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Panel on Administration of Justice and Legal Services

Paper prepared by Legislative Council Secretariat

Process of Appointment of Judges

INTRODUCTION

Article 73(7) of the Basic Law (BL) confers on the Legislative Council (LegCo) the power to endorse the appointment of judges of the Court of Final Appeal (CFA) and the Chief Judge of the High Court. Since 1 July 1997, LegCo has exercised its power to endorse the appointment of judges under BL 73(7) on two occasions. In June 2000, LegCo endorsed seven CFA appointments. In December 2000, LegCo endorsed the appointment of the Chief Judge of the High Court.

2. Having gone through the two appointment exercises, the Panel decided to look into the following matters -

- (a) how LegCo could properly discharge its constitutional duty under BL 73(7); and
- (b) how the system of appointment of judges may be improved to achieve greater transparency and accountability while ensuring judicial independence.

3. In June 2001, a Working Group was formed by the Panel to review the process of appointment of judges. The Working Group recommended and the Panel agreed that the views of the public, in particular the legal community, be sought on the issues identified in the Consultation Paper on Process of Appointment of Judges (the Consultation Paper). The Consultation Paper was published in December 2001, and the consultation period expired on 15 March 2002.

4. The Panel received views from the Judiciary, the Administration, the Hong Kong Bar Association, the Law Society of Hong Kong and a legal professional on the Consultation Paper during the consultation period. The Bar Association has submitted a supplemental response to the Panel on 31 May 2002. Copies of their written submissions are in **Appendices I - VI**. A summary of the written submissions is in **Appendix VII**.

5. At the Panel meeting on 22 April 2002, members discussed some of the issues with the Bar Association, the Judiciary and the Administration. The Working Group

held a meeting on 16 May 2002 to discuss the follow-up action required. The Working Group agreed that the LegCo Secretariat should prepare a paper to summarise the responses received on the Consultation Paper, as well as the discussions held by the Panel and the Working Group on 22 April 2002 and 16 May 2002 respectively. The paper should also invite the Panel to give views on the various issues set out in the Consultation Paper for the purpose of preparing a report of the Panel.

ISSUES IDENTIFIED IN THE CONSULTATION PAPER

Part I Endorsement of judicial appointment by LegCo under BL 73(7)

A. *Options for endorsement procedure*

6. Regarding the procedure for LegCo to endorse judicial appointment under BL 73(7), the Consultation Paper has invited views on the following three options -

(a) *Option 1 - "Normal Procedure"*

This Option embodies the process followed in the second appointment exercise;

(b) *Option 2 - "Expanded Normal Procedure"*

This option expands upon Option 1 and allows for a prior established procedure to deal with controversial cases; and

(c) *Option 3 - "Special Procedure"*

This option proposes to adopt, albeit in modified form, certain features of the system in the United States (US).

For details of the three Options, please refer to **Appendix VIII**.

Responses received

7. The Bar Association strongly supports Option 1, subject to sufficient information on the candidates to be provided to LegCo. The Bar Association does not support Option 2 and considers that there is no need to provide for any specific procedure in controversial cases as Option 1 is already sufficient to cover any such contingency.

8. The Bar Association is of the view that LegCo is given the power to endorse the appointment of CFA judges and the Chief Judge of the High Court under BL 73(7) because of the importance of the posts. LegCo is not given the power to make recommendations as to appointment. LegCo should as a matter of convention accept the recommendation of Judicial Officers Recommendation Commission

(JORC) and only exercise its power under the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) when the recommended candidate is highly controversial. It is not intended that LegCo should duplicate the process of consultation undertaken by JORC. The Bar Association believes that Option 3 is not suitable for Hong Kong as it tends to politicise the appointment and also runs the risk of duplicating the process gone through by JORC.

9. The Law Society has not made any specific comments on either Option 1 or Option 2 but notes that the two Options follow substantially the existing procedure. The Law Society considers Option 3 is inappropriate for Hong Kong for a number of reasons. It is of the view that the necessary assessment of judicial qualities of a candidate, a matter of prime concern in judicial appointments, 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 and intrusion into the private life of a candidate must be strictly controlled. A system which might cause unnecessary embarrassment to candidates is objectionable as it would deter suitable candidates from being considered for appointment.

