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Subcommittee on Proposed Senior Judicial Appointment

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 16 February 2006**

Purpose

This paper provides information on the procedure for endorsement of senior judicial appointment by the Legislative Council (LegCo), and the past appointment exercises under Article 73(7) of the Basic Law (BL 73(7)).

Background

Relevant provisions of the Basic law

2. BL 48(6) confers on the Chief Executive (CE) the power and function to appoint judges of the courts at all levels in accordance with legal procedures. In accordance with BL 88, judges shall be appointed by CE on the recommendation of an independent commission, namely the Judicial Officers Recommendation Commission (JORC)^{Note}. In the case of the appointment of judges of the Court of Final Appeal (CFA) and the Chief Judge of the High Court, BL 90 provides that CE shall, in addition to following the procedures prescribed in BL 88, obtain the endorsement of LegCo. BL 73(7) correspondingly confers on LegCo the power and function to endorse the appointment of CFA judges and the Chief Judge of the High Court.

Past appointment exercises

3. Since 1 July 1997, LegCo has exercised its power to endorse the appointment of judges under BL 73(7) on three occasions –

^{Note} Under section 3(1) of the JORC Ordinance, JORC shall consist of the Chief Justice (the Chairman), the Secretary for Justice, 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.

- (a) in June 2000, LegCo endorsed seven CFA appointments, comprising two permanent judges, two non-permanent Hong Kong judges, and three non-permanent judges from other common law jurisdictions (non-permanent common law judges);
- (b) in December 2000, LegCo endorsed the appointment of the Chief Judge of the High Court; and
- (c) in July 2003, LegCo endorsed the appointment of three non-permanent common law judges to CFA and the appointment of the Chief Judge of the High Court.

Review on the process of appointment of judges

4. Having gone through the two appointment exercises in 2000, the Panel on Administration of Justice and Legal Services (AJLS Panel) decided to review the process of appointment of judges. A Consultation Paper was published in December 2001 to seek the views of the public, in particular the legal profession, on a number of issues, namely, the procedure for LegCo to endorse judicial appointments under BL 73(7); the information required to be provided by the Administration to LegCo on a judicial nominee; the membership, accountability and operation of JORC; and the desirability and feasibility of establishing a mechanism for handling complaints against judges.

5. In September 2002, the AJLS Panel issued the Report on Process of Appointment of Judges (the Report), which included, among others, recommendations on the procedure for endorsement of judicial appointments under BL 73(7). The recommendations were endorsed by the House Committee (HC) at its meeting on 16 May 2003.

Procedure for endorsement of judicial appointment by LegCo under BL 73(7)

6. The procedure for endorsement of appointment of judges by LegCo under BL 73(7) as agreed by HC is summarised as follows –

- (a) the Administration advises HC of the acceptance by CE of the recommendation of JORC and provides sufficient information on the recommended judicial appointee(s) to LegCo (this should take place before CE makes any public announcement of his acceptance of the recommendation);
- (b) HC refers the matter to a subcommittee for discussion;
- (c) the subcommittee discusses the matter as soon as possible;

- (d) the subcommittee reports its deliberation to HC;
- (e) the Administration gives notice of a motion to seek the endorsement of LegCo of the recommended appointment;
- (f) the motion is moved, debated and voted on at a Council meeting; and
- (g) if the motion is passed by the Council, CE makes the appointment.

Information to be provided to LegCo for endorsement of judicial appointment

7. During the review, a major concern of the AJLS Panel was that the information provided by the Administration to LegCo in the two appointment exercises in 2000 was sketchy and inadequate. To enable LegCo to exercise effectively its power in endorsing senior judicial appointment, the AJLS Panel had recommended in the Report that, in seeking LegCo's endorsement of a judicial appointment under BL 73(7), the information provided by the Administration should include as many as possible of the items contained in the questionnaire set by the United States Senate Judiciary Committee (**Appendix I**) and the application form for appointment as Justice of the High Court in the United Kingdom (**Appendix II**). The Judiciary had agreed that in future appointment exercises, JORC would be asked to consider the appropriate information that should be supplied to CE, to enable CE to supply sufficient information to LegCo.

