

Panel on Administration and Legal Services
Consultation Paper on Process of Appointment of Judges
Summary of Written Submissions

(Revised)

	Issues for Consultation (Paragraph no. in the Consultation Paper)	Judiciary Administrator (LC Paper No. 1617/01- 02(03))	Director of Administration (LC Paper No. 1617/01- 02(02))	Hong Kong Bar Association (LC Paper No. CB(2)1624/01-02(01))	Law Society of Hong Kong (LC Paper No. 1617/01- 02(04))	Mr Tony YUEN (LC Paper No. 1617/01- 02(05))
	Procedure for LegCo to endorse judicial appointments under BL 73(7)					
(1)	<p>Options for endorsement <u>procedure</u> (paras. 2.5 - 2.6)</p> <p><u>Option 1</u> - to maintain the status quo, subject to adequate information to be provided by the Administration on a judicial nominee</p>	<p>Option 1 is preferred as it enables cases to be dealt with flexibly and appropriately having regard to its features.</p>	<p>--</p>	<p>Option 1 is strongly supported as extending the endorsement procedure beyond the present system would tend to politicise the process to an unacceptable level.</p> <p>LegCo was given the power of endorsing judicial appointments, not making recommendations for appointment.</p> <p>LegCo should not sit on "appeal" from JORC or conduct a "re-hearing" of the recommendation exercise.</p> <p>LegCo should as a matter of convention normally accepts the recommendation of</p>	<p>--</p>	<p>--</p>

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				JORC and will only exercise its powers under the Legislative Council (Powers and Privileges) Ordinance when the recommended candidate is highly controversial.		
	<u>Option 2</u> - to expand upon Option 1 by having a set procedure to deal with cases which may be controversial	Difficult to establish a prior procedure which would be satisfactory for all cases.	--	Does not support Option 2. Option 1 is sufficient to deal with any controversial cases.	--	--
	<u>Option 3</u> - to adopt certain features of the system in the US e.g. the practice of the Senate Judiciary Committee of holding open hearings to question nominees	<p>The institution of JORC distinguishes Hong Kong from many other jurisdictions and is a most important safeguard for judicial independence.</p> <p>The US system would be totally inappropriate and objectionable in Hong Kong's context as it would -</p> <ul style="list-style-type: none"> - deter candidates from being considered for permanent positions as well as non permanent positions, including non-permanent judges from common law jurisdictions, most of which do not have features of the US system; and - have an adverse impact 	--	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.	<p>The US system is considered to be inappropriate for Hong Kong for the following reasons -</p> <ul style="list-style-type: none"> - the necessary investigations are best done by JORC on a confidential basis, with LegCo exercising a supervisory role by way of its power of endorsement; - the process of judicial appointment must not become politicised; - any public intrusion into the public life of a candidate must be strictly controlled; - a system which might 	--

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		on recruitment at lower levels of the Judiciary.			cause unnecessary embarrassment to candidates is objectionable; and - suitable candidates might be deterred from applying.	
	Any other variations	--	--	--	--	--
(2)	Whether the information provided to LegCo on a judicial nominee should be expanded to include as many of the items in the documents set out in Appendices I -IV (para. 2.17)	In future exercises, JORC will be asked to consider the appropriate information that should be supplied to CE to enable CE to supply the same information to LegCo. 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 appointments to senior permanent posts.	--	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 candidates' experience and integrity.	All candidates should be required to complete a detailed application form which would include a detailed description of their legal experience and expertise.	--
(3)	Whether LegCo should be exempt explicitly from the application of section 11(1) of the JORC Ordinance in exercising its duty under BL 73(7) (para. 2.17)	--	--	--	Does not agree that LegCo should be explicitly exempt from the application of section 11(1). As disclosure "in the course of duty" is permissible, any amendment to section 11(1) is considered unnecessary.	--

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	<u>Process of appointment of judges</u>					
(4)	<p><u>Membership of JORC</u> - whether any changes should be introduced in respect of the composition of JORC, e.g. the membership of SJ and the criteria for appointing members to JORC (paras. 3.5 - 3.12)</p>	--	<p><u>Membership of SJ</u></p> <p>It is appropriate for SJ to be involved as a member of JORC in judicial appointments because of her role -</p> <ul style="list-style-type: none"> - as guardian of the public interest in the administration of justice and upholder of the rule of law; - as the principal adviser on legal matters to CE; and - as the head of Department of Justice which employs a large number of lawyers and briefs out a great deal of work to the private sector. <p>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 safeguards are in place. In Hong Kong, such</p>	<p><u>Membership of SJ</u></p> <p>Majority view is that SJ (or a representative of DOJ) should be a member of JORC. It is not necessary for SJ to be an "ex-officio" member.</p> <p>If SJ will be politically appointed under the proposed accountability system, 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, as a member of JORC.</p>	<p><u>Membership of SJ</u></p> <p>As a principal adviser to CE, SJ should advise CE on the recommendation of JORC, but should no longer be a member of JORC.</p>	<p><u>Membership of SJ</u></p> <p>The presence of SJ as a member of JORC undermines the independence of Judiciary. It is advisable to remove SJ from the membership of JORC to show that JORC is independent from the executive branch of the government.</p>

