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Panel on Administration of Justice and Legal Services

**Updated background brief prepared by the Legislative Council Secretariat
for the meeting on 23 January 2017**

Judicial Service Pay Adjustments

Purpose

This paper provides updated background information on the past discussions of the Panel on Administration of Justice and Legal Services ("the Panel") on judicial service pay adjustments.

Background

Judicial remuneration review mechanism

2. In May 2002, the Judiciary Administration ("JA") 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. The Consultancy Report on "System for the Determination of Judicial Remuneration" ("the Mason Report") was completed in February 2003.

3. Following completion of the Mason Report, the Chief Justice ("CJ") put forward to the Chief Executive ("CE") the Judiciary's proposal that the recommendations and views contained in the Mason Report should be adopted as the appropriate system for the determination of judicial remuneration in Hong Kong. Relevant recommendations made in the Mason Report include, inter alia, judicial remuneration should be fixed by the Executive after considering recommendations by an independent body which should be established by statute; the members of the independent body should be appointed by the Executive; and the methodology, i.e. the factors to be considered, should be specified in the statute.

4. On 21 January 2004, CE appointed the Standing Committee on Judicial Salaries and Conditions of Service¹ ("the Judicial Committee") 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 Judiciary's proposal based on the Mason Report should be accepted.

5. In May 2008, CE-in-Council agreed that judicial remuneration should be determined according to a mechanism separate from that of the civil service. Specifically, judicial remuneration is determined by CE-in-Council after considering the recommendations of the independent Judicial Committee. The new mechanism comprises (a) a benchmark study to be conducted on a regular basis² which seeks to check whether judicial pay is kept broadly in line with the movements of legal sector earnings over time; and (b) an annual review.

6. In coming up with the recommendations, the Judicial Committee would take into account the basket of factors approved by the CE-in-Council in May 2008, the principle of judicial independence and the position of the Judiciary³. The basket of factors include the responsibility, working conditions and workload of judges vis-à-vis those of lawyers in private practice; recruitment and retention in the Judiciary; retirement age and retirement benefits of the Judges and Judicial Officers ("JJOs")⁴; unique features of the judicial service; prohibition against return to private practice in Hong Kong; benefits and allowances enjoyed by JJOs; cost of living adjustment; general economic situation in Hong Kong; budgetary situation of the Government; overseas remuneration arrangements; private sector pay levels and trends; and public sector pay as a reference.

7. The first time judicial pay for JJOs was increased under the new mechanism for determining judicial remuneration was in 2011-2012. In conducting its 2011 judicial remuneration review ("JRR"), the Judicial Committee had also taken into account the principle of judicial independence and

¹ The Standing Judicial Committee on Judicial Salaries and Conditions of Service ("the Judicial Committee") is an independent advisory body appointed by the Chief Executive to advise and make recommendations on matters concerning the salary and conditions of service of Judges and Judicial Officers ("JJOs"). It was first established in December 1987 in recognition of the independent status of the Judiciary and the need for the pay and conditions of services of JJOs to be dealt with separately from those of the civil service.

² The Judicial Committee has decided that a benchmark study should in principle be conducted every five years, with its frequency subject to periodic review. The most recent benchmark study was conducted in 2015.

³ The Judiciary considers that there should not be any reduction in judicial pay as a matter of principle.

⁴ "Judges" comprise Judges of the Court of Final Appeal, Justices of Appeal of the Court of Appeal, Judges of the Court of First Instance and District Judges. "Judicial officers" are those serving in Magistrates' Courts and Tribunals, as well as registrars and masters of the High Court and District Court.

the position of the Judiciary. In particular, both the Judiciary and the Judicial Committee agreed in principle that the cumulative effect of the private sector pay trends in 2009, 2010 and 2011 should be taken into account in determining judicial pay adjustment for 2011-2012; and had based their respective calculations on the same set of data. Having considered all relevant factors, the Judicial Committee submitted its report to the CE recommending that judicial salaries should be increased by 4.22% in 2011-2012 with effect from 1 April 2011.

