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Panel on Administration of Justice and Legal Services

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 28 February 2011**

**Membership of Secretary for Justice on
the Judicial Officers Recommendation Commission**

Purpose

This paper provides background information on the Judicial Officers Recommendation Commission ("JORC") and a brief account of past discussions by the Legislative Council ("LegCo") on the membership of Secretary for Justice ("SJ") on JORC since the First LegCo.

Background

Establishment and functions of JORC

2. Before 1 July 1997, the Judicial Service Commission ("JSC") gave advice to the Governor on the appointment of judges of the Supreme Court. The Governor appointed judges by Letters Patent under the Public Seal with instructions given through a Secretary of State. LegCo was not involved in the process of appointment of judges.

3. After 1 July 1997, the Basic Law ("BL") provides for the appointment of the Chief Justice ("CJ") and judges of the Court of Final Appeal ("CFA") and the Chief Judge of the High Court. 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. JORC was established by the JORC Ordinance (Cap. 92) to reflect the requirement of BL 88. In the case of the appointment of judges of 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.

Membership of JORC

4. Under section 3 of the JORC Ordinance, JORC consists of CJ as the Chairman, SJ as an ex-officio member and seven other members appointed by CE including two judges, one barrister, one solicitor and three other persons who are not connected with the practice of law. Section 4 of the JORC Ordinance further provides that a person shall not be appointed as a member of JORC 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. The current membership of JORC is in **Appendix I**.

Operation of JORC

5. 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 members 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.

Relevant discussions on the membership of SJ on JORC

Discussions in 2002

6. In June 2001, a Working Group was formed by the Panel on Administration of Justice and Legal Services ("the Panel") to review the process of appointment of judges with a view to achieving greater transparency and accountability while ensuring judicial independence. The Panel subsequently issued a Consultation Paper on Process of Appointment of Judges ("the Consultation Paper") in December 2001. The Consultation Paper pointed out, among others, that the presence of the Attorney General as an ex-officio member of JSC had long been criticised and invited views on whether any changes should be introduced in respect of the composition of JORC.

7. At the meeting on 22 April 2002, the Panel further discussed issues relating to the Consultation Paper, including the membership of SJ on JORC. Members

noted that both the Hong Kong Bar Association ("Bar Association") and the Law Society of Hong Kong ("Law Society") were of the view that it was not appropriate for SJ, being one of the Principal Officials under the Accountability System, to be a member of JORC. The Law Society considered that the appropriate role for SJ was to advise CE on the recommendation of JORC, instead of taking part in the deliberations of JORC. The Bar Association was of the view that instead of SJ, a representative chosen amongst government lawyers, who was not a holder of a pensionable office, could represent the views of government lawyers in the Department of Justice ("DoJ") on JORC.

8. Some members including Mr Albert HO, Dr Margaret NG, Ms Emily LAU and Ms Audrey EU shared the concern that the membership of a politically appointed SJ in JORC would undermine the independence of JORC. These members considered that there was an inherent conflict of interest for SJ to serve on a body responsible for recommending appointments to senior judicial positions and promotion of incumbent judicial officers. They pointed out that there was 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 judgements and considered it necessary to enhance the transparency of the nomination and appointment process to ensure that the appointment of judges would not be affected by political considerations.

9. The Administration did not agree that the membership of SJ undermined the independence of JORC, pointing out that judges were appointed by CE in accordance with the recommendation of JORC of which SJ was only one of the nine members with no veto power. The Administration considered that as guardian of the public interest in the administration of justice, upholder of the rule of law and the principal adviser on legal matters to CE, it was appropriate for SJ to be involved, as a member of JORC, in judicial appointments. As the head of DoJ which employed a large number of lawyers and briefed out a great deal of work to the private sector, SJ was also in a unique position and had considerable knowledge to contribute to JORC's deliberations in respect of judicial appointments. The Administration also advised that there was 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 breached judicial independence, provided that safeguards were in place. In Hong Kong, such safeguards included the security of tenure of judges as guaranteed by BL 89, 90(2) and 91. The Administration was of the view that the statutory membership of SJ in JORC should continue.

10. At its meeting on 22 July 2002, the Panel further discussed issues relating to the Consultation Paper on the process of appointment of judges and

recommended, among others, that the membership of SJ in JORC should be reviewed.

