

司法及法律事務委員會
**Panel on Administration of Justice
and Legal Services**

任命法官的程序

報告

**Report on
Process of
Appointment of Judges**

**香港特別行政區
立法會**

**Legislative Council
of the
Hong Kong Special Administrative Region**

**2002年9月
September 2002**

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報告

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司法及法律事務委員會

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立法會
司法及法律事務委員會

職權範圍

1. 在符合維持司法獨立及法治精神的原則下，監察及研究與司法及法律事務有關的政策事宜，包括有關官員及部門在推行上述工作方面的效能。
2. 就上述政策事宜交換及發表意見。
3. 在上述政策範圍內的重要立法或財務建議正式提交立法會或財務委員會前，先行聽取有關的簡介，並提出對該等建議的意見。
4. 按事務委員會認為需要的程度，監察及研究由事務委員會委員或內務委員會建議其處理的上述政策事宜。
5. 按照《議事規則》的規定向立法會或內務委員會提交報告。

立法會

司法及法律事務委員會

委員名單

主席	吳靄儀議員
副主席	曾鈺成議員, JP
委員	何俊仁議員 李柱銘議員, SC, JP 涂謹申議員 劉健儀議員, JP 劉漢銓議員, GBS, JP 劉慧卿議員, JP 余若薇議員, SC, JP

(總數：9位議員)

秘書 馬朱雪履女士

法律顧問 馬耀添先生

日期 2001年10月11日

第1章 —— 背景

1.1 《基本法》第七十三(七)條賦予立法會同意終審法院法官和高等法院首席法官任命的權力。自1997年7月1日以來，立法會曾先後兩次根據《基本法》第七十三(七)條行使權力，同意對法官的任命。在2000年6月，立法會同意7項終審法院法官的任命。在2000年12月，立法會同意高等法院首席法官的任命。

1.2 經過上述兩次任命後，事務委員會決定研究下列事項：

- (a) 立法會如何能妥為履行其根據《基本法》第七十三(七)條的憲法責任；及
- (b) 可如何改善任命法官的制度，既提高制度的透明度及問責性，同時又保證司法獨立。

1.3 在2001年6月，事務委員會成立了工作小組，檢討任命法官的程序。工作小組建議就有關任命法官程序的諮詢文件(“諮詢文件”)所提出的事項，邀請公眾(尤其是法律界)表達意見，事務委員會表示贊同。諮詢文件在2001年12月印發，諮詢期於2002年3月15日屆滿。

1.4 事務委員會在諮詢期內接獲司法機構政務處、行政署長、香港律師會、香港大律師公會及一名法律專業人士對諮詢文件的意見。大律師公會於2002年5月31日向事務委員會提交了補充回應。該等組織或人士的意見書載於**附錄I至VI**。

1.5 上述組織或人士就諮詢文件所提問題發表的意見，以及事務委員會提出的建議，載於下文第2至5章。

第2章 —— 立法會根據 《基本法》第七十三(七) 條同意司法人員的任命

同意任命程序

2.1 關於立法會根據《基本法》第七十三(七)條同意司法人員任命的程序，諮詢文件邀請各界就下述三大方案發表意見。

方案1 —— “正常程序”

2.2 《基本法》第七十三(七)條並無就行使同意權力訂定任何正式程序。因此，該項權力可根據立法會的既定做法及程序行使。如認為有關任命通常不具爭議性，下文載述的“正常程序”將足以處理此類情況 ——

- (a) 政府當局告知立法會內務委員會，行政長官接納司法人員推薦委員會(“推薦委員會”)就任命司法人員提出的建議(這應在行政長官公布其接納有關建議前進行)；
- (b) 內務委員會把此事轉交司法及法律事務委員會或其他事務委員會或委員會討論；
- (c) 有關的事務委員會／委員會盡快在立法會全體議員獲邀出席的會議上討論此事；
- (d) 有關的事務委員會／委員會向內務委員會匯報其討論結果；
- (e) 政府當局請求立法會藉通過議案同意所推薦的任命；
- (f) 有關議案在立法會會議席上進行辯論並付諸表決；及
- (g) 如有關議案獲立法會通過，行政長官便作出任命。

2.3 如某項任命具爭議性，而有關的事務委員會或委員會認為有需要調查此事(不論是否透過強迫任何人作證或出示文件的方法)，有關的事務委員會或委員會可在依循上文步驟(d)向內務委員會作出報告後，請求立法會藉議案授權其行使《立法會(權力及特權)條例》(第382章)所賦予的傳召證人或要求出示文件的權力。不然，亦可在此階段提出建議，藉立法會決議委任專責委員會進行調查。

2.4 方案1對現行做法(體現第二次法官任命工作中實際依循的程序)及程序帶來最少變動，亦無須對《議事規則》作出任何修改。不過，這假設了政府當局在上文步驟(a)提交資料方面的做法大有改善。

方案2 —— “經擴大的正常程序”

2.5 方案2是在方案1的基礎上擴展而成。就沒有爭議性的情況而言，方案1的“正常程序”將予依循。此外，如有某些情況可能具爭議性，而為了公眾利益應作更詳細的進一步研究或深入調查，在方案2下另有一個既定程序，用以處理此類情況。

2.6 方案2的優點是，在有需要時可即時引用預先訂立的既定程序。不過，由於在此階段缺乏具體細節，實難以確定方案2會否較上文第2.2至2.3段所述的現行安排更具效率。此外，此方案亦欠缺方案1的彈性。

2.7 如屬意採用此方案，立法會將會就詳細程序再作商議。

方案3 —— “特殊程序”

2.8 方案3建議經適當修改後採納美國制度的若干特點，例如參議院司法委員會舉行公開聆訊向提名人提出質詢的做法。

2.9 事務委員會察悉，在美國，如聯邦法官職位出現空缺，可能獲提名的人便會由司法部進行面試，並由聯邦調查局及獨立的非政府組織美國律師公會調查。獲提名人須填妥分別由司法部、美國律師公會及參議院所編定的問卷。公眾人士可查閱獲提名人的參議院問卷，但在“所涉及的法律訴訟程序／稅務審計／其他機密事務”標題下的部分則除外。如該等機構所提交的報告對獲提名人有良好評價，司法部長便向總統正式推薦有關提名。獲總統批准的提名經簽署後會送交參議院，由參議院將獲提名擔任法官的人選轉交參議院司法委員會處理。獲提名人會接受調查，並在參議院司法委員會的確認提名聆訊中作證，而該等公開舉行的聆訊可由電台及電視廣播。參議院司法委員會會就提名進行表決。法官的任命必須得到參議院過半數票通過才獲確認。有關提名經參議院給予意見及同意後，總統會簽署法官委任狀，正式委任獲提名人。

2.10 美國制度的長處是其具有透明度及問責性。不過，正如美國的經驗顯示(有時更顯得甚為引人注目)，該制度不但有侵犯個人私隱之嫌，更極為政治化，與香港沿用至今的做法大相逕庭。該制度在美國頗具爭議。對香港而言，此種制度有否可能獲社會接受，以及會否令傑出人士不願尋求或接納提名，均是重要的考慮因素。

2.11 如屬意採用此方案，立法會便須進一步考慮實際上如何在香港施行該制度，當中須顧及《基本法》第八十八條的規定，即法官是由行政長官根據獨立委員會的推薦任命。

接獲的回應

2.12 大律師公會強烈支持方案1，惟當局須向立法會提供有關人選的足夠資料。大律師公會並不支持方案2，並認為沒有必要就富爭議的情況制訂任何具體程序，因方案1已足以處理任何此類特殊情況。

2.13 大律師公會認為，基於終審法院法官和高等法院首席法官等職位的重要性，立法會根據《基本法》第七十三(七)條獲授權同意該等職位的任命，但立法會卻無權推薦任命人選。依照一般慣例，立法會應接納推薦委員會推薦的人選，而只在獲推薦的人選極具爭議時，才會行使《立法會(權力及特權)條例》(第382章)賦予的權力。按照原意，立法會不應重複推薦委員會已進行的諮詢程序。大律師公會認為方案3並不適合香港，因該方案會令任命變得政治化，兼有重複推薦委員會已進行的程序的風險。

