

**Panel on Administration of Justice and
Legal Services (“the Panel”) : Consultation Paper on
Process of Appointment of Judges (“the Consultation Paper”)**

The Judiciary’s response

1. The Consultation Paper sets out a number of issues for consultation. They are summarized in Chapter 5.

Scope of Judiciary’s response

2. The Judiciary’s response will deal with the following :
 - (a) The issues concerning the procedure for LegCo to endorse judicial appointments under BL73(7).
 - (b) As to the issues concerning the process of appointment of judges :
 - (i) The issues on the membership of JORC and the voting of JORC are essentially matters of policy for the Administration.
 - (ii) As to the other issues (namely, whether JORC should be required to publish an annual report; whether open recruitment should be extended to judicial vacancies at the High Court level and above; whether section 11(1) of the JORC Ordinance should be reviewed and amended to facilitate consultation by JORC Members), the Judiciary will conduct a review of JORC’s operation after the Panel has issued its final report on these issues after its consultation. However, at this stage, the Judiciary will make a number of observations.
 - (c) The issues concerning the mechanism for handling complaints against judges.

Procedure for LegCo to endorse judicial appointments under BL 73(7)

3. The Basic Law requires that judges 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 (BL 88). The institution of an independent commission (that is, JORC) distinguishes Hong Kong

from many other jurisdictions and is a most important safeguard for judicial independence. This is part of the constitutional context which it is important to bear in mind when considering the proper procedure for LegCo to adopt when exercising its power to endorse.

4. As pointed out in the Consultation Paper (para.2.14), the adoption of certain features of the US system eg. the practice of the Senate Judiciary Committee of holding open hearings to question nominees would be a radical departure from Hong Kong's previous practice and the US system is highly intrusive and political and is controversial in the US itself. It would be totally inappropriate and objectionable in Hong Kong's constitutional context. This is because it would highly politicise senior judicial appointments. In the Hong Kong context, such politicisation would seriously undermine judicial independence and the public's confidence in an independent Judiciary.
5. The practical effect of adopting a US system with hearings to question proposed appointees would be that good candidates for senior appointments would be deterred from being willing to be considered. This would be the case with both the permanent positions as well as the non permanent positions, including non-permanent judges from common law jurisdictions, most of which do not have features of the US system. And this would have an adverse impact on recruitment at lower levels of the Judiciary since one of the attractions of joining the Bench may well be regarded by some to be the potential to be elevated to one of the senior positions for which LegCo endorsement is necessary.
6. The normal procedure set out in para.2.6 of the Consultation Paper should be preferred over the expanded normal procedure referred to in para.2.9 thereof. This will enable any case to be dealt with flexibly and appropriately having regard to its features. It may be difficult to establish a prior procedure which would be satisfactory for all cases.
7. When the Chief Executive seeks to obtain LegCo's endorsement of a proposed appointment, LegCo should be given sufficient information. In any future exercise, JORC will be asked to consider the appropriate information that should be supplied to the Chief Executive, to enable the Chief Executive to supply sufficient information to LegCo. When considering this matter, the experience of previous exercises and the information given by applicants in application forms for various judicial posts in Hong Kong and other jurisdictions will be borne in mind. In this connection, careful consideration will have to be given to whether any distinction should be drawn between proposed

appointments as CFA non-permanent judges, particularly those from common law jurisdictions, and proposed appointment to the senior positions which are permanent posts.

Process of appointment of judges

8. As previously stated in para.2(a)(i), the issues on the membership of JORC and the voting of JORC are essentially matters of policy for the Administration.
9. As previously stated in para.2(b)(ii), as regards the other issues concerning the process of appointment of judges, (namely, whether JORC should be required to publish an annual report; whether open recruitment should be extended to judicial vacancies at the High Court level and above; whether section 11(1) of the JORC Ordinance should be reviewed and amended to facilitate consultation by JORC Members), the Judiciary will conduct a review of JORC's operation after the Panel has issued its final report on these issues after its consultation and in the light of that final report.
10. At this stage, the Judiciary will make the following observations which may be of assistance. First, the Chief Justice supports the principle of transparency and accountability and accepts the need for a review at this time. However, it is fundamental to ensure that the judicial independence and judicial quality must not be compromised in any way.
11. Secondly, it should be observed that as to the suggestion that open recruitment should be extended beyond what is done at present, as noted in the Consultation Paper (para.3.16), there are pros and cons. These have to be carefully weighed, bearing in mind the circumstances in Hong Kong.
12. Thirdly, as regards the possible concern that s.11(1) of the JORC Ordinance may hamper consultation by JORC members (para.3.19), the following observations should be made at this stage :
 - (a) Section 11(1) prohibits the publication and disclosure by any JORC member to any unauthorized person or otherwise than in the course of duty of information which has come to his knowledge in the course of his duties without the permission of the Chief Executive. For example, JORC papers and minutes and the information therein could not be published or disclosed.