Previous judicial service pay adjustments

8. Following the CE-in-Council's acceptance of the recommendations made by the Judicial Committee in its reports on the 2009 and 2010 JRRs, the judicial salaries remained unchanged in 2009-2010 and 2010-2011.

9. The judicial pay increases recommended by the Judicial Committee for 2011-2012, 2012-2013, 2013-2014, 2014-2015 and 2015-16 were 4.22%, 5.66%, 3.15%, 6.77% and 4.41% respectively. The proposed pay adjustments were generally supported by members of the Panel, and subsequently approved by the Finance Committee ("FC") of the Legislative Council⁵.

Past discussions

10. The Panel considered the proposed pay increase for JJOs at its meetings held on 20 October 2011, 30 October 2012, 26 November 2013, 24 November 2014 and 23 November 2015. Major views/concerns of members and the Administration's responses are set out in the ensuing paragraphs.

Judicial remuneration

11. At its meeting held on 20 October 2011 to discuss the 2011-2012 judicial service pay adjustment, members observed that the proposed judicial pay increase (i.e. 4.22%) recommended by the Judicial Committee did not meet with the increase (i.e. 4.23%) sought by the Judiciary with the difference being 0.01%. The Panel was of the view that there should be a consensual mechanism for JRR.

12. JA advised that different percentages of judicial pay increase proposed by the Judiciary and recommended by the Judicial Committee were the result of the

⁵ The proposed judicial service pay adjustments for 2011-2012, 2012-2013, 2013-2014, 2014-2015 and 2015-16 were approved by the FC at its meetings held on 18 November 2011, 7 December 2012, 20 December 2013, 20 March 2015 and 19 March 2016 respectively.

different arithmetical approaches adopted in calculating the judicial pay increase and did not represent any fundamental differences regarding matters of principle. With the experience of the 2011-2012 JRR, the Judiciary would adopt the same calculation method as adopted by the Judicial Committee in a similar situation in future.

13. During the discussion of the 2012-2013 judicial service pay adjustment held on 30 October 2012, a member pointed out that the monthly salary of the CJ of the Court of Final Appeal ("CFA"), i.e. \$251,950, was much lower than that of the Secretaries of Departments, i.e. \$350,000, despite the fact that CJ ranked higher than Secretaries of Departments in the Precedence List of the Hong Kong Special Administrative Region. Question was raised as to whether the Judicial Committee had looked into such salary gap.

14. The Administration advised that it was inappropriate to make direct comparison between the pay of JJOs with that of officials appointed under the Political Appointment System in that the former was entitled to a wide range of benefits and allowances, such as housing and retirement benefits and education allowances, in addition to salary, which was not the case for the latter. Moreover, JJOs enjoyed security of tenure until they reached retirement age, which was not the case for political appointees. In recognition of the independence and uniqueness of the Judiciary, JJOs were remunerated according to an independent salary scale. Further, judicial salaries were subject to regular reviews that were distinct from that carried out in respect of the civil service, with the Judicial Committee rendering advice to CE on matters concerning judicial remuneration.

15. The Administration pointed out that whilst it was inappropriate to make direct comparison between judicial pay and private legal sector pay having regard to the uniqueness of judicial work, the findings of the 2010 benchmark study revealed that whilst the pay of Magistrates and District Judges was higher than that of the legal practitioners with comparable level of experience in the private sector, the pay of the Judges of the Court of First Instance ("CFI") of the High Court ("HC") was lower than that of the legal practitioners with comparable level of experience in the private sector. In respect of the pay differentials between CFI Judges and senior counsels with the same years of practice, the pay differential had narrowed from 47% to 42% since 2005. It should however be noted that the changes in differentials between judicial pay and legal sector pay, with some widening and some narrowing at different ranges, pointed to the diversity of legal sector pay. No clear trend could be established from such pay differentials. One interesting observation from the benchmark study was that comparing with solicitors who participated in the benchmark study, a greater number of barristers who participated in the same had expressed interests in joining the bench.