2.14 律師會並未對方案1或方案2提出任何具體意見，但注意到兩個方案大體上依循現行程序。律師會認為基於若干原因，方案3並不適合香港。律師會認為，任命司法人員的首要關注事項是人選的司法質素，這最好由推薦委員會以保密方式進行所需評核，而立法會則以其同意任命的權力發揮監督作用。司法職位的任命過程絕不可變得政治化，而對候選人私生活的干擾亦必須嚴加監控。該會也反對任何可能不必要地令候選人覺得尷尬的制度，因這會令合適人士不願成為有關職位的候選人。

2.15 司法機構認為方案1較方案2可取，因方案1的特點是容許立法會靈活而恰當地處理任何不同情況；此外，要預設一個能適用於所有情況的程序亦很困難。

2.16 司法機構亦認為，就實際影響而言，採用方案3會令合適人士卻步，不願成為高級司法職位的候選人。常任和非常任法官職位，包括來自其他普通法管轄區的非常任法官職位都會如此。事實上，大部分普通法管轄區都不採納美國制度的做法。再者，方案3會有礙司法機構招聘較初級的司法人員，原因是，對於部分希望參與法官行列者而言，其中一個吸引之處，很可能在於將來有機會擢升至高級司法職位，而要獲得高級司法職位的任命，便須經由立法會同意。

2.17 政府當局同意司法機構的反對意見，不贊同在香港採納具有美國制度若干特點的方案。

事務委員會的建議

2.18 事務委員會經考慮所接獲的意見後，建議採納方案1。事務委員會已邀請立法會議事規則委員會研究，就實施方案1的程序而言，現行規則是否足夠。

第3章 —— 向立法會提供有關司法職位提名人的資料

引言

3.1 事務委員會主要關注到，政府當局在上兩次法官任命中，所提供給立法會的資料未見具體，亦有所不足。諮詢文件曾就當局是否應向立法會提供更多有關司法職位提名人的資料，以便立法會根據《基本法》第七十三(七)條行使同意法官任命的權力。諮詢文件載有美國參議院問卷、英國高等法院法官職位申請表及香港區域法院和以下級別法院司法職位申請表等表格，以供參考。

接獲的回應

3.2 大律師公會認為，當局應向立法會提供足夠資料，包括候選人的個人及專業背景，讓立法會可在知情的情況下，根據候選人的經驗及品格作出決定。大律師公會亦認為，英國高等法院法官職位申請表內，除個人執業時的總收入外，其他資料可用作香港的參考資料。

3.3 律師會認為，政府當局應向立法會提供更多有關司法職位提名人的資料，以便立法會履行《基本法》第七十三(七)條所賦予的職能。該會亦支持要求所有司法職位候選人填寫詳盡的申請表，提供有關其法律專業經驗及專長的詳情。

3.4 司法機構表示會要求推薦委員會在日後作出推薦時，考慮向行政長官提交適當資料，以便行政長官能向立法會提供足夠的資料。在考慮此方面的事宜時，司法機構將參考以前徵求立法會同意法官任命的經驗，以及香港與其他司法管轄區所要求不同司法職位的申請人在申請表內提供的資料。同時，司法機構須仔細考慮，就終審法院非常任法官(特別是來自其他普通法管轄區的法官)的任命建議所提供的資料，是否應與就其他高級法院常任法官的任命建議所提供的有所區別。

事務委員會的建議

3.5 事務委員會建議，政府當局在徵求立法會根據《基本法》第七十三(七)條同意司法人員的任命時，應盡可能提供美國參議院司法委員會擬訂的問卷(附錄VII)和英國高等法院法官職位申請表(附錄VIII)中所載的資料。

第4章 —— 任命法官 的程序

引言

4.1 事務委員會認為有必要檢討現行制度，以提高整個任命法官程序(而非限於須經立法會同意的任命事宜)的透明度及問責性。諮詢文件亦曾邀請各界就其他事項，即推薦委員會的成員組合、問責性及運作，以及放寬《司法人員推薦委員會條例》第11(1)條所訂披露資料的限制等表達意見。

4.2 司法機構向事務委員會保證，終審法院首席法官對於透明度及問責性等原則表示支持，並同意現時有需要檢討有關程序。不過，基本要點是必須確保司法獨立和司法質素不會受到任何損害。司法機構會待事務委員會就此等事項發表報告後，檢討推薦委員會的運作。

推薦委員會的成員組合

4.3 《基本法》第八十八條規定，法官根據當地法官和法律界及其他方面知名人士組成的獨立委員會推薦，由行政長官任命。

4.4 根據《司法人員推薦委員會條例》第3(1)條，推薦委員會由終審法院首席法官(擔任主席)、律政司司長及由行政長官委任的7名委員組成，包括大律師及律師各1名、兩名法官，以及行政長官認為與法律執業完全無關的人士3名。

4.5 《司法人員推薦委員會條例》第4條規定，某些人無資格獲委任為推薦委員會委員，當中包括立法會議員，以及出任可享有退休金的職位(除法官職位外)的人，而該職位的薪酬全部或部分是由公共收入繳付的。

律政司司長的委員身份

4.6 諮詢文件曾指出，律政司出任司法人員敘用委員會委員一事長久以來備受批評。有意見認為，作為政府行政機關一分子，律政司司長出任推薦委員會的委員，會損害委員會的獨立性。諮詢文件曾邀請各界就應否改變推薦委員會的組成規定及委任推薦委員會委員的準則表達意見。

接獲的回應

4.7 政府當局並不同意指律政司司長出任推薦委員會委員會損害委員會的獨立性此說法。事實上，行政長官按《基本法》第八十八條根據推薦委員會的推薦任命法官，而律政司司長只是推薦委員會9名委

員之一，並沒有否決權，因此不應也不會對推薦委員會的獨立性和公正性有任何損害。當局認為律政司司長應在推薦委員會佔有席位的理據如下——

- (a) 律政司司長在司法工作方面擔當公眾利益的守護人及法治的維護者，她作為推薦委員會的成員並參與任命司法人員的工作是恰當的；
- (b) 律政司司長是行政長官的法律事務首席顧問，她作為推薦委員會的成員並就司法人員的任命向行政長官提出意見是恰當的；及
- (c) 律政司聘用大量律師，並外判大量工作予私人執業者，作為律政司的首長，律政司司長處於獨特位置，也甚為了解有關情況，可協助推薦委員會審議司法人員的任命。

4.8 除了上述理據外，政府當局亦強調，不論有關司法獨立的國際及人權原則或普通法，均沒有指出行政機關參與法官的提名會違反司法獨立，唯必須設立保障措施以作防範。在香港，保障措施包括《基本法》第八十九、九十(二)及九十一條對法官任期的保障。行政長官根據獨立運作的推薦委員會所作推薦而任命司法人員的制度，比起其他主要普通法管轄區的制度毫不遜色。政府當局認為，律政司司長作為推薦委員會的法定委員此一安排應該繼續。

4.9 一名法律專業人士認為，律政司司長的委員身份有損司法機構的獨立，兼違反三權分立的基本憲法原則。為彰顯推薦委員會獨立於政府行政機關的地位，律政司司長不應出任推薦委員會委員。

4.10 律師會認為，作為行政長官的首席法律顧問，律政司司長不應繼續出任推薦委員會委員。律政司司長一職的恰當角色是就推薦委員會的推薦人選向行政長官提供意見。由於行政長官並不參與推薦委員會的商議過程，其首席顧問也不應參與。

4.11 大律師公會在初步回應中表示，該會大多數會員認為，律政司司長(或律政司的代表)應出任推薦委員會委員。大律師公會認為，雖然律政司司長未必須要擔任“當然委員”，但推薦委員會商議有關司法職位任命的事宜時，律政司作為三大法庭使用者之一，其成員的意見應得到充分反映。然而，若律政司司長一職變成政治任命，該公會的會員強烈認為，為確保司法機構的獨立，並顯示法官的任命政治中立，由律政司的代表出任推薦委員會委員，會較律政司司長合適。大律師公會亦表示，有屬於少數但人數亦有相當多的會員強烈認為，律政司司長作為政府行政機關一分子，完全不應出任推薦委員會委員。

4.12 在行政長官公布問責制的詳情後，大律師公會重新研究有關事項，並向事務委員會提交補充回應。大律師公會的結論是，律政司司長不應出任推薦委員會委員。當局可挑選一名並非擔任可享有退休金職位的政府律師，出任推薦委員會委員，以代表律政司中政府律師

