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Paper for the House Committee meeting on 14 May 2010

Subcommittee on Proposed Senior Judicial Appointments

Purpose

This paper reports on the deliberations of the Subcommittee on Proposed Senior Judicial Appointments.

Background

Constitutional and statutory provisions

2. Article 48(6) of the Basic Law ("BL") 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 BL88, judges shall be appointed by CE on the recommendation of an independent commission, namely, the Judicial Officers Recommendation Commission ("JORC"). Section 6(1) of the Hong Kong Court of Final Appeal ("CFA") Ordinance (Cap. 484) also provides that the Chief Justice of CFA ("CJ") shall be appointed by CE acting in accordance with the recommendation of JORC.

3. In the case of the appointment of judges of CFA and the Chief Judge of the High Court, BL90 provides that CE shall, in addition to following the procedures prescribed in BL88, obtain the endorsement of the Legislative Council ("LegCo"). Subject to the endorsement of LegCo, CE shall report such appointment to the Standing Committee of the National People's Congress for the record. BL73(7) correspondingly confers on LegCo the power and function to endorse the appointment of CFA judges and the Chief Judge of the High Court. Such procedure is also stipulated in section 7A of the Hong Kong CFA Ordinance.

4. Pursuant to BL88 and the JORC Ordinance (Cap. 92), JORC is entrusted with the function of making recommendations to CE regarding the filling of vacancies in judicial offices. As prescribed in the JORC Ordinance, JORC consists of CJ as the Chairman, the Secretary for Justice ("SJ") and seven other members appointed by CE comprising two judges, one barrister, one solicitor and three other persons who are not connected with the practice of law. CE is required by the JORC Ordinance to consult

the Bar Council of the Hong Kong Bar Association and the Council of the Law Society of Hong Kong regarding the appointment of the barrister and the solicitor respectively.

5. Section 12(1) of the Hong Kong CFA Ordinance provides that a person shall be eligible to be appointed as CJ if he is -

- (a) a permanent judge;
- (b) the Chief Judge of the High Court;
- (c) a Justice of Appeal;
- (d) a judge of the Court of First Instance; or
- (e) a barrister who has practised as a barrister or solicitor in Hong Kong for a period of at least 10 years.

6. Section 12(3) of the Hong Kong CFA Ordinance provides that a person shall be eligible to be appointed as a non-permanent Hong Kong judge if he is -

- (a) a retired Chief Judge of the High Court;
- (b) a retired Chief Justice of CFA;
- (c) a retired permanent judge of CFA;
- (d) a Justice or retired Justice of Appeal; or
- (e) a barrister who has practised as a barrister or solicitor in Hong Kong for a period of at least 10 years,

whether or not he is ordinarily resident in Hong Kong.

7. BL90 stipulates that CJ shall be a Chinese citizen who is a permanent resident of the Hong Kong Special Administrative Region with no right of abode in any foreign country. This requirement is also reflected in section 6(1A) of the Hong Kong CFA Ordinance.

The current appointment exercise

8. In a letter dated 8 April 2010 to the Chairman of the House Committee ("HC"), the Director of Administration advised that in accordance with BL88, CE had accepted the recommendations of JORC to appoint -

- (a) Mr Justice Geoffrey MA Tao-li as CJ; and

- (b) Mr Justice Robert Tang Ching, Mr Justice Frank Stock and Mr Justice Michael John Hartmann as non-permanent Hong Kong judges to CFA.

The Subcommittee

9. At the HC meeting on 16 April 2010, after consideration of the procedures for LegCo's endorsement of judicial appointment of judges as agreed by HC in May 2003, members formed a subcommittee to consider the proposed senior judicial appointments.

10. Under the chairmanship of Hon Margaret NG, the Subcommittee has held one meeting with the Administration and the Judiciary Administration ("JA") to discuss the proposed senior judicial appointments and related issues. The membership list of the Subcommittee is in the **Appendix**.

Deliberations of the Subcommittee

The proposed senior judicial appointments

11. In response to the Subcommittee's enquiry about the nomination procedure for the appointment of the next CJ, JA has advised that there was no nomination procedure in the appointment process. JORC had agreed to draw up a long list of persons who complied with the professional eligibility requirements for the appointment (leaving aside the nationality requirement under BL90) by consolidating the list of eligible judges drawn up by the Judiciary and the lists of eligible barristers provided by the Bar Association, the Department of Justice ("DoJ") and the Legal Aid Department. The long list had a total of 739 names of persons, but the number came down to 735 when the four JORC members who had declared that they did not wish to be considered as candidates for appointment as CJ were excluded. JORC went through the long list and agreed that eight persons should be placed on the short list for further consideration. In accordance with the agreed procedures, CJ ascertained from each of the eight persons on the short list whether the person was willing to serve and whether the person complied or was able and willing to comply with the nationality requirement under BL90 if appointed, and three persons had indicated their unwillingness to serve. After detailed consideration on the suitability of the five remaining persons, JORC decided to recommend the appointment of Mr Justice MA as the next CJ.

12. The Subcommittee has noted the curriculum vitae of Mr Justice MA, Mr Justice TANG, Mr Justice Stock and Mr Justice Hartmann as provided by the Administration. The Subcommittee supports the proposed appointments of

- (a) Mr Justice Geoffrey MA Tao-li as CJ; and

- (b) Mr Justice Robert Tang Ching, Mr Justice Frank Stock and Mr Justice Michael John Hartmann as non-permanent Hong Kong judges to CFA.

