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Panel on Administration of Justice and Legal Services

Background brief prepared by the Legislative Council Secretariat for the meeting on 23 November 2009

Appointment of the Chief Justice of the Court of Final Appeal

Purpose

This paper provides background information on the procedure for making the appointment of the Chief Justice (CJ) of the Court of Final Appeal (CFA). It also provides information on the appointment of the incumbent CJ in 1997.

Relevant provisions of the Basic law and the Hong Kong CFA Ordinance (Cap. 484)

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 BL 88, 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 CFA Ordinance also provides that 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 (HC), BL 90 provides that CE shall, in addition to following the procedures prescribed in BL 88, 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. BL 73(7) correspondingly confers on LegCo the power and function to endorse the appointment of CFA judges and the Chief Judge of HC. Such procedure is also stipulated in section 7A of the Hong Kong CFA Ordinance.

Procedure for endorsement of appointment of judges by LegCo under BL73(7)

Options for the endorsement procedure put forward by the Panel on Administration of Justice and Legal Services (the Panel) for consultation

4. In June 2001, the Panel commenced a review of the process of appointment of judges with a view to looking into how LegCo could properly discharge its

constitutional duty under BL, and how the system of appointment of judges might be improved to achieve greater transparency and accountability while ensuring judicial independence.

5. The Panel published the Consultation Paper on Process of Appointment of Judges in December 2001 to invite views from the public, in particular the legal community, the Judiciary, the Administration and academics. The Panel put forward in the Consultation Paper three options for the procedure for LegCo to endorse judicial appointment under BL 73(7), namely: (a) the "Normal Procedure" under which the power of endorsement would be exercised under the already established practice and procedure of LegCo with more information to be provided by the Administration on a judicial appointment; (b) the "Expanded Normal Procedure" which expanded on the "Normal Procedure" but allowed for a prior established procedure to deal with controversial cases; and (c) the "Special Procedure" which proposed to adopt, albeit in modified form, certain features of the system in the United States (US), e.g. the practice of the Senate Judiciary Committee of holding open hearings to question nominees.

6. The Panel noted that the Judiciary, the Hong Kong Bar Association and the Law Society of Hong Kong were in favour of the "Normal Procedure", subject to adequate information to be provided to LegCo by the Administration on the judicial nominees. They considered that the "Special Procedure" was inappropriate for Hong Kong, for the reasons that the US system would politicise the process of judicial appointment, and deter suitable candidates from being considered for appointment. The Administration also shared the Judiciary's objection to the "Special Procedure".

7. The Panel also noted the Bar Association's view that LegCo was given the power to endorse the appointment of CFA judges and the Chief Judge of HC under BL 73(7) because of the importance of the posts. LegCo was not given the power to make recommendations as to the appointment. LegCo should as a matter of convention accept the recommendation of JORC and only exercise its powers under the LegCo (Powers and Privileges) Ordinance (Cap. 382) when the recommended candidate was highly controversial. It was not intended that LegCo should duplicate the process of consultation undertaken by JORC.

Procedure for LegCo's endorsement as recommended by the Panel and agreed by the House Committee (HC)

8. The Panel recommended in its Report on Process of Appointment of Judges published in September 2002 that the "Normal Procedure" with the following steps be adopted -

- (a) the Administration advises HC 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) HC refers the matter to the Panel or some other Panel(s) or committee(s) for discussion;
- (c) the Panel(s)/committee(s) discuss 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 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 LegCo, CE makes the appointment.

9. Having considered the view of the Committee on Rules of Procedure that proposals for the appointment of judges were not policy matters that could be referred to Panels for discussion, the Panel agreed to modify its recommended procedure to enable HC to refer the recommended judicial appointment(s) to a subcommittee, instead of a Panel, for discussion.

10. The Panel also recommended that in seeking LegCo's endorsement of a judicial appointment under BL73(7), the information provided by the Administration should include as many as possible 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 United Kingdom. In this connection, 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 following procedure for endorsement of appointment of judges by LegCo under BL 73(7) as recommended by the Panel was endorsed by HC on 16 May 2003 –

- (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.

Regarding (b) above, it was agreed at the HC meeting on 28 May 2004 that it would be for HC to decide whether or not a subcommittee should be appointed.

JORC

Membership

11. Pursuant to BL88 and the JORC Ordinance (Cap. 92), JORC is entrusted with the function of making recommendations to CE regarding the appointment of judges. As prescribed in the Ordinance, JORC consists of CJ as the Chairman, the Secretary for Justice (SJ) and seven other members appointed by CE consisting of 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 and the Council of the Law Society regarding the appointment of the barrister and the solicitor respectively.