的意見。大律師公會曾考慮以下事項，達致上述結論 ——

- (a) 《基本法》第八十八條規定，法官根據“獨立”委員會推薦，由行政長官任命。“獨立”可論證為指完全獨立於政府行政機關的意思；及
- (b) 《司法人員推薦委員會條例》第4(1)條禁止立法會議員及擔任可享有退休金的職位(法官除外)的人出任推薦委員會委員，此事實正好顯示推薦委員會的委員必須保持獨立。

大律師公會認為，律政司是三大法庭使用者之一，若推薦委員會內能有一名委員代表律政司，反映該部門的公平、集體及專業意見，對於推薦委員會執行其職責會有幫助。

事務委員會委員的意見

4.13 現將個別事務委員會委員發表的意見綜述如下 ——

- (a) 由政治任命的行政機關成員出任負責推薦高級司法職位任命人選及就現職司法人員擢升事宜作出建議的機構的委員，此事本身存在利益衝突；
- (b) 鑒於公眾關注到，某些法官曾因在憲法訴訟案件中作出不利政府的判決而影響到晉升機會，因此應在制度內設立保障措施，以解決此一關注問題；及
- (c) 提名及任命過程的透明度必須提高，以確保任命法官的程序不會受到政治考慮所左右。委員不反對由律政司一名高級法律專員(本身為公務員)出任推薦委員會委員。然而，律政司司長若是政治任命的人員，便不應出任推薦委員會委員。

事務委員會的建議

4.14 事務委員會察悉，除政府當局持有不同意見外，法律界認為律政司司長不應出任推薦委員會委員，尤其是律政司司長一職若屬於政治任命，更不應如此。此外，大律師公會認為應由律政司的代表出任推薦委員會委員。事務委員會建議政府當局應檢討律政司司長應否出任推薦委員會的委員。

其他推薦委員會委員

接獲的回應

4.15 政府當局認為，推薦委員會委員的任命，乃取決於個別委員本身的長處及相關條件。當局委任各個委員會的成員時，也採用同一套準則。對於諮詢文件提及某名委員是全國人民代表大會(“人大”)代表，政府當局認為，並無理由只因為某委員是人大代表而對其身份有

所歧視。

4.16 大律師公會指出，關於《基本法》第八十八條中所指屬於“其他方面知名人士”的推薦委員會委員，《司法人員推薦委員會條例》訂明的準則是，有關人士共有3名，須完全與法律執業無關。然而，委任“其他方面知名人士”，可能有損推薦委員會的獨立性。大律師公會建議 ——

- (a) 《司法人員推薦委員會條例》應更清楚訂明此類委員的委任準則；
- (b) 此類委員的數目應由3名減至兩名；及
- (c) 應訂定程序，以便就對此類委員的委任以保密方式諮詢立法會(或相關委員會)及法律界。此外亦有意見認為該等委任須經立法會同意。

4.17 律師會認為，律師及大律師應各有兩名(而非一名)加入推薦委員會，因為在評估司法職位候選人的質素，以及在其他推薦委員會委員作出評估時提供協助方面，執業律師最能勝任。然而，為確保有關委員能持續向推薦委員會提供最新及不偏不倚的意見，任期應以兩年為限。

4.18 一名法律專業人士指出，推薦委員會內3名與法律執業完全無關的委員，均來自社會中上階層。他認為應考慮委任一名具影響力而又能代表基層利益的領袖加入推薦委員會。

立法會議員

接獲的回應

4.19 關於立法會議員並無資格出任推薦委員會委員一事，政府當局指出，在回歸後，立法會須根據《基本法》第七十三(七)條履行另一職能，即同意較高級別法院法官的任命。

4.20 大律師公會一直認為，委任“政界人士”為推薦委員會委員，會影響公眾對司法機構的印象及推薦委員會的公信力。

4.21 律師會認為不宜委任有政治背景或擔任政治任命公職的人士出任推薦委員會委員，因此不應委任立法會議員為推薦委員會委員。

4.22 一名法律專業人士認為，只要被委任的“政界人士”向香港市民負責，例如直選產生的立法會議員，即使委任“政界人士”成為推薦委員會委員，也沒有問題。他認為應對《司法人員推薦委員會條例》第4(1)條作出修訂。

事務委員會的建議

4.23 事務委員會建議政府當局應考慮法律界提出的下述建議 ——

- (a) 大律師公會就委任“其他方面知名人士”的準則、人數及程序所提出的建議(請參閱上文第4.16段)；
- (b) 律師會提出有關把律師及大律師的席位由各一個增至各兩個，以及任期定為兩年的建議(請參閱上文第4.17段)；
- (c) 一名法律專業人士提出關於委任一名具影響力而又能代表基層利益的領袖加入推薦委員會的建議(請參閱上文第4.18段)；及
- (d) 兩個法律專業團體的意見，即不宜委任“政界人士”為推薦委員會委員；以及一名法律專業人士提出的意見，即應修訂《司法人員推薦委員會條例》，以容許委任對香港市民負責的“政界人士”出任推薦委員會委員(請參閱上文第4.20至4.22段)。

推薦委員會的問責性

4.24 諮詢文件曾邀請各界就應否規定推薦委員會每年發表報告，以提高其透明度及問責性一事表達意見。司法人員敘用委員會(“敘用委員會”)曾在1976年至1982年期間採取此一做法，每年均發表報告。

接獲的回應

4.25 大律師公會支持有關規定推薦委員會每年發表報告的建議。

4.26 一名法律專業人士亦支持有關建議，並認為報告應包括推薦委員會委員曾作出或考慮的任命，以及委員對該等任命的表決情況等資料。

事務委員會的建議

4.27 事務委員會建議推薦委員會應每年發表報告，內容與敘用委員會過往發表的年報相若。

推薦委員會的運作

為司法職位空缺進行公開招聘

4.28 英國及加拿大均公開招聘某些法官，而美國則不會就聯邦法官的任命採用公開招聘的做法。英國自1997年起便為高等法院的職位空缺進行公開招聘。在香港，公開招聘的做法只限於區域法院或以下級別法院的司法職位空缺。諮詢文件曾邀請各界就應否把公開招聘的做法擴展至高等法院及以上級別法院的司法職位空缺一事表達意見。

接獲的回應

4.29 大律師公會支持為所有司法職位空缺進行公開招聘，並提出香港採用英國的現行制度亦有其可取之處。據瞭解，在英國，大法官不時會邀請有意出任司法職位的人士，以書面向其表達他們的興趣。大法官有責任向在英國等同於推薦委員會的機構悉數提交收到的興趣表達書，但有明文規定他可保留權利委任從未以書面表達興趣的人士。大律師公會認為，該制度適用於如香港般的較小地方，並可解決諮詢文件提及的大部分(如非全部)關注事項，因此值得考慮。

4.30 律師會支持公開招聘高等法院及以上級別法院的司法人員職位。

4.31 一名法律專業人士亦支持為各級法院的司法職位空缺進行公開招聘。只為區域法院或以下級別法院的司法職位空缺進行公開招聘，此一做法不能令人信服。至於有意見關注到為高等法院及以上級別法院的司法職位進行公開招聘，或會令合資格候選人不願申請，而且會令落選者感到尷尬，若此意見成立，則在較低級別法院的司法職位招聘工作中，情況亦是一樣。

4.32 司法機構認為，擴大現行公開招聘機制的適用範圍有利亦有弊，此方面的問題須因應香港的情況，審慎加以衡量。此事項將會納入司法機構對推薦委員會運作的檢討範圍內。

事務委員會的建議

4.33 事務委員會認為，由於《基本法》第九十二條規定，法官和其他司法人員可從其他普通法適用地區聘用，所有級別法院的法官職位均應進行公開招聘，讓有興趣的海外候選人申請，實是合理的做法。事務委員會建議應把公開招聘的做法擴展至高等法院及以上級別法院的司法職位空缺。

放寬《司法人員推薦委員會條例》第11(1)條所訂披露資料的限制

4.34 《司法人員推薦委員會條例》第11(1)條訂明 ——

“委員會任何委員或其他人如未經行政長官許可，向任何未獲授權的人發布或披露他在根據本條例或與本條例有關的執行職責的過程中所知悉的任何文件、通訊或資料的內容或部分內容，或在其執行職責的過程以外發布或披露該等內容，即屬犯罪，一經定罪，可處罰款\$2,000及監禁1年。”