- (b) But there is nothing in s.11(1) or otherwise to preclude or inhibit a JORC member from undertaking consultation on a continuous basis in such manner as the member thinks fit. In other words, the member can gather feedback all the time. In this way, the member can build up information which will enable him or her to deal with judicial appointments including promotions as they arise. For it to be as helpful as possible, the information on performance would be gathered with particulars over a period of time in a fair and objective manner.
- (c) It should be noted that s.11(1) of the JORC Ordinance is in similar terms to s.12(1) of the Public Service Commission Ordinance Cap.93. These provisions recognize that there is a need for confidentiality, having regard to the nature of the work involved in appointments and promotions.

Mechanism for handling complaints against judges

13. When considering the mechanism for handling complaints against judges, it is important to bear in mind the following considerations :
 - (a) The principle of judicial independence is of course a fundamental principle. The safeguards for judicial independence include the security of tenure for judges. Under the Basic Law, judges may only be removed for inability to discharge his or her duties or for misbehaviour by the Chief Executive on the recommendation of a tribunal of at least three judges appointed by the Chief Justice. (In the case of the Chief Justice, the tribunal of at least five judges is appointed by the Chief Executive.) See BL 89. Under the Judicial Officers (Tenure of Office) Ordinance, Cap.433, judicial officers (below District Court Judge) may only be dismissed or disciplined (including reprimand) during their term by the Chief Executive on the recommendation of JORC which is made after considering the report of a tribunal appointed by the Chief Justice.

- (b) The principle of judicial independence also involves the independence of each judge at any level to adjudicate according to law without interference.
 - (c) Judges have the duty of resolving disputes. One side is likely to be disappointed or dissatisfied by the judicial decision.
14. Under the present mechanism (set out in a paper issued on 12 March 2002 to the Panel) :
- (a) Any complaint against a judge may be made by anyone directly or may be referred to the Judiciary, for example, by a member of the Executive or of LegCo.
 - (b) Any complaint is handled by the Court Leader consulting the Chief Justice as appropriate.
 - (c) After preliminary inquiry by the Court Leader, if prima facie, it appears to be a sufficiently serious case, the matter will be referred to the Chief Justice for consideration. The Chief Justice will deal with the matter and consider whether a tribunal should be appointed under BL 89 or the Judicial Officers (Tenure of Office) Ordinance.
 - (d) If after preliminary inquiry, the case does not fall within (c), the Court Leader will deal with the matter, consulting the Chief Justice as appropriate. The Court Leader has access to the Court file and audio recordings of the relevant proceedings and can seek further information from the complainant and the judge's response to the complaint. A reply will then be sent to the complainant. In it, the Court Leader can express a view whether he regards the judge's conduct as appropriate. But it must be borne in mind that he has no disciplinary power as such. Where the Court Leader has expressed an adverse view of the judge's conduct in his reply, he will inform the judge concerned of his view. The matter may be brought to the attention of the Chief Justice. And the Chief Justice or the Court Leader may discuss the matter with and counsel the judge concerned to seek to avoid recurrence of similar conduct. Further, the matter will be brought to the attention of JORC at the appropriate time.

15. In practice, most complaints relate to disappointment or dissatisfaction with the judge's judicial decisions. A reply is sent to the complainant pointing out that the matter is the subject matter of judicial decision and explaining procedures for appeal.
16. The present system is satisfactory. It respects judicial independence (including the independence of each judge to adjudicate without interference) and the constitutional and legal guarantees for security of tenure to safeguard judicial independence. At the same time, it enables legitimate complaints against judges to be satisfactorily dealt with and responded to. Nothing should be done which puts judicial independence at any risk.

Judiciary Administration
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