12. Section 4 of the JORC Ordinance provides that a person shall not be appointed to be a member of the Commission if he is a LegCo Member; or he holds a pensionable office (other than the office of a judge) the emoluments whereof are payable wholly or partly out of public revenue, unless he is on leave prior to retirement and has already received official notification of the pension which will be payable to him for service which comprised service in the office or post of which he is the holder.

13. Members may wish to note that during the Panel's review of the process of appointment of judges, the issue relating to the membership of JORC was also discussed. The discussion of the Panel was focused on whether SJ should be a member of JORC. The Bar Association's view was that SJ, being one of the Principal Officials under the Accountability System, should not be a member of JORC. A representative chosen amongst government lawyers, who was not holder of a pensionable office, could represent the views of government lawyers of the Department of Justice (DoJ) on JORC. It was considered necessary for a representative of DoJ to be a member of JORC as DoJ was one of the three major court users. The Law Society also did not consider it appropriate for SJ, as the principal legal adviser to CE, to be a member of JORC. The Administration, however, considered the arrangement appropriate.

14. Some Panel members expressed the view that there would be an inherent conflict of interest for SJ, a politically appointed member of the executive under the Accountability System, to serve on a body responsible for recommending appointments to senior judicial offices and promotion of incumbent judicial officers.

15. The current membership of JORC is in **Appendix I**.

Operation of JORC

Procedure

16. The procedure and voting requirements of JORC are laid down in the JORC Ordinance. The Chairman and no fewer than six other members may exercise and perform any of the functions, powers and duties of JORC. For the purposes of any meeting of JORC, if CJ is unable to act as Chairman, those members present at that meeting may by resolution appoint any of their member to act in his place and in so acting to exercise and perform all the functions of the Chairman at that meeting. If any appointed member is absent from Hong Kong or is unable to act, CE may appoint another person to act temporarily as a member.

Voting requirements

17. At a meeting of JORC, a resolution is effective if -
- (a) where seven members are present, at least five vote in favour;
 - (b) where eight members are present, at least six vote in favour; and
 - (c) where nine members are present, at least seven vote in favour.

Disclosure of interests

18. The JORC Ordinance provides that where JORC is exercising its functions in relation to the filling of vacancies in judicial offices as specified in Schedule 1 to the JORC Ordinance or to the extension of the term of office of CJ under section 14 of the Hong Kong CFA Ordinance, a member who is or may reasonably be regarded as a candidate for selection to fill any such vacancy or whose term of office is being considered for extension shall disclose whether or not, if he were to be selected or if the extension of his term of office were to be recommended, he is willing to accept appointment or the extension, and that disclosure shall be recorded in the minutes of JORC's meeting. A member who discloses a willingness to accept an appointment or extension shall not take part in any deliberation of JORC with respect to that appointment or extension and shall not vote on any question concerning the same; and shall, with respect to any deliberation of JORC concerning that appointment or extension as the case may be and any question concerning the same, be treated as being unable to act.

19. Members may wish to note that in reply to a written question raised by Ms Emily LAU at the Council meeting on 19 May 1999, the then Chief Secretary for Administration explained that, in addition to the above statutory requirement, judges on JORC would not participate in deliberations on filling of vacancies if he was or might

reasonably be regarded as a candidate for filling the vacancies. It had been the practice of JORC members to declare their personal association, if any, with any candidate being considered for appointment, and any possible interest in matters laid before JORC.

Selection process

20. According to the Judiciary Administration, as only eligible persons of the highest standing will be considered for appointment, such persons are generally well known to the Judiciary, the legal profession and members of JORC. No advertisement is placed.

It is normal practice that the secretary to JORC would in consultation with the Chairman put up a list of candidates for JORC's consideration. In coming up with the proposed list, a number of steps are taken: first, the pool of all potential qualified candidates who may be able to comply with the minimum legal requirements for the post would be identified.

Second, having regard to the size of the pool of potential candidates, and the responsibilities and the qualities required of the post holder, the Chairman may advise that only those highly experienced candidates should be put to JORC for consideration, instead of all candidates who meet the minimum legal requirements. The proposed list submitted, apart from containing a sufficiently large number of candidates, is not meant to be exhaustive. It can be revised and any JORC member is also at liberty to put forward further names. After deliberation, JORC would then come up with a shortlist of candidates having regard to the responsibilities and the qualities required of the post holder.^{Note}

21. Statutory provisions relating to the operation of JORC are in **Appendix II**.

The post of CJ

22. The CFA Ordinance (Cap. 484) provides that CJ shall be the head of the Judiciary and shall be charged with the administration of the Judiciary and such other functions as may be lawfully conferred on him. Under the same Ordinance, CJ shall be President of CFA.