4.35 諮詢文件曾邀請各界就下述事項表達意見 ——

- (a) 立法會在履行《基本法》第七十三(七)條所訂的職責時，應否獲明確豁免，不受《司法人員推薦委員會條例》第11(1)條規限；及

- (b) 應否覆檢和修訂《司法人員推薦委員會條例》第11(1)條，以便提高推薦委員會運作的透明度。

接獲的回應

4.36 大律師公會認為，《司法人員推薦委員會條例》第11(1)條的寫法涵蓋範圍太廣，應予修訂，使推薦委員會委員能更恰當、更有效地履行職能。目前，推薦委員會的委員因受限制而未能就候選人進行適當諮詢。嚴格來說，由於條例所訂的禁制範圍非常廣泛，以致他們甚至不能討論如何改善任命過程。如能適當修訂該條例第11(1)條，便可解決立法會在行使同意任命的權力時所遇到的部分問題。儘管如此，提供予立法會的資料必須保密。

4.37 律師會不同意明文豁免立法會不受《司法人員推薦委員會條例》第11(1)條規限。律師會亦注意到，根據該條例第11(1)條，在“執行職責的過程中”披露資料實際上是容許的。律師會並不認為有必要修訂第11(1)條。

4.38 對於有意見關注到《司法人員推薦委員會條例》第11(1)條可能妨礙推薦委員會委員的諮詢工作，司法機構提出下列意見——

- (a) 該條例第11(1)條規定，推薦委員會委員未經行政長官許可，不得向任何未獲授權的人發布或披露他在執行職責的過程中所知悉的任何資料，亦不得在其執行職責的過程以外發布或披露該等資料。舉例而言，推薦委員會的文件、會議紀要和當中的資料均不得發布或披露；
- (b) 該條例第11(1)條或其他方面卻沒有禁止或限制推薦委員會委員按自己認為適合的方式進行持續諮詢。換言之，委員隨時都可以收集意見，藉此累積有助處理包括擢升事宜的司法任命的資料，以便在出現空缺時使用。為使該等關於工作表現的資料能對委員的工作提供最大幫助，委員將以公平客觀的方式，在一段時間內持續進行資料收集；及
- (c) 《司法人員推薦委員會條例》第11(1)條的用語與《公務員敘用委員會條例》(第93章)第12(1)條相若。由於委任和擢升事宜所涉及的工作性質，該等條文均確認有需要把有關過程保密。

事務委員會的建議

4.39 事務委員會建議司法機構應覆檢《司法人員推薦委員會條例》第11(1)條，以便提高推薦委員會運作的透明度。

推薦委員會的表決

4.40 在1990年7月11日前，敘用委員會每項決議均須獲得主席及所有曾考慮有關決議的委員一致通過，方為有效。《司法人員敘用委員會條例》於1990年7月11日作出修訂，將委員人數由6名增至9名，並訂明在兩票反對的情況下通過的決議屬於有效。當局於1997年提交《司法人員推薦委員會條例》以取代《司法人員敘用委員會條例》時，並無更改此項條文。諮詢文件提及曾有批評指即使法律界兩名代表反對某項提名，該候選人仍可獲得任命。諮詢文件曾邀請各界就應否修改現行有關推薦委員會通過有效決議可容許的反對票數的條文表達意見。

接獲的回應

4.41 政府當局認為，所有委員無論背景為何，現行表決規則均一律適用。此安排運作良好，並無理由改變。

4.42 下列兩個有關任命終審法院法官及高等法院首席法官的表決規則的方案，兩者在大律師公會內均獲得程度相若的支持 ——

方案(a) —— 可以過半數票通過決議，但反對票不得超過兩票，而投反對票者不得為司法機構的代表、律政司司長(或律政司的代表)或法律專業人士；及

方案(b) —— 決議必須一致通過。

4.43 大律師公會解釋，該會大部分會員基於兩個理由支持方案(a)。第一，方案(a)被認為較具彈性。鑒於推薦委員會的委員人數，即使候選人如何有實力，也未必定可獲得全體委員一致投票通過，特別是當有多於一名合適候選人可供考慮時，情況尤然。第二，由於該等任命非常重要，候選人必須取得司法機構的代表、法律專業人士，或律政司司長(或律政司的代表)的支持，他們均處於獨特位置，可以評核候選人是否適合出任有關職位。基於相同理由，獲得上述類別推薦委員會委員支持的候選人，不應遭到“業外”委員否決。支持方案(b)的會員則認為，由於有關職位非常重要，必須取得推薦委員會一致支持。若推薦委員會一致支持某項提名，立法會也不大可能認為情況具爭議性。

事務委員會的建議

4.44 事務委員會建議政府當局應就推薦委員會現行的表決規則進行覆檢。

第5章 —— 處理針對 法官的投訴的機制

引言

5.1 諮詢文件曾邀請各界就設立處理針對法官的投訴的機制是否可取可行初步提出意見。

接獲的回應

5.2 司法機構曾向事務委員會提供文件，闡述有關處理針對法官的投訴的現行機制。司法機構滿意此投訴機制的運作。

5.3 大律師公會雖然支持現行制度，但認為應將制度公開，提高其透明度。

5.4 律師會認為，設立機制處理司法人員表現差劣或不當的事件，也屬恰當。然而，在提出具體建議前，此事項應先經各界充分辯論。

5.5 一名法律專業人士提出警告，有關設立正式機制處理針對法官的投訴此行動，必須極其審慎進行。他認為應維持現狀，並無必要設立此類正式機制。

事務委員會的建議

5.6 事務委員會考慮過立法會秘書處資料研究及圖書館服務部擬備有關“海外地區處理針對法官的投訴的機制”研究報告(立法會RP07/01-02號文件，可於網頁<http://www.legco.gov.hk>上閱覽)。該報告研究了加拿大、英國、美國及美國紐約州處理針對法官的投訴的機制。在處理針對法官及司法機構行政事務人員的投訴方面，事務委員會已要求司法機構在考慮如何改善現行機制時，參考有關的研究結果。

5.7 事務委員會建議於下一個立法會會期另行處理此事項。

第6章 —— 建議摘要

6.1 事務委員會的建議如下 ——

- (a) 應採納第2章第2.2至2.4段所載的方案1，作為立法會根據《基本法》第七十三(七)條同意司法人員任命的程序。
- (b) 政府當局在徵求立法會根據《基本法》第七十三(七)條同意司法人員的任命時，應盡可能提供美國參議院司法委員會擬訂的問卷和英國高等法院法官職位申請表中所載的資料。
- (c) 應檢討律政司司長應否出任推薦委員會的委員。
- (d) 政府當局應考慮法律界提出有關推薦委員會的成員組合的不同建議。
- (e) 推薦委員會應每年發表報告，內容與敘用委員會過往發表的年報相若。
- (f) 應把公開招聘的做法擴展至高等法院及以上級別法院的司法職位空缺。
- (g) 應覆檢《司法人員推薦委員會條例》第11(1)條，以便提高推薦委員會運作的透明度。
- (h) 應就推薦委員會現行的表決規則進行覆檢。
- (i) 事務委員會應於下一個立法會會期另行研究處理針對法官及司法機構行政事務人員的投訴的機制此事項。

附錄

- 附錄 I** 司法機構政務處的回應
- 附錄 II** 行政署長的回應
- 附錄 III** 香港律師會的回應
- 附錄 IV** 香港大律師公會執行委員會的回應
- 附錄 V** 香港大律師公會理事執行委員會的補充回應
- 附錄 VI** Tony YUEN Tat-tong先生的回應
- 附錄 VII** 美國參議院司法委員會編定的問卷
- 附錄 VIII** 英國高等法院法官職位申請表

立法會司法及法律事務委員會事務(事務委員會):
任命法官的程序諮詢文件(諮詢文件)