10. The Judiciary considers that Option 1 should be preferred over Option 2. 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.

11. The Judiciary also considers that the practical effect of adopting Option 3 would be that suitable candidates for senior appointments would be deterred from being willing to be considered. This would be the case for 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. Moreover, Option 3 would have an adverse impact on recruitment of 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.

12. The Administration shares the Judiciary's objection to the option of adopting certain features of the US system in Hong Kong.

Views of members

13. At the meeting of the Working Group on 16 May 2002, a majority of the members present agreed that Option 1 should be supported, on condition that the Administration would provide adequate information on the personal and professional background of a judicial nominee to LegCo.

14. Members also requested the Legal Adviser to advise on the need to make rules in the LegCo Rules of Procedure to facilitate the exercise of the power of LegCo under BL 73(7). The Legal Adviser will provide a separate paper for the consideration of the Panel.

Advice sought

15. *The Panel is invited to consider which of the three Options or their variations should be recommended for LegCo to adopt for endorsing judicial appointments under BL 73(7).*

16. If Option 1 is proposed to be adopted, the Panel will seek the agreement of the House Committee to formally adopt the procedure for future exercises. If either Option 2 or Option 3 is proposed to be adopted, a report will be made to the House Committee to recommend that the Committee on Rules of Procedure be invited to further deliberate on the detailed procedure.

B. Information provided to LegCo

17. The Consultation Paper has invited views on whether more information on a judicial nominee should be made available to LegCo to enable it to exercise its power of endorsement under BL 73(7). The US Senate Questionnaire, the application form for appointment to Justice of the High Court in the UK and the application form for judicial vacancies in the District Court and below in Hong Kong are attached to the Consultation Paper for reference.

Responses received

18. The Bar Association takes the view that LegCo should be provided with sufficient information about the personal and professional background of the candidates to enable LegCo to reach an informed decision based on the candidate's experience and integrity. The Bar Association also considers that the information contained in the application form for appointment to Justice of the High Court in the UK, apart from information on personal gross income from practice, could serve as a useful reference for Hong Kong.

19. The Law Society considers that more information on a judicial nominee should be provided by the Administration to LegCo to enable it to discharge its function under BL 73(7). It supports 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.

20. The Judiciary advises that in any future exercises, JORC will be asked to consider the appropriate information that should be supplied to CE, to enable CE 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.

Views of members

21. At the meeting of the Working Group on 16 May 2002, members suggested that the information to be provided by the Administration should include as many as possible of the items contained in the questionnaire set by the US Senate Judiciary Committee and the application form for appointment as Justice of the High Court in the UK.

Advice sought

22. *The Panel is invited to consider the types of information that should be provided by the Administration to LegCo to enable it to discharge its duty on endorsement of judicial appointment under BL 73(7) in future.*

Part II Process of appointment of judges

23. The Panel considers that it is necessary to review the existing system so as to improve the transparency and accountability of the process of appointment of judges as a whole, not confining to those appointments which require LegCo's endorsement. The Consultation Paper has invited views on a number of other issues, namely, the membership, accountability and operation of JORC.

24. The Judiciary assures the Panel that 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. The Judiciary will conduct a review of JORC's operation after the Panel has issued the final report on these issues.

A. *Membership of JORC*

25. BL 88 provides that judges shall be appointed by CE on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.

26. Under section 3(1) of the JORC Ordinance, JORC shall consist of the Chief Justice (the Chairman), the Secretary for Justice (SJ), and seven members appointed by CE including one barrister, one solicitor, two judges, and three persons who are not, in the opinion of CE, connected in any way with the practice of law.

27. Section 4 of the JORC Ordinance provides that certain persons are ineligible for appointment as members of JORC. These include LegCo Members and a person who holds a pensionable office (other than the office of judges) the emoluments whereof are payable wholly or partly out of public revenue.