16. Question was raised as to whether the total remuneration package for JJOs was reasonably attractive to outside talents who wished to join the bench. The Administration responded that apart from the remuneration package, other factors such as the high esteem of the Judiciary, individual's commitment to serve the public and the opportunity to move to the next level of one's career remained reasonably attractive to outside talents who wished to join the bench.

17. During the discussions of the 2014-2015 and 2015-16 judicial service pay adjustments held on 24 November 2014 and 23 November 2015 respectively, question was raised about whether the views of JJOs had been consulted on judicial remuneration.

18. The Administration advised that the position of the Judiciary was one of the three factors for determining judicial remuneration. The second factor was whether the Judicial Committee had thoroughly examined the basket of factors set out in the LegCo Brief, namely: (i) responsibility, working conditions and workload of judges vis-à-vis those of lawyers in private practice; (ii) recruitment and retention in the Judiciary; (iii) retirement age and retirement benefits of JJOs; (iv) benefits and allowances enjoyed by JJOs; (v) prohibition against return to private practice in Hong Kong; (vi) overseas remuneration arrangements; (vii) cost of living adjustment; (viii) general economic situation in Hong Kong; (ix) budgetary situation of the Government; (x) private sector pay levels and trends; and (xi) public sector pay as a reference. The third factor was the need to ensure that judicial remuneration was sufficient to attract and retain talents in the Judiciary in order to uphold judicial independence. The Administration believed that the Judiciary had consulted the views of JJOs on the previous and the proposed judicial service pay adjustments.

19. Noting that one of the unique features of the judicial service was that Judges at the District Court level and above were prohibited to return to private practice after ceasing to hold office unless with the permission of the CE, a member raised question about whether such permission had been made by the incumbent CE. The Administration replied in the negative.

20. During the discussion of the 2015-2016 judicial service pay adjustment held on 23 November 2015, a member expressed concern that the proposed pay increase of 4.41% for JJOs was below the headline inflation averaged at 4.5% for the 12-month period ended March 2015.

21. The Administration responded that whilst judicial remuneration was determined under a mechanism which was separate from that of the civil service, similar to annual civil service pay adjustment, the aim of annual pay adjustment for

JJOs was not to track inflation. Instead, the basket of factors as approved by the CE-in-Council in May 2008, the principle of judicial independence and the position of the Judiciary had been taken into account in coming up with the recommendation for the proposed pay increase for JJOs.

22. In reply to a member's enquiry as to whether adding 0.5% on top of the net pay trend indicator ("PTI") for JJOs in 2015 was to boost the morale of JJOs as in the case of the civil servants, the Administration considered that if the civil service pay adjustment was based on the net PTI plus 0.5%, the same approach should be adopted for the judicial pay adjustment in 2015. Otherwise, it would put the position of judicial remuneration in a disadvantaged position when compared to the public sector pay adjustment as a whole.

23. Regarding a member's enquiry as to the progress of the 2015 Benchmark Study on the Earnings of Legal Practitioners in Hong Kong ("2015 Benchmark Study"), the Administration responded that the consultant engaged by the Judicial Committee to carry out the Benchmark Study was collecting information from the legal practitioners in private practice through a questionnaire, to be followed by interviews with the respondents. Whilst the Judicial Committee hoped to draw on the findings of the 2015 Benchmark Study in the context of the 2016 judicial remuneration review, the Administration emphasized that the relevant findings should not directly be reflected as actual figures in the judicial service pay adjustment. The Judicial Committee would take into account the findings of the 2015 Benchmark Study as one of the factors before making recommendation on judicial salary pay adjustment in 2016.

Judicial manpower situation and long court waiting times

24. Noting the long court waiting times, concern was raised as to whether the Judiciary had adequate judicial manpower to cope with the increasing workload.