The last appointment exercise

8. The procedure for endorsement of judicial appointment by LegCo set out in paragraph 6 above was adopted for the first time for the appointment exercise in July 2003. A Subcommittee was formed to consider the proposed judicial appointments of three non-permanent common law judges to CFA and the Chief Judge of the High Court.

9. In that appointment exercise, the curriculum vitae of the recommended appointees provided by the Administration had covered various aspects, including personal background, education, legal experience, judicial experience, services and activities, awards, and publications. The Subcommittee agreed that as compared with the two appointment exercises in 2000, the information provided on the recommended appointees was more comprehensive and had much improved. Nevertheless, in respect of the proposed appointment of non-permanent common law judges to CFA, the Subcommittee had requested the Administration to provide additional information on important publications of and major cases tried by the recommended appointees. In response to the Subcommittee's request, the Administration had provided the following supplementary information for members' reference –

- (a) copies of major publications of the recommended appointees; and
- (b) a selection of judgments given by the recommended appointees.

10. Having considered all the available information, the Subcommittee agreed that the recommended appointees had extensive legal and judicial experience and eminent standing and supported the proposed appointments, which were subsequently endorsed by LegCo on 3 July 2003.

The current appointment exercise

11. In her letter dated 6 January 2006 to the HC Chairman, the Director of Administration advised that CE had accepted the recommendation of JORC on the appointment of Mr Michael McHugh AC and Mr Justice Thomas Munro Gault DCNZM as non-permanent common law judges to CFA. Attached to the letter were –

- (a) an advance copy of the press statement on the appointment; and
- (b) a paper entitled “Appointment of Non-Permanent Judges to the Court of Appeal”.

The HC Chairman made arrangements for the letter to be issued to all Members.

12. At the meeting of 13 January 2006, a subcommittee was formed by the HC to consider the proposed judicial appointment.

13. According to the Administration, its intention is to move the motion for obtaining LegCo’s endorsement on the appointment at the earliest opportunity within this legislative session. Subject to the endorsement of LegCo, CE will make the recommended appointment under BL 88. The two recommended appointees will be ready to take up appointment in April 2006.

Questionnaire set by the Senate Judiciary Committee in the United States

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

A. GENERAL PERSONAL QUESTIONS

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

IV.1

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

IV.2

I.3. Date and place of birth.

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

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

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

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

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

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

B. LEGAL EXPERIENCE AND BACKGROUND

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

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

I.11. All courts in which admitted to practice with dates and list any lapses. Same information for administrative bodies requiring special admission.

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

C. FINANCIAL DATA AND CONFLICT OF INTEREST

- II.1. Sources, amounts and dates of all anticipated receipts from business relationships. Describe arrangements for any future compensation.
- II.2. Explain how you will resolve potential conflicts of interest and identify likely areas which may initially pose conflicts.

I.18 Describe ten most significant litigated matters you personally handled. Give citation, summary, identify client, detail nature of your participation. Also : (a) date of representation. (b) name of court and judge. (c) names, addresses and phone numbers of co-counsel and principal counsel for other parties.

I.19 Describe the most significant legal activities you pursued (non-trial or non-litigation). Describe the nature of your participation (unless privileged).

II.3. Do you have plans to pursue outside employment with or without pay if confirmed? If so, explain.

II.4. List all sources of income received in the calendar year prior to nomination.

II.5. FINANCIAL STATEMENT REQUIRED

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

IV.3. Ever been discharged or resigned due to impending discharge?

IV.4. Have you and your spouse paid all back taxes? Any tax payments made prior to your nomination? If so, detail.

IV.5. Tax lien or collection procedure ever instituted against you? If so, detail.

IV.6. You or spouse ever subject of any tax audit or inquiry? If so, detail.

IV.7. You or spouse ever declared bankruptcy? If so, give particulars.

IV.8. Have you or any organization you belonged to ever been under investigation for violating any law or regulation? If so, detail.