28. The Consultation Paper has pointed out that the presence of the Attorney General (AG) had long been criticised and there was a view that SJ, being a part of the executive branch of the Government, would undermine the independence of

JORC. The Consultation Paper has invited views on whether any changes should be introduced in respect of the composition of JORC and the criteria for appointing members to JORC.

Membership of SJ

Responses received

29. The Administration does not agree that the membership of SJ undermines the independence of JORC. The fact that judges are appointed by CE in accordance with the recommendation of JORC under BL 88, 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. SJ's membership 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 SJ to be involved, as a member of JORC, in judicial appointments;
- (b) as the principal adviser on legal matters to CE, it is appropriate for SJ to be involved, as a member of JORC, in making recommendation to CE on judicial appointments; and
- (c) as the head of the Department of Justice (DOJ), which employs a large number of lawyers and briefs out a great deal of work to the private sector, SJ is in a unique position, and has considerable knowledge, to contribute to JORC's deliberations in respect of judicial appointments.

30. The Administration also stresses 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 Hong Kong, such safeguards include the security of tenure of judges as guaranteed by BL 89, 90(2) and 91. The system of appointment of judicial officers by CE on the recommendation of the independent JORC also compares favourably with other major common law jurisdictions. The Administration is of the view that the statutory membership of SJ in JORC should continue.

31. A legal professional considers that the presence of SJ undermines the independence of the Judiciary and is contrary to the basic constitutional principle of separation of powers. In order to show that JORC is independent from the executive branch of the Government, SJ should not be a member of JORC.

32. The Law Society considers that SJ, as principal legal adviser to CE, should no longer be a member of JORC. The appropriate role for SJ is to advise CE on the recommendation of JORC. As CE does not take part in the deliberations of JORC, neither should his principal adviser.

33. In its initial response, the Bar Association indicated that the majority view was that SJ (or a representative of DOJ) should be a member of JORC. The Bar Association considered that while it was not necessary for SJ to be an "ex-officio" member, the views of members of DOJ, being one of the three major court users, should be adequately reflected in the deliberations of JORC on matters relating to judicial appointments. However, should SJ become a political appointee, there was a strong feeling within the Bar that in order to ensure the independence of the Judiciary and the appearance of absence of political influence in the appointment of judges, it was more appropriate to have a representative of DOJ, rather than SJ, as a member of JORC. The Bar Association also advised that a sizable minority of its members had expressed strong views that SJ, being a member of the executive branch of the Government, should not be a member of JORC at all.

34. Following the details of the accountability system announced by CE, the Bar Association has revisited the issue and submitted a supplemental response to the Panel. The Bar Association concludes that SJ should not be a member of JORC. A representative chosen amongst government lawyers, who is not holder of a pensionable office, can represent the views of government lawyers in DOJ on JORC. In arriving at the conclusion, the Bar Association has taken into account the following -

- (a) BL 88 provides that judges shall be appointed by CE on the recommendation of an "independent" commission. Arguably "independent" means being wholly independent from the executive branch of the Government; and
- (b) the fact that section 4(1) of the JORC Ordinance bars LegCo Members and holders of a pensionable office (except judges) from appointment to JORC is an indication of the requirement of the independence of JORC members.

The Bar Association is of the view that to have a JORC member representing the fair, collective and professional opinion of DOJ, one of the three major court users, would assist JORC in discharging its duty.

Views of members

35. The views expressed by individual members at the Panel meeting on 22 April 2002 are summarised as below -

- (a) there is an inherent conflict of interest for a politically appointed member of the executive to serve on a body responsible for recommending appointments to senior judicial positions and promotion of incumbent judicial officers;

- (b) there is public concern that the promotion prospect of judges who made rulings against the Government in constitutional litigation cases had been adversely affected as a result of their judgments. Safeguards should be introduced to the system to address such concern; and
- (c) it is necessary to increase the transparency of the nomination and appointment process to ensure that the appointment of judges would not be affected by political considerations. There is no objection to having a senior Law Officer of DOJ, who is a civil servant, to be a member of JORC. However, a politically appointed SJ should not be a member of JORC.