13. The Administration advised that it intended to move motions pursuant to BL90 and section 7A of the Hong Kong CFA Ordinance to obtain the endorsement of LegCo on the recommended appointments as soon as practicable before LegCo goes into recess in July 2010, as the incumbent CJ would leave his office on 31 August 2010. The Subcommittee has no objection to the Administration giving notices of motions to seek the endorsement of LegCo on the recommended appointments.

Appointment of serving Justices of Appeal as non-permanent judges to CFA

14. While the Subcommittee is supportive of the proposed appointment of the three non-permanent Hong Kong judges to CFA, some members have expressed grave concern that serving Justices of Appeal of the Court of Appeal of the High Court are being made non-permanent judges of CFA. They consider that the arrangement of allowing the same pool of judges to sit in both courts could give the public the impression that they are denied a real appeal in CFA and would erode public confidence in the administration of justice even though these non-permanent Hong Kong judges would not hear appeals from cases in which they have sat. Members note that the legal profession has raised similar concern that such dual roles of judges would diminish their confidence in a fresh look being given to the case on appeal.

15. JA has explained that the appointment of serving Justices of Appeal as non-permanent Hong Kong judges is provided for under the Hong Kong CFA Ordinance and in line with existing policy. Such appointment was made before in 1997. JORC noted that it was unsatisfactory to have only three non-permanent Hong Kong judges in CFA all of whom resided outside Hong Kong and this posed some operational difficulties for the Court. It was considered necessary to increase the number of non-permanent Hong Kong judges to allow greater flexibility in dealing with the heavy caseload of CFA. JORC considered that the three serving Justices of Appeal were suitable for appointment as non-permanent Hong Kong judges. JA has further advised that CJ foresees that the three recommended appointees would hear only a small number of CFA cases. In the some 40 cases of substantive appeals handled by CFA each year, CJ would sit in about half of them. The existing three non-permanent Hong Kong judges who are retired judges would be nominated to sit in most of the remaining cases. It is envisaged that the three recommended appointees would be required to sit in no more than 10 CFA cases in total each year.

16. While appreciating the need of flexibility in appointing a Justice of Appeal as a non-permanent Hong Kong judge in CFA, some members have reiterated that it is highly undesirable to have as many as three judges serving concurrently in the Court of Appeal and CFA. They have pointed out that 10 cases is no small number in relation to the total caseload of 40 in CFA and the three recommended appointees might need to sit in more CFA cases should Mr Justice MA be appointed as CJ, as he would need to recuse himself from hearing cases tried by his spouse, Madame Justice YUEN. They

are also concerned that the three Justices of Appeal, as non-permanent judges of CFA, might find themselves in an embarrassing situation of having to criticize the judgments made by their colleagues in the Court of Appeal. Moreover, apart from substantive appeals, a non-permanent Hong Kong judge could also be nominated to sit in the Appeal Committee in place of a permanent judge to hear applications for leave to appeal.

17. Members are of the view that the crux of the problem is the relatively small number of permanent judges in CFA, and more resources should be provided to the Judiciary to allow more judges to be appointed. Members note that in accordance with section 16 of the Hong Kong CFA Ordinance, CFA is constituted by five judges when hearing and determining appeals and this shall include CJ or a permanent judge designated to sit in his place, three permanent judges and one non-permanent Hong Kong judge or one non-permanent common law judge. Where CJ is not available to sit, he shall designate a permanent judge to preside. Where a sufficient number of permanent judges are not available, CJ shall nominate a non-permanent Hong Kong judge to sit in place of a permanent judge. Members are of the view that consideration might also have to be given to appointing more permanent judges or having more than one panel of CFA judges.

18. The Subcommittee has agreed to refer the policy issues of appointing serving Justices of Appeal as non-permanent judges of CFA and of judicial manpower situation in CFA and other levels of courts to the Panel on Administration of Justice and Legal Services ("AJLS Panel") for follow up.

Membership of SJ on JORC

19. Some members have expressed reservation about the membership of SJ, being a Principal Official under the Political Appointment System, on JORC. Members note that during the review of the process of appointment of judges conducted by the AJLS Panel in 2002, both the Bar Association and the Law Society had expressed similar reservation.

20. The Administration has explained that under the JORC Ordinance, SJ is an ex-officio member of JORC. The Administration considers it appropriate for SJ to be a member of JORC as DoJ is a major court user which has also briefed out a significant number of cases to private practitioners. Apart from being the principal adviser on legal matters to the Government, SJ is also endowed with the constitutional role of being the guardian of public interest in the administration of justice and the upholder of the rule of law. The Administration has stressed that when appointed as a member of JORC, SJ has taken an oath to discharge his duties in relation to JORC without fear or favour.

21. The Subcommittee has agreed to refer the issue to the AJLS Panel for follow-up.

Advice sought

22. Members are invited to note the deliberations of the Subcommittee.

Council Business Division 2
Legislative Council Secretariat
13 May 2010

Subcommittee on Proposed Senior Judicial Appointments

Membership List

Chairman	Dr Hon Margaret NG
Members	Hon Albert HO Chun-yan Hon LAU Kong-wah, JP Hon Emily LAU Wai-hing, JP Hon Abraham SHEK Lai-him, SBS, JP Hon Audrey EU Yuet-mee, SC, JP Hon Ronny TONG Ka-wah, SC Hon Paul CHAN Mo-po, MH, JP Dr Hon Priscilla LEUNG Mei-fun Hon Paul TSE Wai-chun (Total : 10 Members)
Clerk	Miss Flora TAI
Legal Adviser	Mr KAU Kin-wah
Date	4 May 2010