IV.9. Have you ever been the subject of a complaint to any group, agency or court for breach of ethics or rule of conduct? If so, give particulars.

IV.10 Ever been a party to any litigation?

IV.11 Please advise the Committee of any other adverse information that may affect your nomination.

E. GENERAL/OTHER

III.1. Describe your work to provide those disadvantaged with legal services.

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

**Appendix II
(English version only)**

LORD CHANCELLOR

**Application for appointment as
Justice of the High Court**

Restricted - Appointments

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

Please read the guidance notes before completing this form.

Section A - Personal details

Title (tick as applicable)

Mr Mrs Miss Ms Other (please state)

Professional surname

Private surname (if different from professional surname)

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

Date of birth

Decorations/honours

Professional address

Postcode
Telephone
Email

Private address

Postcode
Telephone
Email

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

Professional Private

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

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

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

Queen's Bench Chancery Family

Nationality

Section B - Educational and professional history

1 Further and/or Higher Education

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

2 Legal training**Barristers**

Month and year of call to the Bar _____

Inn of Court _____

Circuit membership (if any) _____

Specialist Bar Association (if any) _____

Year Silk taken (if applicable) _____

Solicitors

Month and year of admission as a solicitor _____

Specialist Solicitors' Association (if any) _____

Higher courts (Civil) Date granted _____

Higher courts (Criminal) Date granted _____

Higher courts (All Proceedings) Date granted _____

Year Silk taken (if applicable) _____

All applicants

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

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

All applicants

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

Dates	Chambers, firm or other organisation and address	Particulars

Barristers and Solicitors

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

%	Administrative and Public Law (including Judicial Review)
	Arbitration
	Banking and Financial Services
	Chancery
	Commercial and Admiralty
	Common Law - Contract, Sale of Goods
	Common Law - Personal Injury
	Common Law - Product Liability
	Common Law - Professional Negligence
	Common Law - Other
	Company Law
	Conveyancing
	Criminal
	Defamation
	Disciplinary
	Employment and industrial relations
	European and International
	Family
	Housing
	Human Rights
	Immigration
	Insolvency
	Intellectual Property
	Landlord and Tenant
	Parliamentary, Planning and Local Government (including Rating)
	Practice Management
	Restrictive practice and monopolies
	Revenue
	Technology and Construction
	Other (please specify):

If you are no longer in active practice as a barrister or a solicitor, on what date and in what circumstances did you cease to practise?

3 Fees

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

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

Section C - Judicial experience

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

No

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

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

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

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

Section D - General

Character

Have you ever been convicted of, or cautioned for, any criminal offence, other than a minor road traffic offence such as parking, or are any such proceedings pending? No Yes (please give details, including dates, below)

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

Have you ever been adjudged bankrupt, made a composition with your creditors, or been sued to judgement for any debt, or are any such proceedings pending? No Yes (please give details, including dates, below)

Have you ever had proceedings brought against you, or paid a penalty, or made a composition in respect of failure to pay, or any other default relating to, VAT or any other form of tax or rates, or are any such proceedings pending? No Yes (please give details, including dates, below)

Have you ever had an action brought against you for professional negligence without the matter being dismissed, or are any such proceedings pending? If you are a solicitor and such an action has been brought or is pending against your firm in respect of a matter under your supervision, answer 'yes'. No Yes (please give details, including dates, below)

Are you, or have you ever been, subject to the disciplinary proceedings of the Bar or The Law Society (including the Bar's and The Law Society's procedures in respect of complaints about inadequate professional services or "shoddy work") in respect of a matter involving you personally or under your supervision, without the matter having been dismissed, or are any such proceedings pending? No Yes (please give details, including dates, below)

Are you aware of anything in your private or professional life which would be a source of embarrassment to yourself or the Lord Chancellor if it became known in the event of your appointment as a High Court Judge? No Yes (please give details below or, if you prefer, contact a member of Judicial Group staff as mentioned in the 'Guide for Applicants')

Consultation

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

Further information

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

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

Signature

Date