Advice sought

36. Apart from the Administration, the legal profession considers that SJ should not be a member of JORC, especially in the case of a politically appointed SJ. Moreover, the Bar Association considers that a representative from DOJ should sit on JORC instead. The Panel is invited to consider whether any recommendation should be made in respect of the membership of SJ on JORC.

Other members of JORC

Responses received

37. The Administration is of the view that the appointments to JORC are based on merits and relevant attributes of individual members. These same criteria are adopted across the board in appointments to boards and committees. Regarding to the reference to a JORC member who is a deputy to the National People's Congress (NPC) in the Consultation Paper, the Administration sees no reason to discriminate against the membership of a particular member on the ground that he is a deputy to the NPC.

38. The Bar Association points out that in relation to the JORC members who are "eminent persons from other sectors" under BL 88, the criteria stipulated in the JORC Ordinance are that there shall be three in number and they are not connected in any way with the practice of law. However, the appointment of "eminent persons from other sectors" has the potential of undermining the independence of JORC. The Bar Association proposes that -

- (a) the criteria for appointment of these members should be more clearly set out in the Ordinance;
- (b) the number of these members should be reduced from three to two; and
- (c) procedures should be established so that LegCo (or its relevant committee) and the legal profession be consulted on a confidential basis on the appointment of these lay members. There is also a view that these appointments should be endorsed by LegCo.

39. The Law Society considers that both branches of the legal profession should have two members, instead of one member on JORC, as 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 perspective may continually be offered to JORC, the appointment should be for a term of two years only.

40. A legal professional points out that all the three members of JORC who are not connected in any way with the practice of law have come from the upper middle class. He considers that a prominent leader who represents the interests of the grass root class should be appointed as a member of JORC

LegCo Members

Responses received

41. Regarding the ineligibility of LegCo Members for JORC membership, the Administration points out that after the Reunification, LegCo has a separate role to play under BL 73(7), i.e. to endorse appointment of senior judges.

42. It has been the view of the Bar Association that the appointment of "political figures" as members of JORC would affect the public's perception of the Judiciary and the credibility of JORC.

43. The Law Society does not consider it appropriate for any person who has specific political affiliations or appointments to be appointed as a member of JORC. Therefore, LegCo Members should not be appointed as members of JORC

44. A legal professional does not consider appointing "political figures" as members of JORC will pose a problem, as long as the "political figures" are accountable to the people of Hong Kong, e.g. a LegCo Member who is directly elected. He considers that section 4(1) of the JORC Ordinance should be amended.

Advice sought

45. *The Panel is invited to consider –*

- (a) *the Bar Association's proposal on the criteria, number and procedure in respect of appointment of "eminent persons from other sectors" (paragraph 38 above refers);*
- (b) *the Law Society's proposal to increase the number of each branch of the legal profession from one to two for a term of two years (paragraph 39 above refers);*
- (c) *the proposal of a legal professional that a prominent leader representing the interests of grass root people be appointed as a JORC member (paragraph 40 above refers); and*

- (d) *the views of the two legal professional bodies that the appointment of “political figures” as members of JORC is not appropriate, and the view of a legal professional that the JORC Ordinance should be amended to allow for the appointment of “political figures” who are accountable to the people of Hong Kong (paragraphs 42 - 44 above refer).*

B. Accountability of JORC

46. The Consultation Paper has invited views on whether JORC should be required to publish an annual report in order to enhance its transparency and accountability, a practice adopted by the Judicial Service Commission from 1976 to 1982.

Responses received

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

48. A legal professional also supports the proposal and considers that the report should contain information such as the appointments made or considered, and the voting of members of JORC on these appointments.

