts" [LC Paper No. CB(2)1271/04-05(01)]
		Background brief on "Judiciary's cost saving measures, budgetary arrangements and fees and charges" [LC Paper No. CB(2)1333/04-05(01)]
		Judiciary Administration's paper on "Budgetary arrangements for the Judiciary" [LC Paper No. CB(2)1333/04-05(02)]
		Administration's paper on "Expenditure estimates and charges for the Judiciary" [LC Paper No. CB(2)1333/04-05(03)]
		Minutes of meeting [LC Paper No. CB(2)2057/04-05]
	23 May 2005	Background brief on "Budgetary arrangements for the Judiciary" [LC Paper No. CB(2)1621/04-05(03)]
		Minutes of meeting [LC Paper No. CB(2)2232/04-05]
	12 July 2005	Letter dated 25 May 2005 to the Secretary for Financial Services and the Treasury on budgetary arrangement for the Judiciary [LC Paper No. CB(2)2234/04-05(01)]

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper/Question</u>
		<p>Judiciary Administration's letter dated 5 July 2005 on "Budgetary arrangements for the Judiciary" [LC Paper No. CB(2)2234/04-05(02)]</p> <p>Administration's paper on "Budgetary arrangements for the Judiciary – the Administration's response" [LC Paper No. CB(2)2234/04-05(03)]</p> <p>Minutes of meeting [LC Paper No. CB(2)2621/04-05]</p>
	27 March 2006	<p>Background brief prepared by the LegCo Secretariat on "Budgetary arrangement and resources for the Judiciary" [LC Paper No. CB(2)1489/05-06(01)]</p> <p>Judiciary Administration's letter dated 20 March 2006 on "Budgetary arrangement and resources for the Judiciary" [LC Paper No. CB(2)1489/05-06(02)]</p> <p>Administration's letter dated 20 March 2006 [LC Paper No. CB(2)1489/05-06(03)]</p> <p>Minutes of meeting [LC Paper No. CB(2)2048/05-06]</p>