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		--	<p>safeguards include the security of tenure of judges.</p> <p><u>Other members</u></p> <p>Appointments are based on merits and relevant attributes of individual members. No reason to discriminate against the membership of a particular member simply on the ground that he is a deputy to the NPC.</p> <p><u>LegCo Members</u></p> <p>After the reunification, LegCo has a separate role under Article 73(7) of the Basic Law to endorse appointment of senior judges.</p>	<p><u>Other members</u></p> <p>The criteria for appointment of such members should be more clearly set out in the JORC Ordinance.</p> <p>The number of such members should be two, instead of three.</p> <p>Procedures should be provided for LegCo and the legal profession to be consulted on a confidential basis on the appointment of these members. There are also views within the Bar that the appointments must be endorsed by LegCo.</p> <p>--</p>	<p><u>Other members</u></p> <p>There should be two members from each branch of the legal profession on the JORC. Practising lawyers are best placed to assess the quality of judicial candidates and to offer assistance to other members of JORC in their assessment.</p> <p>Appointments to JORC should be for a term of two years only.</p> <p><u>LegCo Members</u></p> <p>Any person who has specific political affiliations or appointments should not be a member of JORC.</p>	<p><u>Other members</u></p> <p>There are now three members of JORC who are not connected in any way with the practice of law. However, these three members are all from the upper middle class. Consideration should be given to appointing a prominent leader who represents the interests of the grass root class as a member of JORC.</p> <p><u>LegCo Members</u></p> <p>Appointment of a LegCo Member who is directly elected as a member of JORC should not pose a problem. Section 4(1) of the JORC Ordinance should be amended.</p>

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(5)	<u>Accountability of JORC</u> - whether JORC should be required to publish an annual report (paras 3.13 - 3.14)	The Judiciary will conduct a review of JORC's operation after the Panel has issued its final report.	--	The proposal to require JORC to publish an annual report is supported.	--	JORC should publish an annual report to enhance its transparency and accountability. The report should contain the appointments made or considered and the voting of JORC members.
(6)	<u>Open recruitment for judicial vacancies</u> - whether open recruitment should be extended to judicial vacancies at the High Court level and above (paras. 3.15 - 3.17)	The Judiciary will conduct a review of JORC's operation after the Panel has issued its final report. <u>Observations at this stage</u> - the pros and cons have to be carefully weighed.	--	Open recruitment for all judicial vacancies is supported. There are merits in adopting the present English system in Hong Kong.	Open recruitment should be adopted for judicial vacancies at the High Court level and above.	Open recruitment should be adopted for judicial vacancies at all levels.
(7)	<u>Consultation by JORC members</u> - whether section 11(1) of the JORC Ordinance should be reviewed and amended (paras. 3.18 - 3.20)	The Judiciary will conduct a review of JORC's operation after the Panel has issued its final report. <u>Observations at this stage</u> - - JORC papers and minutes could not be published or disclosed; - there is nothing to preclude or inhibit a JORC member from undertaking consultation on a continuous basis; and	--	Section 11(1) of the JORC Ordinance is too widely drawn and should be amended to enhance the proper and effective discharge of the functions of JORC members. This would also address the problems experienced by LegCo in exercising its power in endorsing judicial appointments. However, confidentiality of the information provided to LegCo must be preserved	--	--

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		- Section 11(1) is in similar terms to section 12(1) of the Public Service Commission Ordinance which recognises the need for confidentiality in matters relating to appointment and promotion.	--	--	--	--
(8)	<u>Voting of JORC</u> - whether any changes should be made to the existing provision governing the number of dissenting votes permissible for a resolution of JORC to be effective (paras. 3.21 - 3.23)	--	There is no reason why any two members of 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. There is no reason to change it.	There is more or less equal support on the following two options in relation to appointments to the CFA and Chief Judge of the High Court - (a) a majority vote is permitted but the dissenting votes must not exceed two and must not include a dissenting vote from the representatives of the judiciary, the SJ (or the representative from DOJ) or the legal profession; or (b) voting shall be unanimous given the importance of the appointments. The majority of the Bar supports the first option.	--	--

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	<u>Mechanism for handling complaints against judges</u>					
(9)*	Preliminary views on the desirability and feasibility of establishing a mechanism for handling complaints against judges (paras. 4.1 - 4.2)	The present system is satisfactory. (A separate paper has been provided to the Panel vide LC Paper No. CB(2)1388/01-02(02).)	--	The Judiciary Administrator's paper on the present system is supported. However, the system should be published to increase transparency.	It is appropriate to establish a system to address instances of poor or inappropriate judicial performance. However, the matter should be fully debated before specific proposals are put forward.	The move to establish a formal system in handling complaints against judges must proceed with great prudence. There is no need to establish such a formal system and status quo should be maintained.

Council Business Division 2
Legislative Council Secretariat
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Abbreviations

CE - Chief Executive
 CFA - Court of Final Appeal
 BL - Basic Law
 DOJ - Department of Justice
 JORC - Judicial Officers Recommendation Commission
 LegCo - Legislative Council
 SJ - Secretary for Justice
 US - United States

* The Research and Library Services Division of LegCo is undertaking a research on the systems adopted in Canada, the United States and the United Kingdom for handling complaints against judges. The research is expected to be completed in June 2002.