23. BL90 and section 6(1A) of the Hong Kong CFA Ordinance stipulate that CJ of CFA shall be a Chinese citizen who is a permanent resident of the Hong Kong Special Administrative Region (HKSAR) with no right of abode in any foreign country. The statutory professional qualifications for CJ are stipulated in section 12(1) of the Hong Kong CFA Ordinance as follows -

"(1) A person shall be eligible to be appointed as the Chief Justice if he is -

^{Note} Paragraphs 7 to 11 of the Research Report on the Process of Appointment of Judges in Hong Kong since 1976 published by Research and Library Services Division of the Legislative Council Secretariat in April 2001

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

Appointment of the incumbent CJ in 1997

The process

24. In April 1997, the CE Office announced the membership of JORC for a two-year term, which would take effect on 1 July 1997. Since the relevant Ordinances on the appointment of CJ would not come into effect until 1 July 1997, JORC (Designate) was tasked to complete preparatory work before 1 July 1997 in order to ensure the timely establishment of the HKSAR Judiciary. Its first task was to make recommendations to CE in respect of the appointment of CJ. On 20 May 1997, JORC (Designate) unanimously recommended that Mr Andrew LI be appointed CJ. On 24 May 1997 the then SJ moved a motion to seek support from the Council for Mr LI to be appointed as CJ and the motion was passed on the same day.

25. When moving the motion, the then SJ informed the Council that JORC had considered over 140 people who possessed the qualifications laid down in section 12 of the Hong Kong CFA Ordinance. These included serving Justices of Appeal, serving HC Judges, barristers who had practised as a barrister or solicitor in Hong Kong for at least 10 years (including those in private practice or working for the then Legal Department), retired CJ, retired Justices of Appeal and retired judges of HC who qualified under the terms of BL.

26. The then SJ also gave an account of the selection process of JORC as follows -

- (a) members canvassed the views of senior members of the Judiciary and the profession to gauge their perception of the qualities of CJ as well as their assessment of the candidates;
- (b) when canvassing such views, no precondition was made on what people could say and who they could support. Full consideration was given to the views obtained;
- (c) members also considered information and materials provided by the candidates themselves;
- (d) there had been a systematic narrowing of choice in considering the candidates at successive meetings;
- (e) members also took time to reflect on the views obtained; and

- (f) members in the end relied upon their own assessments and made up their own minds.

Selection criteria

27. According to the then SJ, JORC, on the basis of feedback from the senior members of the Bench and the professions, had amplified the qualities for the appointment to embrace the following -

- (a) personal qualities of honesty, integrity, industry, independence and intellectual capacity;
- (b) outstanding competence as a lawyer and the ability to project a sense of professional excellence;
- (c) judicial qualities of mastery of facts and law, clear, concise and convincing expression and the ability to develop the law consistently with principle and practical needs;
- (d) vision, drive and leadership qualities which would set a clear direction for the Judiciary; and
- (e) the ability to work with people and to engender respect and trust from members of the Judiciary and the legal profession so that together with them he could lead the development of CFA and the legal system to achieve the necessary local and international respect.

28. The then SJ further pointed out that, to prevent any possible suggestion of interference in the process of judicial appointments, she had decided not to, and in fact did not, exercise her right to nominate candidate at any stage of the proceedings, nor did any of the lay members of JORC nominate any candidate. The recommendation of Mr Andrew LI was made by JORC unanimously.

Relevant papers

29. A list of relevant papers available on the LegCo website (<http://www.legco.gov.hk>) is in **Appendix III**.

Current membership of the Judicial Officers Recommendation Commission

Ex officio chairman and member

The Honourable Chief Justice Andrew LI Kwok-nang, GBM (Chairman)

The Honourable WONG Yan-lung, SC, JP (Secretary for Justice)

Judges

The Honourable Mr Justice Roberto Alexandre Vieira RIBEIRO

The Honourable Mr Justice Louis TONG Po-sun

Barrister and solicitor

Mr Rimsky YUEN Kwok-keung, SC (barrister)

Mr Michael John Lintern-Smith (solicitor)

Persons not connected with the practice of law

Professor Lap-Chee TSUI

Dr Rosanna WONG Yick-ming, JP

Dr Edgar CHENG Wai-kin, GBS, JP

Statutory Provisions Relating to the Operation of the Judicial Officers Recommendation Commission

The Judicial Officers Recommendation Commission Ordinance (Cap. 92) contains the following provisions relating to the operation of the Commission -

- (a) It is an offence under the Ordinance to -
 - (i) wilfully give false information to the Commission or any member (section 8);
 - (ii) publish or disclose, without the permission of the Chief Executive, to any unauthorized person or otherwise than in the course of duty the contents or any part of the contents of any document, communication or information which has come to his knowledge in the course of his duties under or in connection with the Judicial Officers Recommendation Commission Ordinance (section 11); and
 - (iii) influence or attempt to influence a decision of the Commission or any member (section 12).
- (b) Reports, statements or other communications which the Commission may in the exercise of its functions or the discharge of its duties make to the Chief Executive or to the Chief Justice shall be privileged in that its production may not be compelled in any legal proceedings (section 9).
- (c) A member of the Commission shall have the same protection and privileges in proceedings brought against him for any act done in the execution of his duty as such member as a judge has when acting in the execution of his office (section 10).