司法機構的回應

1. 諮詢文件列出多項需要諮詢的事宜，諮詢事項摘要載於諮詢文件的第5章。

司法機構的回應範圍

2. 司法機構將就下列各項事宜作出回應：
 - (a) 有關立法會根據《基本法》第73(7)條同意司法人員任命程序的事項。
 - (b) 有關任命法官程序方面的事項：
 - (i) 司法人員推薦委員會的成員組合和表決事宜，基本上屬政府的決策事務。
 - (ii) 至於其他事項（即司法人員推薦委員會是否需要每年發表報告；公開招聘的機制應否擴大至高等法院及以上級別法院的司法職位空缺；《司法人員推薦委員會條例》第11(1)條是否需要檢討和修訂，以便該委員會委員進行諮詢工作），司法機構將在事務委員會完成其諮詢工作，並就這些事項發表最後報告後，會就司法人員推薦委員會的運作進行檢討。但是，司法機構在現階段會提出一些看法。
 - (c) 有關處理投訴法官機制的事項。

立法會根據《基本法》第73(7)條同意司法人員任命的程序

3. 《基本法》規定，香港特別行政區法院的法官，根據當地法官、法律界和其他方面知名人士組成的獨立委員會推薦，由行政長官任命（《基本法》第88條）。獨立委員會（即司法人員推薦委員會）的設立，使香港有別於很多其他司法管轄區，亦是保障司法獨立一個至為重要的元素。這是

憲制法規的一部分，當考慮立法會應採納什麼程序以履行其同意法官任命的職能時，我們必須緊記這一點。

4. 正如諮詢文件（第2.14段）所述，若採納美國制度的某些做法，例如像美國參議院司法委員會般舉行公開聆訊，向獲提名人提出質詢，就會與香港沿用的做法大相逕庭。而且，美國這個制度，不但有侵犯個人私隱之嫌，更極具政治性，即使在美國本土亦備受爭議。就香港的憲制法規而言，是完全不適當和不能接受的。這些做法會使高級司法人員的任命變得高度政治化，如果在香港實行，將嚴重削弱司法的獨立性，和打擊公眾對司法獨立的信心。
5. 就實際的影響而言，如果採納美國的制度，讓獲提名人在公開聆訊中接受提問，會令優秀的人士卻步，不願意成高級司法職位的候選人。常任和非常任職位的候選人，包括來自其他普通法管轄區的非常任法官都會如此。事實上，大部分普通法管轄區都沒有採納美國制度的做法。再者，此舉對司法機構招聘較初級的司法人員也會有不良的影響。因 很可能某些人認為成 法官其中一個吸引之處，在於將來有獲擢升至高級司法職位的機會。而某些高級司法職位的任命，是必須得到立法會的同意的。
6. 諮詢文件第2.6段所述之正常程序比第2.9段所述之經擴大的正常程序較為可取。正常程序能夠按照每個情況的特點作出彈性和恰當的處理。要預先訂定一個能妥善處理每一個情況的程序，實非易事。
7. 當行政長官徵求立法會同意司法人員任命的建議時，立法會必須獲得足夠的資料。日後，司法人員推薦委員會在作出推薦的時候，我們將要求推薦委員會考慮向行政長官提交適當的資料，以便行政長官能夠提供足夠的資料予立法會。在這方面，我們將參考以前徵求立法會同意法官任命的經驗，和香港以及其他司法管轄區申請不同司法職位的申請人，在申請表 所提供的資料。同時，我們需要仔細考慮，是否應把終審法院非常任法官(特別是來自其他普通法管轄區的人士)委任的資料提供，與其他常任法官委任的資料提供，予以區分。

任命法官的程序

8. 正如上文第2(a)(i)段所述，司法人員推薦委員會的成員組合和表決事宜，基本上屬政府的決策事務。
9. 正如上文第2(b)(ii)段所述，有關任命法官程序的事項（即司法人員推薦委員會是否需要每年發表報告；公開招聘機制應否擴大至高等法院及以上級別法院的司法空缺；《司法人員推薦委員會條例》第11(1)條是否需要檢討和修訂，以便該委員會委員進行諮詢工作），司法機構將在事務委員會完成其諮詢工作，並就這些事項發表最後報告後，根據該份報告，對司法人員推薦委員會的運作進行檢討。
10. 在現階段，司法機構擬表達下列意見。這些意見或許對有關的諮詢工作，有所幫助。首先，終審法院首席法官支持任命法官的程序，在原則上，必須具透明度和是負責任的，並且同意現時有關的程序需要進行檢討。不過，最首要的是我們要確保司法獨立和司法質素不會受到任何損害。
11. 第二，有一點應該留意：有關擴大現行公開招聘機制適用範圍的建議，正如諮詢文件(第3.16段)所提及，此建議有利亦有弊。這方面的問題須因應香港的情況予以仔細衡量。
12. 第三，關於《司法人員推薦委員會條例》第11(1)條可能妨礙司法人員推薦委員會委員的諮詢工作（第3.19段）的憂慮，我們在現階段提出下列意見：
 - (a) 第11(1)條規定，司法人員推薦委員會委員未經行政長官許可，不得向任何未獲授權的人發布或披露他在執行職責的過程中所知悉的任何資料，亦不得在其執行職責的過程以外發布或披露該等資料。舉例來說，該委員會的文件、會議紀錄和當中的資料均不得發布或披露。
 - (b) 然而第11(1)條或其他方面 沒有禁止或限制推薦委員會委員按自己認為適當的方式進行持續諮詢。換言之，委員隨時都可以收集意見，藉此累積有助處理包括擢升的司法任命的資料，以便在這些空缺出現時使用。為使這些關於工作表現的資料，能對委員的工作

提供最大的幫助,委員會以公平客觀的方式,在一段時間內持續進行資料的收集工作。

- (c) 有一點必需留意:《司法人員推薦委員會條例》第11(1)條的用語與第93章《公務員 用委員會條例》第12(1)條相若。由於委任和擢升所涉及的工作性質,這些條文均確認有關的過程有保密的需要。

處理投訴法官的機制

13. 在考慮處理投訴法官的機制時,必須注意下列各點:

- (a) 司法獨立這個原則至為重要。維護司法獨立的途徑包括法官任期的保障。根據《基本法》,法官只有在無力履行職責或行為不檢的情況下,行政長官才可根據終審法院首席法官任命不少於三名法官組成的審議庭的建議,予以免職。(若關乎終審法院首席法官,則須由行政長官任命不少於五名法官組成審議庭進行審議。)請參閱《基本法》第89條。根據香港法例第433章《司法人員(職位任期)條例》,在司法人員推薦委員會考慮過由終審法院首席法官任命的審議庭的報告並向行政長官作出建議後,行政長官方可根據建議將該在職之司法人員(區域法院法官以下者)免職或予以紀律處分(包括譴責)。
- (b) 司法獨立的原則也關係到各級法官獨立地依法進行審判,不受任何干涉。
- (c) 解決爭端是法官的職責。法官作出的司法判決或會令訴訟之一方感到失望或不滿。

14. 在現行的機制下(2002年3月12日發給委員會的文件已詳細述及):

- (a) 任何人可直接向司法機構投訴法官,也可由他人,如立法會議員或行政機關,將其投訴轉給司法機構。
- (b) 任何投訴均由有關的法院首長處理,法院首長在適當情況下會諮詢終審法院首席法官。

- (c) 法院首長在作出初步調查後，如表面證據顯示該投訴看來有足夠嚴重性，會把投訴交予終審法院首席法官考慮。終審法院首席法官會處理該投訴，並考慮應否根據《基本法》第89條或《司法人員（職位任期）條例》委任審議庭進行審議。
- (d) 若經初步研究後，發現該投訴不屬於上述(c)段的情況，法院首長會親自處理投訴，並在適當情況下諮詢終審法院首席法官。法院首長可取得法院檔案及有關的審訊過程的錄音，亦可向投訴人索取進一步資料，以及要求有關法官就投訴作出回應。法院首長將回覆投訴人。在回覆中，法院首長可表達他對有關法官的行為是否恰當的看法。但必須要留意，法院首長沒有執行紀律處分的權力。若法院首長在其答覆中對有關法官的行為表達了負面的看法，他會將意見告知有關法官，也可向終審法院首席法官作出報告。而終審法院首席法官或法院首長可與有關法官討論，並給予輔導，以免類似行為重現。而且，司法人員推薦委員會亦會於適當時候獲告知該事。
15. 實際上，大部分投訴是關於不滿法官的司法判決或對法官的司法判決感到失望的。司法機構給投訴人的回覆中，會指出投訴事項是司法判決的內容，並解釋上訴的有關程序。
16. 現行的投訴機制是令人滿意的。這個機制既尊重司法獨立（包括各個法官獨立審判案件，不受干涉），也尊重為了維護司法獨立而設的保障法官任期的憲法及法律保證。同時，這個機制也使針對法官的合理投訴得到滿意的處理及回應。在任何情況下，司法獨立都不應受到威脅。