25. The Administration advised that the Judiciary had kept under constant review its judicial establishment and manpower situation having regard to operational needs. For instance, to cope with the increasing workload in the Lands Tribunal, particularly arising from more compulsory sale cases since 2009, two new judicial posts were created in 2012⁶. Pending the filling of vacancies in the substantive posts, the Judiciary would continue its established practice of engaging temporary judicial resources to help relieve workload. The deployment of external deputy/temporary JJOs also served the need for private solicitors and

⁶ The Judiciary proposed to seek funding support from FC in 2014-2015 to create seven permanent judicial posts to enhance the establishment of judicial manpower at various levels of court.

barristers to gain actual experience in the Judiciary, before making a decision on whether to join the bench. The Administration further advised that the Judiciary had reviewed the frequency of conducting recruitment exercises for CFI Judges. Noting that the recruitment trawl might not match the timing for some interested parties to join the bench, CJ considered that CFI recruitment exercises should be conducted regularly on a yearly basis, instead of approximately every three years in the past.

26. Noting that the vacancy rate of judicial posts had dropped from 20.2% as at 31 March 2014 (i.e. 40 of the 193 established judicial posts were not filled) to 11.9% as of November 2014 (i.e. 23 of the 193 established judicial posts were not filled), questions were raised about whether a vacancy rate of over 10% for judicial posts was a longstanding manpower situation in the Judiciary and whether a staff vacancy rate of over 10% was also not uncommon in other Bureaux/Departments ("B/Ds").

27. The Administration pointed out that of the 23 vacant judicial posts, around nine could not be filled for the time being pending the completion of the West Kowloon Law Courts Building. Accordingly, the vacancy rate could not be said to be serious and was not uncommon in other B/Ds. The Administration further pointed out that the Judiciary had kept under constant review its judicial establishment and manpower situation having regard to operational needs. For example, eight judicial posts were created upon the completion of a comprehensive establishment review of the manpower situation of JJOs in 2008; two judicial posts were created in 2012 to cope with the increasing workload in the Lands Tribunal, two judicial posts were created in 2013 to cope with the new responsibilities arising from the establishment and operation of the Competition Tribunal under the Competition Ordinance (Cap. 619); and resources had been secured by the Judiciary in 2014-2015 to create seven judicial posts at various levels of court.

28. As regards long court waiting times, the Administration advised that the problem should be viewed in totality. According to the Judiciary, whilst the waiting times for the CFI, insofar as the Civil Running List and the Criminal Running List were concerned, had exceeded their waiting time targets, the respective court waiting times for the CFA, the District Court, the Family Court, the Magistrates' Courts and specialized courts and tribunals had generally been met. The Chief Judge of the HC was giving top priority to deploying judicial resources for hearing appeals by the CFI.

29. Concern was raised as to whether the Judiciary could fill the judicial vacancies in a timely manner, so as to reduce the long court waiting times. During the discussion of the 2014-2015 judicial service pay adjustment held on

24 November 2014, members noted that the Judiciary had indicated, for the first time in its submission to the Joint Secretariat for the Advisory Bodies on Civil Service and Judicial Salaries and Conditions of Service, that some initial signs of difficulties could be observed at the recruitment of the CFI Judge and engagement of deputy Special Magistrates. It was also said that not all vacancies could be filled at the CFI Judge level for the past two recruitment exercises conducted in 2012 and 2013. In particular, for the exercise in 2013, the number of eligible candidates found suitable for appointment was much smaller than the available vacancies. At the Magisterial level, the Judiciary said it had been encountering difficulties in inviting suitable persons from the private practice to deputize as Special Magistrates.

30. The Administration advised that with the gradual filling of judicial vacancies by substantive appointments, the number of external deputy/temporary JJOs had decreased from a total of 41 as at 31 March 2014 to 27 as at November 2014. The Administration pointed out that upon the completion of the previous round of recruitment exercises for Permanent Magistrates and Special Magistrates conducted in the first half of 2014, 16 Permanent Magistrate and five Special Magistrate appointments had been made. More Permanent Magistrate and Special Magistrate appointments would shortly be announced. The Administration further advised that the Judiciary had just launched another open recruitment for CFI Judges in October 2014. The Judiciary, the Administration and the Judicial Committee would closely monitor whether there was recruitment difficulty of CFI Judge; and if so, whether this was due to judicial remuneration and/or other factor(s).

