

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

13 March 2002

***By Fax [2509 9055]***

Mrs Percy Ma  
Clerk to the Panel on Administration  
of Justice and Legal Services  
Legislative Council Building  
8 Jackson Road  
Hong Kong

Dear Mrs Ma,

**LegCo Panel on Administration of Justice  
and Legal Services (“AJLS” Panel)**

**Consultation Paper on  
Process of Appointment of Judges**

Thank you for your letter of 12 December 2001, inviting the Administration’s view on subjects covered in the Consultation Paper on Process of Appointment of Judges prepared by the LegCo AJLS Panel.

We note that the scope of the consultation covers both policy issues relating to the membership, appointment criteria and voting of the Judicial Officers Recommendation Commission (“JORC”); as well as issues that fall under the purview of JORC and the Judiciary, concerning the operation of JORC, the provision of information on the appointment of senior judges and recruitment of judges etc. We would like to set out the Administration’s view on the policy issues raised.

**Membership of JORC**

Membership of the Secretary for Justice  
(Paragraph 3.7 to 3.9 of the Consultation Paper)

We do not agree with the view that with the Secretary for Justice (“SJ”) as a member of JORC, the independence of JORC will be undermined. Indeed,

to put things in their proper perspective, the fact that judges are appointed by the Chief Executive (CE) in accordance with the recommendation of JORC under Article 88 of the Basic Law, of which SJ is only one of the nine members and has no veto power, should not, and does not in any way undermine the independence and impartiality of JORC.

We consider that the SJ's membership in JORC is justified for the following reasons : -

- (a) as guardian of the public interest in the administration of justice, and upholder of the rule of law, it is appropriate for the SJ to be involved, as a member of JORC, in judicial appointments;
- (b) as the principal adviser on legal matters to the CE, it is appropriate for the SJ to be involved, as a member of JORC, in making recommendation to the CE on judicial appointments; and
- (c) as the head of the Department of Justice, which employs a large number of lawyers and briefs out a great deal of work to the private sector, the SJ is in a unique position, and has considerable knowledge, to contribute to JORC's deliberations in respect of judicial appointments.

We should stress that, these justifications aside, there is no suggestion under international and human rights principles of judicial independence, or under the common law, that involvement of the executive in the nomination of judges breaches judicial independence, provided that safeguards are in place. In our case, such safeguards include the security of tenure of judges as guaranteed by Articles 89, 90(2) and 91 of the Basic Law. The system of appointment of judicial officers by the CE on the recommendation of the independent JORC also compares favourably with other major common law jurisdictions. Our view is therefore that the statutory membership of SJ in JORC should continue.

#### Appointment Criteria of JORC members (Paragraph 3.10 – 3.12)

The view of the Administration is that appointments to JORC are based on merits and relevant attributes of individual members as reflected in paragraph 3.10 of the Consultation Paper. These same criteria are adopted across the board in appointments to boards and committees. We note the Consultation Paper has highlighted the fact that a member is a deputy to the National People's Congress. We however see no reason to discriminate against the membership of a particular member simply on the ground that he is a deputy to the NPC.

As regards the ineligibility of LegCo Members for JORC membership, we note that after the Re-unification, LegCo has a separate role to play under Article 73(7) of the Basic Law to endorse appointment of senior judges.

### **Accountability of JORC**

#### Voting of JORC (Paragraph 3.21 – 3.23)

The Administration is of the view that there is no reason why any two members in JORC should have, in effect, a veto power over appointments that enjoy the support of the remaining majority. The current voting rules are uniformly applied to all members, irrespective of their background. It has worked well and there is no reason to change it.

### **Other Issues Covered in the Consultation Paper**

As for the remaining issues covered in the Consultation Paper that fall under the purview of JORC/Judiciary, I note that the Judiciary have forwarded their views to the LegCo AJLS Panel separately. Upon completion of the consultation exercise, and receipt of the final report from the AJLS Panel, the Administration will be happy to invite the Judiciary to consider the matters in the light of the results of the consultation exercise.

On the specific question of LegCo procedure to endorse judicial appointments (paragraph 2.5 – 2.15), we note the observation made in the Consultation Paper about the highly intrusive and political nature of the US system. In this regard, the Administration shares the Judiciary's objection to the option of adopting features of the US system in Hong Kong, since the judicial appointments would be politicized, and the Judicial independence undermined by such an approach.

Yours sincerely,

( Miss Eliza Lee )  
for Director of Administration

c.c. Department of Justice (Attn: Mr Bob Allcock)  
Judiciary Administrator (Attn: Miss Emma Lau)