Advice sought

49. *The Panel is invited to consider what specific information should be provided in the report and whether the report should be published on an annual basis. Members may wish to note that the annual reports previously published by the Judicial Service Commission gave a general account of the composition and functions of the commission, and the appointments made or considered in the year of the report.*

C. Operation of JORC

Open recruitment for judicial vacancies

50. Both UK and Canada conduct open recruitment for certain judges, while such practice is not adopted in the US for federal judge appointments. Open recruitment has been adopted in the UK for vacancies in the High Court since 1997. In Hong Kong, open recruitment is limited to vacancies at and below the District Court level. The Consultation Paper has invited views on whether open recruitment should be extended to judicial vacancies at the High Court level and above.

Responses received

51. The Bar Association supports open recruitment for all judicial vacancies. The Bar Association 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 invites application from 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 Association considers 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.

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

53. A legal professional also supports that open recruitment should be adopted for judicial vacancies at all levels. It is unconvincing that open recruitment is only adopted at and below the District Court level. Any concern that open recruitment at the High Court level and above may dissuade eligible candidates from applying and cause embarrassment to an unsuccessful applicant is equally valid in recruitment exercises at the lower level of courts.

54. The Judiciary is of the view that there are pros and cons in extending open recruitment beyond what is done at present. These have to be carefully weighed, bearing in mind the circumstances in Hong Kong. This issue will be covered in the review of the operation of JORC to be conducted by the Judiciary.

Views of members

55. At the meeting of the Working Group on 16 May 2002, members present pointed out that as BL92 provided for judges and other members of the Judiciary to be recruited from other common law jurisdictions, it was only reasonable that open recruitment of judges at all levels of courts should be conducted to enable interested overseas candidates to apply.

Advice sought

56. The legal profession is in support of adopting open recruitment for all judicial vacancies. The Panel is invited to consider whether open recruitment should be extended to judicial vacancies at the High Court level and above.

Relaxation of restrictions on disclosure

57. Section 11(1) of the JORC Ordinance states that -

"Any member of the Commission or other person who, without the permission of the Chief Executive, publishes or discloses to any unauthorised person or otherwise than in the course of duty the contents or any part of the contents of any document, communication or information whatsoever which has come to his knowledge in the course of his duties under or in connexion with this Ordinance shall be guilty of an offence and shall be liable on conviction to a fine of \$2,000 and to imprisonment of 1 year."

58. The Consultation Paper has invited views on -
- (a) 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); and
 - (b) whether section 11(1) of the JORC Ordinance should be reviewed and amended in order to enhance the transparency of the operation of JORC.

Responses received

59. The Bar Association considers that section 11(1) of the JORC Ordinance too widely drawn and should be amended so as to enhance the proper and effective discharge of functions of members of JORC. At present, members of JORC are hindered from proper consultation of the candidates. Strictly speaking, they are prevented from discussing improvement of the process of appointment because of the width of the prohibition. If section 11(1) is properly amended, some of the difficulties experienced by LegCo in exercising its power in endorsing appointments should be removed. Nevertheless, confidentiality of the information provided to LegCo must be preserved.

60. The Law Society does not agree that LegCo should be explicitly exempted from the application of section 11(1) of the JORC Ordinance. The Law Society also notes that under section 11(1) of the 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.

61. On the concern that section 11(1) of the JORC Ordinance may hamper consultation by JORC members, the Judiciary has made the following observations -

- (a) section 11(1) prohibits the publication and disclosure by any JORC member to any unauthorised 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 CE. For example, JORC papers and minutes and the information therein could not be published or disclosed;
- (b) But there is nothing in section 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 section 11(1) of the JORC Ordinance is in similar terms to section 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.

Advice sought

62. *The Bar Association considers that section 11(1) of the JORC Ordinance should be amended to facilitate JORC members to discharge their duties. The Judiciary and the Law Society do not consider that this is necessary. The Panel is invited to consider whether section 11(1) of the JORC Ordinance should be reviewed and amended in order to enhance the transparency of the operation of JORC.*

Voting of JORC

63. Before 11 July 1990, every resolution of the JSC has to be passed by the unanimous vote of the Chairman and every member who considers the resolution. On 11 July 1990, the JSC Ordinance was amended to expand the number of members from six to nine, and to provide that two dissenting votes are permissible for a resolution to be effective. This has remained unchanged when the JORC Ordinance was introduced to replace the JSC Ordinance in 1997. The Consultation Paper has mentioned about the criticism that a candidate could still be appointed even if the two representatives of the legal profession objected to the nomination. The Consultation Paper has invited views on 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.