31. A member raised concern that judicial remuneration, particularly at the Magisterial level, was one of the main reasons why the Judiciary had encountered difficulties in engaging outside lawyers to sit as external deputy JJOs as pointed out by the Law Society. Another reason why suitable persons from the private practice would not consider applying for Deputy Special Magistrate was because there was no guarantee that they would be appointed as Permanent Magistrate after a tenure of, say, two years, despite good performance. To enable the Judiciary to better cope with the increased workload of JJOs and to help reduce court waiting times, the member urged the Administration to provide new financial resources as required by the Judiciary. The member also said that many capable lawyers in private practice with many years of practising experience were interested in joining the bench. The member suggested that apart from conducting open recruitment, the Judiciary could consider approaching eligible legal practitioners direct and/or engaging an executive search firm to see whether these legal practitioners were willing to join the bench.

32. The Administration advised that since 2011-2012, 100% of the new resources requested by the Judiciary were met by the Administration. Specifically, in 2014-2015, the Judiciary would be provided with the financial resources required for the creation of seven additional judicial posts at various levels of courts (including three Justices of Appeal of the Court of Appeal of the High Court, one CFI Judge, one District Judge and two Magistrates), the engagement of a team of 10 legally qualified staff to provide professional support to judicial education, and the creation of 59 net additional civil service posts in the Judiciary Administration to meet the needs arising from the increased levels of judicial and registry services. Such increased provisions would also enable the Judiciary to meet the requirements for the filling of all the existing substantive JJO posts at all levels of court, the engagement of temporary judicial manpower to help improve waiting times in some pressure areas in the interim and the employment of support staff to fill all the existing posts in the Judiciary Administration.

33. A member queried whether, apart from the higher costs of appointing eligible overseas applicants for judicial posts, another reason for the Judiciary not to recruit judges from outside Hong Kong in order to address the recruitment difficulties was due to the need for judges to be bilingual since the handover.

34. The Administration advised that appointments of JJOs were all made through open recruitment exercises. Candidates from local and overseas might apply. According to the Judiciary, of the 81 judicial posts filled between 2011 and 2015, 51 and 30 were filled by candidates outside and within the Judiciary respectively.

35. A member opined that to instill public confidence in the judicial system, the Judiciary should refrain from appointing former prosecutors from the Department of Justice to become judges and ensure high standard of judicial conduct.

Staff and other support for JJOs

36. Some members were concerned about the lack of staff and other support for JJOs. These members pointed out that judges were not provided with sufficient support in preparing judgements, especially judgements in the Chinese language, and some judges had to make use of their personal time to prepare judgements. A member further pointed out that in some overseas common law jurisdictions, judges were supported by a team of qualified barristers serving as judges' clerks to alleviate the workload of judges.

37. The Administration advised that the Judiciary had launched the Scheme on Judicial Assistants ("the Scheme") in 2010 to provide enhanced support to appellate judges in discharging their duties. The objectives of the Scheme were: (a) to provide assistance to appellate judges in the CFA and the Court of Appeal of the HC in conducting research on law points and assisting in other work of the court; and (b) to enable fresh and bright law graduates who were about to embark upon careers in the legal profession to acquire an insight into the appellate process and to benefit from working with appellate judges.

38. Members pointed out that under the Scheme, Judicial Assistants were only assigned to provide assistance to appellate judges. To better help JJOs to cope with the increased workload and to keep court waiting times within targets, the Judiciary should expand the scope of the Scheme to all levels of court and engage more young solicitors and barristers as Judicial Assistants. The Administration undertook to convey members' views on the Scheme to the Judiciary for consideration.

Retirement age of judges

39. Some members noted that the statutory normal retirement age for JJOs was 60 or 65, depending on the level of court. Beyond that, extension of service might be approved up to the age of 70 or 71, depending on the level of court and subject to consideration on a case-by-case basis. As retirement was the main source of wastage amongst JJOs, the member suggested that consideration should be given to extending the retirement age of JJOs as in the case of civil servants.

40. The Administration advised that according to the Judiciary, an outside consultant was engaged to review the retirement ages for JJOs at different levels of courts. The Judiciary planned to apprise the Government of the results of the review once the results became available.