Recent discussions in 2009 and 2010

11. In connection with the impending retirement of the former CJ, Mr Andrew LI Kwok-nang, the Panel discussed with the Administration the procedures and working timetable to fill the anticipated vacancy of CJ at its meeting on 23 November 2009. During the discussion, Dr Margaret NG and Ms Emily LAU reiterated their view that SJ, being a political appointee, should not be a member of JORC. They were concerned that in the event that the candidate proposed by JORC was highly controversial, the membership of SJ on JORC might further complicate the matter. Mr TAM Yiu-chung, however, did not consider that there was any problem with SJ's membership on JORC. Noting that the then SJ had not exercised her right to nominate any candidate for the appointment of CJ in 1997 to prevent any possible suggestion of interference in the process of judicial appointments, Mr TAM asked whether SJ would follow the same practice in the upcoming appointment exercise.

12. The Administration advised that apart from being the principal adviser on legal matters to the Government, SJ was 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. In addition, SJ had the overall responsibility for DoJ which was one of the three major court users. The other Law Officers in DoJ each had their own role within DoJ and did not have the overall responsibility for the Department as SJ did. It was essential that SJ remained a member of JORC to fulfil his important roles in these various respects. The Administration also stressed that when appointed as a member of JORC, SJ had taken an oath to discharge his duties in relation to JORC without fear or favour. The Administration further explained that the approach taken by the then SJ was a reflection of the special circumstances at the time when the motion for the appointment of the former CJ was moved in the Provisional Legislative Council in 1997. At that time, the then SJ designate had not yet taken up office. The incumbent SJ had, however, been in office for quite some time and was in a position to participate in the appointment process himself, including, if he thought fit, suggesting names for JORC's consideration.

13. On the concern about the voting power of SJ on JORC, the Administration explained that each member of JORC had equal voting power. According to the voting requirements of JORC as laid down in section 3(3A) of the JORC Ordinance, a resolution at a meeting of JORC was effective if (a) where seven members were present, at least five voted in favour; (b) where eight members were present, at least six voted in favour; and (c) where nine members were

present, at least seven voted in favour. In other words, more than two dissenting votes were required to vote down a resolution of JORC on a recommended appointment. Members also noted that the deliberations of JORC were confidential and details of its voting results would not be disclosed.

14. At the House Committee meeting on 16 April 2010, a subcommittee was appointed to consider the recommended appointments of CJ and three non-permanent Hong Kong judges to CFA. The Subcommittee had also expressed reservation about the membership of SJ on JORC and had referred the issue to the Panel for follow-up.

Relevant papers

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

Council Business Division 2
Legislative Council Secretariat
24 February 2011

Current membership of the Judicial Officers Recommendation Commission

Ex officio chairman and member

The Honourable Chief Justice Geoffrey MA Tao-li (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

**Relevant documents on membership of Secretary for Justice on
the Judicial Officers Recommendation Commission**

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper</u>
Panel on Administration of Justice and Legal Services ("AJLS Panel")	--	<p>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]</p>
	22 April 2002	<p>Submission from the Director of Administration on the Consultation Paper [LC Paper No. CB(2)1617/01-02(02)]</p> <p>Submission from the Judiciary Administration on the Consultation Paper [LC Paper No. CB(2)1617/01-02(03)]</p> <p>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></p> <p>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></p> <p>Submission from Mr Tony YUEN Tat-tong [LC Paper No. CB(2)1617/01-02(05)] <i>(English version only)</i></p> <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"</p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper</u>
		<p>[LC Paper No. CB(2)2350/01-02(01)] (English version only)</p>
	22 July 2002	<p>Paper prepared by the Legislative Council ("LegCo") 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>
	23 November 2009	<p>Administration's paper on the procedures and working timetable to fill the anticipated vacancy of the Chief Justice of the Court of Final Appeal [LC Paper No. CB(2)217/09-10(01)]</p> <p>Background brief on "Appointment of the Chief Justice of the Court of Final Appeal" prepared by the LegCo Secretariat [LC Paper No. CB(2)308/09-10(04)]</p> <p>Minutes of meeting [LC Paper No. CB(2)787/09-10]</p>
House Committee	16 April 2010	<p>Director of Administration's letter dated 8 April 2010 to the Chairman of the House Committee [issued vide LC Paper No. CB(2)1253/09-10]</p>

<u>Meeting</u>	<u>Meeting Date</u>	<u>Paper</u>
Subcommittee on Proposed Senior Judicial Appointments	4 May 2010	Minutes of meeting [LC Paper No. CB(2)1783/09-10]
House Committee	14 May 2010	Report of the Subcommittee on Proposed Senior Judicial Appointments [LC Paper No. CB(2)1514/10-11]

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