

**Response of the Bar Council of the Hong Kong Bar Association
to the Consultation Paper on Process of Appointment of Judges**

1. In response to the Issues on which views were invited as set out in the Consultation Paper, the Bar Council (hereafter "the Bar") submits the following comments.

I: Procedure for LegCo to Endorse Judicial Appointments under BL 73 (7)

IA. Options for Endorsement Procedure

2. The Bar strongly supports Option 1 as outlined in the Consultation Paper.
3. It is noted that the power or function under BL 73 (7) will be exercised by LegCo however it is constituted. It is therefore necessary to avoid politicising the way in which this power/function is performed and whatever is done must be wholly consistent with preserving the independence of the judiciary. We believe that to extend the endorsement procedure beyond the present system would tend to politicise the process to an unacceptable level.
4. Further, it must be remembered that the appointment (and removal) of judges generally is made by the Chief Executive upon the recommendation of JORC. LegCo was given the power or role of endorsing appointments to the CFA and of the Chief Judge because of the importance of these posts. It is not LegCo's role to make

recommendations as to appointment. This is an important distinction which must be borne in mind.

5. Therefore, it cannot be intended that LegCo would duplicate the process of consultation undertaken by JORC. LegCo should not, either in reality or by perception, sit on "appeal" from JORC or conduct a "re-hearing" of the recommendation exercise.
6. Furthermore, the Bar believes that as long as suitable persons are appointed to JORC, the possibility of a totally unacceptable candidate being put forward must be remote.
7. It is therefore more appropriate for the *status quo* to be maintained, subject to sufficient information on the candidates being provided to LegCo (as to which see paras 10 and 11 below). Moreover, LegCo should recognise that some self-imposed constitutional constraints should be adopted by it so as to ensure that the independence of the judiciary is protected. In this connection, the Bar suggests that LegCo should as a matter of convention normally accept the recommendation of JORC and will only exercise its powers under the Legislative Council (Powers and Privileges) Ordinance when the proposed candidate is highly controversial.
8. The Bar does not support Option 2. In the Bar's view, there is no need to provide for any specific procedure in controversial cases. Option 1 is already sufficient to cover any such contingency.
9. The Bar strongly believes that Option 3 is not suitable for Hong Kong. It tends to politicise the appointment and also runs the risk of duplicating the process gone through by JORC.

IB. Information Provided to LegCo

10. The Bar is not able to comment on whether the information supplied to LegCo under the present procedures is sufficient because it is not known what is covered by "Career history".
11. The Bar takes the view that LegCo should be provided with sufficient information about the personal and professional background of the candidate to enable LegCo to reach an informed decision based on the candidate's experience and integrity.
12. In relation to the relaxation of restrictions on disclosure, see paras 22-23 below.

II. Process of Appointment of Judges

IIA. Membership of JORC

(1) Secretary for Justice

13. A majority of the Bar agrees that the SJ (or a representative of the DOJ, see para 14 below) should be a member of JORC, broadly for the reasons given for the inclusion of the SJ (formerly the AG) as set out in para 3.8 of the Consultation Paper. However, the Bar takes the view that it is not necessary that the SJ should be an "ex-officio" member.
14. There is, moreover, an added dimension to this question. It is likely that in the near future, the SJ will be politically appointed under the

proposed changes to the appointment of senior officials. There is a strong feeling within the Bar that in order to ensure the independence of the judiciary and the appearance of lack of political influence in the appointment of judges, it is more appropriate to have a representative of DOJ, rather than SJ him/herself, as a member of JORC.

15. Mention must also be made of the strong views expressed by the sizable minority that the SJ, being a member of the Executive, should not be a member of JORC at all.

(2) Eminent Persons from Other Sectors

16. In relation to the JORC members who are "eminent persons from other sectors" under BL 88, at present the only criteria under the JORC Ordinance are that there shall be 3 in number and not connected in any way with the practice of law.
17. Clearly the appointment process of these "eminent persons from other sectors" has the potential to undermine the independence of JORC from the Executive.
18. The Bar therefore proposes that the criteria for appointment of such members be more clearly set out in the Ordinance. The Bar also proposes that their number be reduced to 2. The Bar would also like to see procedures being introduced so that LegCo (or some appropriate committee of LegCo) and the professions would be consulted on a confidential basis on the appointment of these lay members. There are even views expressed that appointments must be endorsed by LegCo.

IIB. Accountability of JORC

19. The Bar supports the proposal to require JORC to publish an annual report.

IIC. Operation of JORC

(1) Open recruitment

20. As made known to the Panel previously, the Bar supports open recruitment for all judicial vacancies.
21. The Bar also suggests that there are merits in adopting the present English system in Hong Kong. It is understood that the Lord Chancellor from time to time openly invites anyone interested in judicial appointments to write to him expressing their interest. The Lord Chancellor is obliged to put before the English equivalence of JORC all written expressions of interest received, but expressly reserves his right to appoint those who have never written in. The Bar thinks that such a system would work in a relatively small community like Hong Kong and would address most, if not all, relevant concerns mentioned in the Consultation Paper and is worthy of consideration.

(2) Amendment of s 11 (1) of JORC Ordinance

22. The Bar considers the present s 11 (1) of JORC Ordinance too widely drawn and should be amended so as to enhance the proper and effective discharge of the members' functions. At present, not only are the members hindered from proper consultation of the

candidates, they are strictly speaking even prevented from discussing improvement of the process of appointment because of the width of the prohibition.

23. Moreover, if s 11 (1) is properly amended, some of the difficulties experienced by LegCo in exercising its powers in endorsing appointments should be removed. Nevertheless, confidentiality of the information provided to LegCo must be preserved where the same relates to individual candidates and their appointment.

(3) Voting of JORC

24. There is more or less equal support within the Bar over the following alternatives in relation to appointments to the CFA and Chief Judge:

- (1) A majority vote is permitted but the dissenting votes must not exceed 2 and must not include a dissenting vote from the representatives of the judiciary, the SJ (or the representative from the DOJ) or the legal professions.

- (2) Voting should be unanimous.

25. The majority supports the first option, ie majority votes should be permitted. The principal reason in support of permitting majority votes is that given the size of JORC (which may increase in the future) it may not always be possible for any candidate, no matter how strong, to secure the unanimous votes of all members. This is particularly so when there are more than 1 suitable candidates to consider for the same position, and different members of JORC may reasonably prefer a candidate over another. It would therefore be

more flexible to allow majority votes.

26. Nevertheless, those in support of permitting majority votes are also of the view that given the importance of these appointments, the candidate must have the support of the judiciary, the SJ (or DOJ) and the legal professions, which are in a unique position to evaluate the candidate's suitability to these positions. For the same reason, a candidate who is supported by members of the judiciary, the SJ (or DOJ) and the legal professions should not be vetoed by the "lay" members.
27. The minority takes the view that given the importance of these positions, the unanimous support of the JORC should be necessary. It is also less likely that LegCo will find controversial a candidate unanimously supported by JORC.

III. Mechanism for Complaints Against Judges

28. The Bar is in receipt of the Judiciary Administration's paper on Mechanism for Handling Complaints against Judges.
29. The Bar believes that the present system as described in that paper is workable and sufficient. However, the system should be published to increase transparency.

Dated 15 April 2002.