41. A member questioned the need for the Judiciary to hire an outside consultant to review the retirement ages of JJOs, as the Judiciary was well versed with the legal sector. Another member urged the Judiciary to expedite its review on the retirement ages of JJOs so as to better attract quality candidates and experienced private practitioners to join the bench.

Judicial education

42. Some members opined that to maintain the quality of administration of justice, it was vital for JJOs at all levels of court to undergo continuing judicial education. Members hoped that with the setting up of the Hong Kong Judiciary Institute by the Judiciary in 2013, more structured judicial education would be

provided to JJOs, particularly those at the lower levels of court. Some other members were of the view that, in order to ensure that JJOs were in touch with social reality, it was necessary for JJOs to acquire knowledge and have exposure to the developments of the systems and conditions of the Mainland as well as to have good grasp of the sentiments and opinions of the people of Hong Kong.

Latest position

43. For the 2016-2017 annual adjustment, the Judicial Committee recommended a 4.85% increase in the pay for JJOs for 2016-2017 with effect from 1 April 2016. In the light of the findings of the 2015 Benchmark Study, the Judicial Committee recommended a 4% pay increase for JJOs below the CFI level and a 6% pay increase for Judges at the CFI level and above with effect from 1 September 2016. As in the case of the past judicial service pay adjustments, the Administration intends to seek the views of the Panel prior to seeking funding support from FC.

44. The Panel will discuss the 2016-2017 judicial service pay adjustments for JJOs at its meeting on 23 January 2017.

Relevant papers

45. A list of the relevant papers is in the **Appendix**.

Council Business Division 4
Legislative Council Secretariat
19 January 2017

Judicial Service Pay Adjustments

List of relevant papers

Date	Meeting/Event	References
20 October 2011	Panel on Administration of Justice and Legal Services	Legislative Council Brief File Ref: <u>CSO/ADM CR 6/3221/02</u> Minutes of meeting LC Paper No. <u>CB(2)1356/11-12</u>
30 October 2012	Panel on Administration of Justice and Legal Services	Legislative Council Brief File Ref: <u>CSO/ADM CR 6/3221/02</u> Background brief on "2012-2013 Judicial service pay adjustment" prepared by the Legislative Council ("LegCo") Secretariat LC Paper No. <u>CB(4)61/12-13(01)</u> Letter dated 30 October 2012 from The Law Society of Hong Kong on the 2012-2013 judicial service pay adjustment and related issues LC Paper No. <u>CB(4)79/12-13(01)</u> Minutes of meeting LC Paper No. <u>CB(4)220/12-13</u>

Date	Meeting/Event	References
26 November 2013	Panel on Administration of Justice and Legal Services	<p>Legislative Council Brief File Ref: <u>CSO/ADM CR 6/3221/02</u></p> <p>Background brief on "Judicial service pay adjustment" prepared by LegCo Secretariat LC Paper No. <u>CB(4)157/13-14(03)</u></p> <p>Minutes of meeting LC Paper No. <u>CB(4)511/13-14</u></p> <p>Administration's response to the information requested by members concerning "Judicial service pay adjustment" LC Paper No. <u>CB(4)223/13-14(01)</u></p>
24 November 2014	Panel on Administration of Justice and Legal Services	<p>Legislative Council Brief File Ref: <u>CSO/ADM CR 6/3221/02</u></p> <p>Updated background brief on "Judicial service pay adjustment" prepared by LegCo Secretariat LC Paper No. <u>CB(4)172/14-15(04)</u></p> <p>Minutes of meeting LC Paper No. <u>CB(4)355/14-15</u></p>
23 November 2015	Panel on Administration of Justice and Legal Services	<p>Legislative Council Brief File Ref: <u>CSO/ADM CR 6/3221/02</u></p> <p>Updated background brief on "Judicial service pay adjustment" prepared by LegCo Secretariat LC Paper No. <u>CB(4)226/15-16(03)</u></p> <p>Minutes of meeting LC Paper No. <u>CB(4)422/15-16</u></p>

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