Responses received

64. The Administration is of the view that 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. It has worked well and there is no reason to change it.

65. There is more or less equal support within the Bar Association over the following options in relation to voting rules on appointment of CFA judges and Chief Judge of the High Court -

Option (a) - a majority vote is permitted but the dissenting votes must not exceed two and must not include a dissenting vote from members of the Judiciary, SJ (or a representative from DOJ), or the legal profession ; and

Option (b) - voting must be unanimous.

66. The Bar Association explains that the majority of its members supports Option (a) for two reasons. First, Option (a) is considered to be more flexible. Given the size of JORC, it may not always be possible for any candidate, no matter how strong, to secure the unanimous votes of all members of JORC. This is particularly so when the number of suitable candidates put up for consideration is more than one. Secondly, given the importance of these appointments, the candidate must have the support of members from the Judiciary, the legal profession, or SJ (or a representative of DOJ) who are in a unique position to evaluate the candidate's suitability to these positions. For the same reason, a candidate who is supported by the aforementioned categories of JORC members should not be vetoed by the "lay" members. Those who are in support of Option (b) take the view that given the importance of these positions, the unanimous support of JORC is necessary. It is also less likely that LegCo will find a nomination which is unanimously supported by JORC to be controversial.

Advice sought

67. *The Panel is invited to consider whether the current rules on voting of JORC should be reviewed or changed, taking into account the Bar Association's proposal in paragraphs 65 - 66 above.*

Part III Mechanism for handling complaints against judges

68. The Consultation Paper has also invited preliminary views on the desirability and feasibility of establishing a mechanism for handling complaints against judges.

69. The Panel has agreed that, pending consideration of a research report prepared by the Research and Library Services Division of LegCo Secretariat on "Mechanism for Handling Complaints Against Judges in Overseas Places", this issue should be dealt with as a separate exercise at a later date.

WAY FORWARD

70. Subject to the views of the Panel, a draft report on the process of appointment of judges will be prepared for the endorsement of the Panel.

Council Business Division 2
Legislative Council Secretariat
10 July 2002

**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
March 2002

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)

**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.



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

Consultation Paper on Process of Appointment of Judges

1. Composition of JORC and the criteria for appointing members of 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 for 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 views, 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 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 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 handing 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

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

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

	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))
	<u>Procedure for LegCo to endorse judicial appointments under BL 73(7)</u>					
(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 style="text-align: center;">--</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 accept the recommendation of JORC and will only exercise its powers under the</p>	<p style="text-align: center;">--</p>	<p style="text-align: center;">--</p>

	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))
				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 on recruitment at lower levels of the Judiciary. 	--	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 private life of a candidate must be strictly controlled; 	--

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					<ul style="list-style-type: none"> - a system which might 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)	<p>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.</p> <p>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.</p>	--	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>Membership of JORC - 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) S.3</p>	--	<p>Membership of SJ</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>Membership of SJ</p> <p><i>Initial response</i></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>A sizable minority expresses the strong view that SJ, being a member of the Executive, should not be a member of JORC at all.</p>	<p>Membership of SJ</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>Membership of SJ</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>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 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><i>Supplemental response</i></p> <p>Being a political appointee under the accountability system, SJ should not be a member of JORC. A representative chosen amongst government lawyers, who is not holder of a pensionable office, can represent the views of government lawyers in DOJ on JORC.</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><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>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>