司法機構政務處
2002年3月

譯本

CSO/ADM CR 8/4/3222/85(96)

傳真函件[2509 9055]

香港
昃臣道8號
立法會大樓
司法及法律事務委員會秘書
馬朱雪履女士

馬女士：

立法會司法及法律事務委員會
任命法官的程序
諮詢文件

多謝你二零零一年十二月十二日來信，附錄立法會司法及法律事務委員會就任命法官的程序擬備的一份諮詢文件，邀請政府當局就諮詢文件所涵蓋的課題表達意見。

我們注意到，諮詢文件的範圍既涵蓋有關司法人員推薦委員會（“推薦委員會”）的成員組合、委任準則和表決的政策性事項，也涉及一些在推薦委員會和司法機構職權範圍內的事項，包括推薦委員會的運作，以及就較高級別法院的法官的任命和法官的招聘提供資料。現將政府當局對各項政策性事項的意見闡述如下。

推薦委員會的成員組合
律政司司長的委員身分
(諮詢文件第3.7至3.9段)

諮詢文件指出，有意見認為，律政司司長出任推薦委員會的委員，會損害推薦委員會的獨立性。我們不同意這種看法。事實上，從恰當的角度來看，行政長官是按基本法第八十八條根據推薦委員會的推薦任命法官，而律政司司長只是推薦委員會九名委員之一，並沒有否決權，因此其作為委員身份，不應也不會對推薦委員會的獨立性和公正性有任何損害。

我們認為，律政司司長應在推薦委員會佔有席位的理據如下:-

- (a) 律政司司長在司法工作方面擔當公眾利益的守護人及法治的維護者，她作為推薦委員會的成員並參與任命司法人員的工作是恰當的；
- (b) 律政司司長是行政長官的法律事務首席顧問，她作為推薦委員會的成員並就司法人員的任命向行政長官提出意見是恰當的；
- (c) 律政司聘用大量律師，並外判大量工作予私人執業者，作為律政司的首長，律政司司長處於獨特位置，也甚為了解有關情況，可協助推薦委員會審議司法人員的任命。

除了這些理據外，我們也要強調一點：假若有保障措施，不論是根據有關司法獨立的國際及人權原則或普通法，都沒有指出行政機關參與法官的提名會違反司法獨立。就我們的情況而言，保障措施包括《基本法》第八十九條、九十(二)條及九十一條對法官任期的保障。行政長官根據獨立運作的推薦委員會所作出的推薦而任命司法人員的制度，比起其他主要普通法地區的制度毫不遜色。因此我們認為，律政司司長作為推薦委員會的法定委員這一安排應該繼續。

推薦委員會委員的委任準則(第3.10至3.12段)

政府當局認為，當局在委任推薦委員會委員時，會考慮個別委員的本身長處和在諮詢文件第3.10段所述有關條件。當局委任各個委員會的成員時，也是採用同一套準則。我們注意到諮詢文件特別指出某名委員是全國人民代表大會代表。不過，我們認為沒有理由純粹因為某名委員是全國人民代表大會代表，便對他的委員身分有所歧視。

至於立法會議員沒有資格獲委任為推薦委員會委員這一點，我們注意到在回歸後，立法會根據《基本法》第七十三(七)條可行使的職權，即同意較高級別法院的法官的任免。

推薦委員會的問責性

推薦委員會的表決(第3.21至3.23段)

政府當局認為，並沒有理據，容許推薦委員會任何兩名委員有效地否決其餘多數委員支持的某項任命。現時表決的規則一律適用於所有委員，不論其背景。這項規則一向運作良好，並沒有理由作出改變。

諮詢文件所涵蓋的其他事項

至於諮詢文件所涵蓋而又在推薦委員會/司法機構職權範圍內的其餘事項，我們理解司法機構已另行回覆立法會司法及法律事務委員會。而在諮詢工作完成，以及在收到司法及法律事務委員會的最後報告後，政府當局將樂於邀請司法機構根據諮詢工作的結果考慮有關事項。

關於立法會同意司法人員任命的程序這一具體問題(第2.5至2.15段)，我們注意到諮詢文件提到，美國的制度不但有侵犯個人私隱之嫌，更極具政治性。就這點而言，政府當局和司法機構意見一致，均反對在香港採用具有美國制度特色的方案，因為這樣做會使司法人員的任命政治化和損害司法獨立。

行政署長
利敏貞代行

二零零二年三月十三日

副本送：律政司(經辦人：區義國先生)
司法機構政務長(經辦人：劉媽華女士)



The Law Society's Comments on the Consultation Paper on Process of Appointment of Judges

1. Independence of The Judicial Officers Recommendation Commission ("JORC")

Article 88 of the Basic Law provides that judges of the Courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.

The JORC exercises the functions of the independent commission referred to in the Basic Law. The Law Society emphasizes that, as provided in the Basic Law, the independent character of the JORC must be maintained.

2. Endorsement of Judicial Appointments by LegCo

Article 73(7) of the Basic Law provides that one of the powers and functions of LegCo is to endorse the appointment and removal of the judges of the Courts of Final Appeal and the Chief Judge of the High Court.

Article 90 of the Basic Law provides that the Chief Executive shall obtain the endorsement of LegCo to the appointment or removal of judges of the Court of Final Appeal and the Chief Judge of the High Court.

The LegCo Panel has observed that for the purposes of the endorsement the information provided to LegCo by the Administration has been sketchy and inadequate. The Law Society considers that this issue should be addressed because without proper information, LegCo would not be in a position to properly exercise its function of endorsement.

3. Endorsement Procedure

In relation to endorsement the LegCo Panel has proposed three options for consideration. The first two substantially follow the existing procedure. The last of these options is entitled "Special Procedure" and envisages an adoption in modified form of certain features of the US system, such as the holding of open hearings by the Senate Judiciary Committee to question judicial candidates.

The LegCo Panel observed that the strength of the US system was its transparency and accountability, but also noted that the system was highly intrusive and political, and that the system was controversial in the US.

The Law Society considers an adoption of the US system to be inappropriate for Hong Kong for the following reasons:-

1. the judicial qualities of a candidate are the prime concern and the necessary investigations are best done by the JORC on a confidential basis, with LegCo exercising a supervisory role by way of its power of endorsement;
2. the process of judicial appointment must not become politicized;
3. any public intrusion into the private life of a candidate must be strictly controlled;
4. a system which might cause unnecessary embarrassment to candidates is objectionable; and
5. suitable candidates might be deterred from applying.

4. Information on Judicial Candidates

The Law Society supports the LegCo Panel suggestion that more information on a judicial candidate should be made available to LegCo.

The Law Society does not agree that LegCo should be explicitly exempted from the application of section 11(1) of the JORC Ordinance prohibiting the disclosure of information relating to specific appointments to any unauthorized person without the permission of the Chief Executive. The Law Society would also note that under section 11(1) of that Ordinance disclosure “in the course of duty” is in fact permissible. The Law Society does not consider any amendment to section 11(1) is necessary.

5. Appointment of Judges

The LegCo Panel also went into the question of appointment of judges generally. They referred to “the secrecy of the present system of appointment of judges” and called for greater transparency and accountability.

The Law Society recognizes the need for transparency and accountability. However, it must also be recognized that much of the work of the JORC could only be effectively done on a confidential basis, for example consultations on the suitability of a candidate.

The Law Society supports a requirement that all candidates for judicial appointment should be required to complete a detailed application form which would include a detailed description of their legal experience and expertise.

6. Composition of JORC

The Law Society considers that the Secretary for Justice as principal legal adviser to the Chief Executive, should no longer be a member of JORC. The appropriate role for the Secretary for Justice is to advise the Chief Executive on the recommendations of the JORC. The Chief Executive does not take part in the deliberations of JORC. Neither should his principal legal adviser.