Appointment of the Chief Justice of the Court of Final Appeal

Relevant documents

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper</u>
Legislative Council	24 May 1997	Motion moved by the Secretary for Justice on the "Appointment of the Chief Justice of the Court of Final Appeal of the Hong Kong Special Administrative Region"
	19 May 1999	A written question raised by Hon Emily LAU on "Appointments to the Judicial Officers Recommendation Commission"
Panel on Administration of Justice and Legal Services (AJLS Panel)	28 November 2000	<p>Research Reports on the process of appointment of judges in some foreign countries: the United States [RP01/00-01]</p> <p>Research Reports on the process of appointment of judges in some foreign countries: the United Kingdom [RP02/00-01],</p> <p>Minutes of meeting [LC Paper No. CB(2)657/00-01]</p>
	24 April 2001	<p>Research Reports on the process of appointment of judges in Hong Kong since 1976 [RP07/00-01]</p> <p>Research Reports on the process of appointment of judges in some foreign countries: Canada [RP08/00-01]</p> <p>A supplementary information note on the process of appointment of judges in some foreign countries: the United States [IN12/00-01]</p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper</u>
		Minutes of meeting [LC Paper No. CB(2)2138/00-01]
	15 May 2001	Research Reports on the process of appointment of judges in some foreign countries - An overall comparison on the process of appointment of judges in UK, USA, Canada and Hong Kong [RP12/00-01] Minutes of meeting [LC Paper No. CB(2)152/01-02]
	--	Consultation Paper on Process of Appointment of Judges published by the AJLS Panel on 12 December 2001 (the Consultation Paper) [LC Paper No. CB(2)662/01-02]
	22 April 2002	Submission from the Director of Administration on the Consultation Paper [LC Paper No. CB(2)1617/01-02(02)] Submission from the Judiciary Administration on the Consultation Paper [LC Paper No. CB(2)1617/01-02(03)] Submission from the Hong Kong Bar Association on the Consultation Paper [LC Paper No. CB(2)1624/01-02(01)] <i>(English version only)</i> Submission from the Law Society of Hong Kong on the Consultation Paper [LC Paper No. CB(2)1617/01-02(04)] <i>(English version only)</i> Submission from Mr Tony YUEN Tat-tong [LC Paper No. CB(2)1617/01-02(05)] <i>(English version only)</i>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper</u>
		<p>Summary of written submissions on the Consultation Paper [LC Paper No. CB(2)1624/01-02(02)] <i>(English version only)</i></p> <p>Minutes of meeting [LC Paper No. CB(2)2545/01-02]</p>
	--	<p>A supplemental response dated 31 May 2002 from the Bar Council on "Process of appointment of judges" [LC Paper No. CB(2)2350/01-02(01)] <i>(English version only)</i></p>
	22 July 2002	<p>Paper prepared by the Legislative Council Secretariat on the process of appointment of judges [LC Paper No. CB(2)2544/01-02(01)]</p> <p>Paper prepared by Legal Service Division on "Rules of Procedure for the Endorsement of the Appointment of Judges under Article 73(7) of the Basic Law" [LC Paper No. LS123/01-02]</p> <p>Minutes of meeting [LC Paper No. CB(2)119/02-03]</p>
	--	<p>Report on Process of Appointment of Judges prepared by the AJLS Panel [issued vide LC Paper No. CB(2)2798/01-02 on 20 September 2002]</p>
Committee on Rules of Procedure	6 March 2003	<p>Progress Report of the Committee on Rules of Procedure for the period from July 2002 to June 2003 (pages 16 to18)</p>
House Committee	16 May 2003	<p>Report of the AJLS Panel on "Procedure for endorsement of appointment of judges by the Legislative Council under Article 73(7) of the Basic Law"</p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper</u>
		[LC Paper No. CB(2)2059/02-03] Director of Administration's letter dated 2 May 2003 on "Senior Judicial Appointments" Minutes of meeting [LC Paper No. CB(2)2118/02-03]

Council Business Division 2
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