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			<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>LegCo Members</u></p> <p>Any person who has specific political affiliations or appointments should not be 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>
(5)	<p><u>Accountability of JORC</u> - whether JORC should be required to publish an annual report (paras 3.13 - 3.14)</p>	<p>The Judiciary will conduct a review of JORC's operation after the Panel has issued its final report.</p>	--	<p>The proposal to require JORC to publish an annual report is supported.</p>	--	<p>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.</p>
(6)	<p><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)</p>	<p>The Judiciary will conduct a review of JORC's operation after the Panel has issued its final report.</p> <p><u>Observations at this stage</u> - the pros and cons have to be carefully weighed.</p>	--	<p>Open recruitment for all judicial vacancies is supported.</p> <p>There are merits in adopting the present English system in Hong Kong.</p>	<p>Open recruitment should be adopted for judicial vacancies at the High Court level and above.</p>	<p>Open recruitment should be adopted for judicial vacancies at all levels.</p>

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(7)	<p><u>Consultation by JORC members</u> - whether section 11(1) of the JORC Ordinance should be reviewed and amended (paras. 3.18 - 3.20)</p>	<p>The Judiciary will conduct a review of JORC's operation after the Panel has issued its final report.</p> <p><u>Observations at this stage</u> -</p> <ul style="list-style-type: none"> - 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) 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. 	<p>--</p> <p>--</p>	<p>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.</p> <p>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</p> <p>--</p>	<p>--</p> <p>--</p>	<p>--</p> <p>--</p>

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(8)	<p><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)</p> <p>S.3 (5) (C)</p>	--	<p>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.</p>	<p>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 -</p> <p>(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</p> <p>(b) voting shall be unanimous given the importance of the appointments.</p> <p>The majority of the Bar supports the first option.</p>	--	--

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	Mechanism for handling complaints against judges					
(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
 10 July 2002

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 Report on "Mechanism for Handling Complaints Against Judges in Overseas Places" will be submitted to the Panel meeting on 12 July 2002.

**An extract of the Consultation Paper on
Process of Appointment of Judges**

**Chapter 2 - Role of LegCo
to endorse judicial
appointments under
BL 73(7)**

Introduction

2.1 From the outset, it was agreed by all concerned that LegCo's power to endorse the appointment and removal of the judges of the CFA and the Chief judge of the High Court is a substantive power. It is also implicit that this power should be exercised in such a way as to be compatible with the protection of judicial independence and quality under the Basic Law. LegCo must exercise its power and perform its constitutional duty responsibly and on an informed basis.

2.2 A major concern of the Panel is that the present system makes no provision for LegCo to secure the necessary information and reach its conclusion through a proper process of deliberation. Information provided by the Administration to LegCo was sketchy and inadequate. Confidentiality on policy and legal grounds was cited as obstacle against further disclosure. This makes it difficult for LegCo to play a meaningful role under BL 73(7). In considering whether improvements can be made in these two aspects, the Panel has made reference to overseas experience.

Overseas and Hong Kong comparison

2.3 The research reports presented to the Panel show that in the US, Congress is actively involved throughout the process of appointment of federal judges. This includes both the selection of candidates and confirmation of nominations. Through this process, Congress is provided with information and the basis of decision. On the other hand, in the UK, Parliament is not involved in the process of appointment of judges on the High Court Bench and above. Likewise, in Canada, Parliament is not involved in the process of appointment of judges of the Supreme Court and the Federal Court.

2.4 Hong Kong is somewhere in between. Under the Hong Kong system, JORC, an independent commission, advises or makes recommendations to the Chief Executive on the appointment and promotion of judicial officers. BL 73(7) confers on LegCo the power to endorse the appointment of CFA judges and the Chief Judge of the High Court. While BL 73(7) does not specify any mechanism or procedure for the endorsement of judicial appointments by LegCo, LegCo has the power to make any rules of procedure on its own under BL 75, so long as the rules are compatible with the Basic Law. This would include any rules of procedure for the endorsement of judicial appointments.