The Law Society considers that both branches of the legal profession should have a greater presence in the JORC. Under the existing law, one barrister and one solicitor are to be appointed by the Chief Executive in consultation with the Bar Association and the Law Society. The Law Society considers there should be two members from each branch of the profession. The reason is that practising lawyers are best placed to assess the quality of judicial candidates and to offer assistance to other members of JORC in their assessment. However to ensure that fresh and unbiased perspectives may continually be offered to JORC, appointments should be for a term of two years only.

The Law Society does not consider it appropriate that any person who has specific political affiliations or appointments should become a member of JORC. In the same spirit currently no member of LegCo may be a member of JORC.

7. Open recruitment

The Law Society supports the suggestion that there should be open recruitment for judicial vacancies at the High Court level and above.

8. Complaints against Judges

The Law Society considers it appropriate that a system be established to address instances of poor or inappropriate judicial performance. However, the Law Society considers that the matter should be more fully debated before specific proposals are put forward.

9. Law Society Working Party

The above issues have also been considered by the Law Society's Working Party on Civil Justice Reform and its full report will be released in April 2002.

15 March 2002
57474

**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.

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

1. The Bar refers to paragraphs 13 and 14 of its paper dated 15 April 2002 submitted to the AJLS Panel. The Bar gave as majority view that the SJ or a representative of the DOJ should be a member of JORC broadly for reasons given for her inclusion as set out in paragraph 3.8 of the Consultation Paper. We were also of the view that given that the SJ would become a political appointee, it was more appropriate to have a representative of DOJ, rather than the SJ herself, as a member of JORC.
2. The Bar has revisited the issue in the light of the details of the accountability system announced by the Chief Executive since. In the exercise, the Bar made special reference to Article 88 of the Basic Law. The Article provides that judges of the HKSAR shall be appointed by the Chief Executive on the recommendation of an **independent** commission composed of local judges, persons from the legal profession and eminent persons from other sectors.
3. Arguably "independent" means being wholly independent from the executive authorities of the HKSAR. Indeed, one can regard section 4(1) of the Judicial Officers Recommendation Commission Ordinance (Cap. 92), which bars members of the Legislative Council and holders of a pensionable office (except judges) from appointment to JORC, as indicative of the requirements of such independence.
4. Having thus revised the subject, the Bar concludes the SJ should not be a member of JORC. A representative chosen amongst government lawyers, who is not holder of a pensionable office, can represent views of government lawyers in the DOJ on JORC.

Dated 31 May 2002

Consultation Paper on Process of Appointment of Judges

1. Composition of JORC and the criteria for appointing members to JORC

Composition

Membership of Secretary for Justice

I think that the presence of the Secretary for Justice as a member of JORC undermines the independence of Judiciary and separation of powers. Therefore it is advisable to remove the Secretary of Justice as a member in order to show that JORC is independent from the executive branch of the government. In this regard, it should be noted that Article 88 of the Basic Law provides that the judges of the HKSAR shall be appointed by the CE on the recommendation of *an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors*.

Membership of persons from other sectors

There are now three members of JORC who are not connected in any way with the practice of law. No doubt the presence of them will improve the public's confidence of the Judiciary. However, it seems that the three non-legal members are all from the upper middle class. This will give the impression to the public that the law in Hong Kong is manipulated by the wealthy people. I think it is perfectly possible to appoint a prominent leader who represents the interests of the gross root class as a member of JORC.

Criteria for appointing members to JORC

In my view, the power to appoint members of JORC by the CE is fundamentally flawed as the CE is not directly elected and there is very little check and balance in the exercise of the CE's power in the appointment of the members of JORC. In order to improve the mechanism, I think greater transparency is necessary in the appointment process. I think that greater transparency will help to improve public's perception of the Judiciary and the credibility of JORC.

I do not think it is a problem in appointing political figures as members of JORC so far as the political figures are accountable to the people of Hong Kong. In UK, the Sovereign appoints judges on the advice of the Prime Minister. The system works because the Prime Minister is directly elected and there is proper check and balance in the exercise of the Prime Minister's power. For example, I do not see any problem at all in appointing a LegCo member who is directly elected as a member of JORC. In this regard, I consider that section 4(1) of the JORC Ordinance should be amended.

2. Accountability of JORC

I think JORC should be required to publish an annual report to enhance its transparency and accountability. The report should contain the appointments made or considered and the voting of the members.

3. Open recruitment of judicial vacancies

There is no doubt that the qualities of the judges are of paramount importance in our legal system. Article 92 of the Basic Law provides that judges and other members of the judiciary of the HKSAR shall be chosen on the basis of their judicial and professional qualities. It is noted open recruitment is limited to vacancies at and below District Court level only. I think there is no logic at all if open recruitment is adopted at the lower level but not at the higher level. In particular, I find it unconvincing that open recruitment may dissuade eligible candidates from applying as an unsuccessful application might cause embarrassment to them. Does it mean that that there will not be embarrassment caused to the unsuccessful applicants in the lower level? Or, we simply do not care about the embarrassment (if any) caused to the eligible candidates at the lower level. Therefore, I propose that open recruitment should be adopted to judicial vacancies at all levels.

4. Mechanism for handling complaints against judges

In my view, the move to establish a formal system in handling complaints against judges must proceed with great prudence. The system to be established will give rise to the issue of independence of judiciary. Clearly, it is of extreme importance that a judge can decide a case without fear of reprisals. The important question to be considered is which body will be responsible for handling the complaints against judges.

I think there is no need to establish a formal mechanism for handling complaints against judges and I suggest that the status quo should remain. In my view, the present system is adequate provided that there are freedom of expression and freedom of press. Under the existing system, the judges at all levels are not immune from public opinion and they can be criticized by the media if they mis-behave.

Tony Yuen

Solicitor

3 March 2002

附錄 VII
(只備英文本)

Questionnaire set by the Senate Judiciary Committee in the United States

**(Extract from "Report of the Commission on the Selection of Federal Judges
1996, Miller Center Commission No. 7, May 1996")**

A. GENERAL PERSONAL QUESTIONS

I.1. Full name and any former names used.

IV.1

I.2. Address (current residence and office).

IV.2

I.3. Date and place of birth.

I.4. Marital status and spouse's name/maiden name (if applicable), occupation and employer's name/address.

I.5. Education (list each college, law school and date of degree).

I.6. Employment record (list by year each business or other enterprise since college).

I.7. Military service (list dates, service, rank, serial number and type of discharge).

I.8. Honors and Awards of interest to the Committee.

I.13 What is present state of your health and when was your last physical exam?

B. LEGAL EXPERIENCE AND BACKGROUND

I.9. Bar Associations (list all legal or judicial committees or conferences with titles and dates).

I.10 Other memberships in organizations which lobby public bodies.

- I.11 All courts in which admitted to practice with dates and list any lapses. Same information for administrative bodies requiring special admission.
- I.12 List of all publications with copies of material not readily available and speeches on constitutional law or legal policy with readily available press reports about such speeches.
- I.14 State chronologically any judicial offices held with description.
- I.15 Provide citations for your ten most important opinions (if applicable), same for all appellate opinions reversing or criticizing your rulings, and your significant opinions on state or federal constitutional issues with related appellate rulings (if not readily available, provide copies of these).
- I.16 State any other public offices held with terms of service and descriptions, and list chronologically other candidacies.
- II.6. Ever play a role in a political campaign? If so, identify particulars, including candidate, dates, and your title/responsibilities.
- I.17 Describe chronologically your legal career including :
 - a.1 - Clerkships.
 - a.2 - Solo practice.
 - a.3 - Law firms, companies, and government agencies.
 - b.1 - Describe general character of your practice.
 - b.2 - Describe former clients and specialities.
 - c.1 - Frequency of appearances in court? If this varied, give by date.
 - c.2 - Percentage of appearances in (a) federal, (b) state, and (c) other courts.
 - c.3 - Percentage of (a) civil and (b) criminal.
 - c.4 - Number of cases tried to conclusion and state your role.
 - c.5 - Percentage of cases (a) jury and (b) non-jury.

C. FINANCIAL DATA AND CONFLICT OF INTEREST

- II.1. Sources, amounts and dates of all anticipated receipts from business relationships. Describe arrangements for any future compensation.

- II.2. Explain how you will resolve potential conflicts of interest and identify likely areas which may initially pose conflicts.
- I.18 Describe ten most significant litigated matters you personally handled. Give citation, summary, identify client, detail nature of your participation. Also : (a) date of representation. (b) name of court and judge. (c) names, addresses and phone numbers of co-counsel and principal counsel for other parties.
- I.19 Describe the most significant legal activities you pursued (non-trial or non-litigation). Describe the nature of your participation (unless privileged).
- II.3. Do you have plans to pursue outside employment with or without pay if confirmed? If so, explain.
- II.4. List all sources of income received in the calendar year prior to nomination.
- II.5. FINANCIAL STATEMENT REQUIRED

D. INVOLVEMENT IN LEGAL PROCEEDINGS/TAX AUDITS/OTHER CONFIDENTIAL

- IV.3. Ever been discharged or resigned due to impending discharge?
- IV.4. Have you and your spouse paid all back taxes? Any tax payments made prior to your nomination? If so, detail.
- IV.5. Tax lien or collection procedure ever instituted against you? If so, detail.
- IV.6. You or spouse ever subject of any tax audit or inquiry? If so, detail.
- IV.7. You or spouse ever declared bankruptcy? If so, give particulars.
- IV.8. Have you or any organization you belonged to ever been under investigation for violating any law or regulation? If so, detail.
- IV.9. Have you ever been the subject of a complaint to any group, agency or court for breach of ethics or rule of conduct? If so, give particulars.
- IV.10 Ever been a party to any litigation?
- IV.11 Please advise the Committee of any other adverse information that may affect your nomination.

E. GENERAL/OTHER

- III.1. Describe your work to provide those disadvantaged with legal services.
- III.2. Any membership in a discriminatory organization? If so, what efforts did you make to try to change such policies?
- III.3. Selection committee in your jurisdiction to recommend nominations? If so, did they recommend you? Describe the entire process you underwent.
- III.4. Did anyone involved in your selection discuss any legal case or issue seeking to learn how you might rule? If so, explain fully.
- III.5. Discuss your views on a criticism of judicial activism.

LORD CHANCELLOR

Application for appointment as
Justice of the High Court

Restricted - Appointments

Please complete this form in type or write clearly in **black** ink. If there is insufficient space on the form please feel free to continue on a separate sheet. **You should complete all parts of this form, even if you have previously supplied some of the details requested.** This will help to ensure that our records are up to date.

Please read the guidance notes before completing this form.

Section A - Personal details

Title (tick as applicable) Mr Mrs Miss Ms Other (please state)

Professional surname

Private surname (if different from professional surname)

Forenames in full
(please underline the name by which you prefer to be known)

Date of birth

Decorations/honours

Professional address

Postcode
Telephone
Email

Private address

Postcode
Telephone
Email

Please indicate which address is to be used for correspondence relating to this application

Professional Private

Please tick one or more as appropriate to indicate whether you are a :

Barrister Solicitor Queen's Counsel
 Holder of full-time judicial office

Please indicate with a tick the Division(s) of the High Court to which you would prefer to be assigned, if appointed :

Queen's Bench Chancery Family

Nationality

Section B - Educational and professional history

1 Further and/or Higher Education

Dates	Colleges and/or Universities attended	Degrees/diplomas/certificates Awarded (please state class of Any degrees)

2 Legal training**Barristers**

Month and year of call to the Bar _____

Inn of Court _____

Circuit membership (if any) _____

Specialist Bar Association (if any) _____

Year Silk taken (if applicable) _____

Solicitors

Month and year of admission as a solicitor _____

Specialist Solicitors' Association (if any) _____

Higher courts (Civil) Date granted _____

Higher courts (Criminal) Date granted _____

Higher courts (All Proceedings) Date granted _____

Year Silk taken (if applicable) _____

All applicants

Please give dates of pupillage and name(s) and address(es) of pupil-master(s) and/or dates of articles and name(s) and address(es) of principal(s) and firm(s) or other organisation(s) (eg local authorities) with whom articles were undertaken, **starting with the earliest.**

Dates	Name of pupil-master or principal and firm or other organisation	Address

All applicants

Please give details of your professional experience since completing pupillage or articles, **starting with the earliest.** Please include dates, addresses (including where appropriate, the name of the Head of Chambers). Please include under 'Particulars' the type of work done.

Dates	Chambers, firm or other organisation and address	Particulars

Barristers and Solicitors

Please give a general indication of the type of your present practice by entering, against each appropriate category below, the approximate percentage of your working time that you spend on that type of work.

%	Administrative and Public Law (including Judicial Review) Arbitration Banking and Financial Services Chancery Commercial and Admiralty Common Law - Contract, Sale of Goods Common Law - Personal Injury Common Law - Product Liability Common Law - Professional Negligence Common Law - Other Company Law Conveyancing Criminal Defamation Disciplinary Employment and industrial relations European and International Family Housing Human Rights Immigration Insolvency Intellectual Property Landlord and Tenant Parliamentary, Planning and Local Government (including Rating) Practice Management Restrictive practice and monopolies Revenue Technology and Construction Other (please specify):
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If you are no longer in active practice as a barrister or a solicitor, on what date and in what circumstances did you cease to practise?

3 Fees

	Income	Accounting year ending
Please state your personal gross income from practice (exclusive of VAT) in each of the last three completed accounting years, beginning with the most recent (to the nearest £1,000)	£	to
	£	to
	£	to

If you consider that the level of your fees or earnings have been affected by the nature of your or your firm's practice or extraneous factors, please give details in this section

Section C - Judicial experience

Do you now hold, or have you held in the past,
any judicial appointment?
(including part-time appointment)

No

Yes (please state which and give the
date(s) of appointment in the
space below)

If you currently hold a judicial appointment,
please state where you now sit, naming the
court(s) or hearing centre(s).

Please state any locations at which you have
sat in the last 3 years and the court(s) or
hearing centre(s) at which you have sat in that
time.

If you hold or have held any judicial appointment, please describe the work you have done as a holder of
judicial office, including the number of sitting days completed and the jurisdictions exercised.

Section D - General

Character

Have you ever been convicted of, or cautioned for, any criminal offence, other than a minor road traffic offence such as parking, or are any such proceedings pending?

No Yes (please give details, including dates, below)

Please note that applicants for judicial appointment are not protected by sections 4(2) and 4(3) of the Rehabilitation of Offenders Act 1974, and convictions which would normally be regarded as 'spent' within the meaning of the Act should therefore be declared. [Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975]

Have you ever been adjudged bankrupt, made a composition with your creditors, or been sued to judgement for any debt, or are any such proceedings pending?

No Yes (please give details, including dates, below)

Have you ever had proceedings brought against you, or paid a penalty, or made a composition in respect of failure to pay, or any other default relating to, VAT or any other form of tax or rates, or are any such proceedings pending?

No Yes (please give details, including dates, below)

Have you ever had an action brought against you for professional negligence without the matter being dismissed, or are any such proceedings pending? If you are a solicitor and such an action has been brought or is pending against your firm in respect of a matter under your supervision, answer 'yes'.

No Yes (please give details, including dates, below)

Are you, or have you ever been, subject to the disciplinary proceedings of the Bar or The Law Society (including the Bar's and The Law Society's procedures in respect of complaints about inadequate professional services or "shoddy work") in respect of a matter involving you personally or under your supervision, without the matter having been dismissed, or are any such proceedings pending?

No Yes (please give details, including dates, below)

Are you aware of anything in your private or professional life which would be a source of embarrassment to yourself or the Lord Chancellor if it became known in the event of your appointment as a High Court Judge?

No Yes (please give details below or, if you prefer, contact a member of Judicial Group staff as mentioned in the 'Guide for Applicants')

Consultation

You may include here the name(s) and address(es) of up to three members of the judiciary and/or profession who you consider will be able to comment on your qualities and experience. (The arrangements for consultation are outlined in the 'Guide for Applicants': this is an opportunity to name those who would not otherwise be consulted.)

Further information

Please provide any other information which you consider may be relevant to your application, including any matters you wish the Lord Chancellor to be aware of in considering your application. Please assess your own suitability for appointment to the High Court Bench, against the criteria (legal knowledge and experience, skills and abilities, and personal qualities; these are described in more detail in the Guide). You should provide examples of significant achievements to support your assessments. Continue on a separate sheet if necessary.

I declare that the information which I have given on this form is true to the best of my knowledge and belief.

Signature

Date