Options for endorsement procedure

2.5 There are three broad options for consideration -

Option 1 - "Normal Procedure"

2.6 BL 73(7) does not stipulate any formality for the power of endorsement to be exercised. Therefore it can be exercised under the already established practice and procedure of LegCo. It may be thought that the appointment is normally non-controversial, and the "Normal Procedure" set out below would be adequate -

- (a) the Administration advises LegCo's House Committee of CE's acceptance of the recommendation of JORC on a judicial appointment (this should take place before CE makes any public announcement of his acceptance of the recommendation);
- (b) the House Committee refers the matter to the Panel on Administration of Justice and Legal Services or some other Panel(s) or committee(s) for discussion;
- (c) the Panel(s)/committee(s) discusses the matter as soon as possible at a meeting to which all LegCo Members are invited to attend;
- (d) the Panel(s)/committee(s) reports its discussion to the House Committee;
- (e) the Administration seeks the endorsement of LegCo on the recommended appointment by way of a motion;

- (f) the motion is debated and voted on at a Council meeting; and
- (g) if the motion is passed by LegCo, CE will make the appointment.

2.7 In the event that an appointment is controversial and the Panel(s) or committee(s) considers it necessary to inquire into the matter whether or not by means of compelling any persons to testify or documents to be produced, it can, having reported to the House Committee in step (d) above, seek the authorisation of LegCo for it to exercise such powers under the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) by way of a motion. Alternatively, a proposal can be made at that stage for a select committee to be appointed by resolution of LegCo to carry out the inquiry.

2.8 Option 1 involves the least change to the existing practice (it embodies the process actually followed in the second appointment exercise mentioned in para. 1.5) and procedure and does not entail any changes to the Rules of Procedure. However, this is on the assumption that the information provided by the Administration in step (a) above is much improved.

Option 2 - "Expanded Normal Procedure"

2.9 Option 2 expands upon Option 1. In non-controversial cases, the "Normal Procedure" in Option 1 will be followed. In addition, a set procedure will also be provided to deal with cases which may be controversial, where further and more detailed examination or in-depth inquiry is in the public interest.

2.10 The advantage of Option 2 is that a prior established procedure can be invoked immediately when the need arises. However, without the aid of concrete details at this stage, it is difficult to say whether Option 2 will be more efficient than the existing arrangement described in paragraphs 2.6 - 2.7 above. Moreover, this Option lacks the flexibility of Option 1.

2.11 If this Option is preferred, LegCo will further deliberate on the detailed procedure.

Option 3 - "Special Procedure"

2.12 Option 3 proposes to adopt, albeit in modified form, certain features of the US system, e.g. the practice of the Senate Judiciary Committee of holding open hearings to question nominees.

2.13 The Panel notes that in the US, when a vacancy of federal judge occurs, a prospective nominee will be interviewed by the Department of Justice, investigated by the Federal Bureau of Investigation (FBI) and the American Bar Association (ABA), an independent non-governmental organisation. The nominee is required to complete questionnaires set by the Department of Justice, ABA and Senate. The public has access to a nominee's Senate Questionnaire, except the part under the heading of "Involvement in legal Proceedings/Tax Audits/Other Confidential" (**Appendix II**). If the reports from these bodies are favourable, the Attorney General formally recommends the nomination to the President. A nomination approved by the President will be signed and sent to the Senate which refers the judicial nominee to the Senate Judiciary Committee. The nominee will be investigated and testify at confirmation hearings conducted by the Senate Judiciary Committee which are open to the public and may be broadcast by radio and television. The nomination will be voted in the Senate Judiciary Committee. Confirmation of judicial appointments requires a majority vote of the Senate. When the Senate gives its advice and consent, the President signs the judicial commission which officially appoints the nominee.

2.14 The strength of the US system is its transparency and accountability. However, as US experience demonstrates, at times dramatically, that the system is highly intrusive and political, and a radical departure from Hong Kong's practice to date. The system is controversial in the US. An important consideration for Hong Kong is whether this is likely to be accepted by the community, and whether it will make highly qualified persons reluctant to seek or accept nomination.

2.15 If this option is preferred, LegCo will have to further consider in practical terms how the system may be adopted in the Hong Kong context, taking into account BL 88 which stipulates that judges shall be appointed by the CE on the recommendation of an independent commission.

2.16 The Panel invites views on the three options or their variations for LegCo to consider adopting for endorsing judicial appointments under BL 73(7).