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Report of the Subcommittee on Proposed Senior Judicial Appointments

Purpose

This paper reports on the deliberations of the Subcommittee on Proposed Senior Judicial Appointments ("the Subcommittee") regarding the proposed appointment of two non-permanent judges from other common law jurisdictions to the Court of Final Appeal ("CFA").

Background

The Court of Final Appeal

2. CFA is the final appellate court in Hong Kong which hears appeals in civil and criminal matters and may confirm, reverse or vary decisions of the lower courts. CFA consists of the Chief Justice of the Court of Final Appeal ("CJ") and permanent judges ("PJ"). Non-permanent judges ("NPs") may be invited to sit on CFA. There are two lists of NPs –

- (a) the list of non-permanent Hong Kong judges ("HKNPs"); and
- (b) the list of non-permanent judges from other common law jurisdictions ("CLNPs").

Section 10 of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) sets a ceiling of 30 on the total number of persons holding office as NPs at any one time.

3. In accordance with section 16 of Cap. 484, CFA is constituted by five judges when hearing and determining appeals, as follows –

- (a) CJ or a PJ designated to sit in his place under subsection (2);
- (b) three PJs (nominated by CJ); and
- (c) one HKNPJ or one CLNPJ (selected by CJ and invited by CFA).

Tenure of office of non-permanent judges

4. Under section 14(4) of Cap. 484, a NPJ shall hold office for a term of three years, but that term may be extended for one or more periods of three years by the Chief Executive ("CE") acting in accordance with the recommendation of CJ. According to section 14(3) of Cap. 484, there is no retiring age for NPJ.

Constitutional and statutory provisions on senior judicial appointments

5. Under Article 48(6) of the Basic Law ("BL"), CE has the power and function to appoint judges of the courts at all levels in accordance with legal procedures. Article 88 of BL prescribes that judges shall be appointed by CE on the recommendation of an independent commission, namely, the Judicial Officers Recommendation Commission ("JORC"). For the appointment of CFA judges, Article 90 of BL provides that CE shall also obtain the endorsement of the Legislative Council ("LegCo") of the proposed appointment. Thereafter, CE shall report such appointment to the Standing Committee of the National People's Congress for the record. Article 73(7) of BL confers on LegCo the power and function to endorse the appointment of CFA judges. The endorsement requirement is also stipulated in section 7A of Cap. 484.

6. Under Article 88 of BL and the Judicial Officers Recommendation Commission Ordinance (Cap. 92), JORC is entrusted with the function of making recommendations to CE regarding the appointment of judges. As prescribed in section 3 of Cap. 92, JORC consists of CJ as Chairman, Secretary for Justice ("SJ") and seven members appointed by CE including two judges, one barrister, one solicitor and three persons who are not, in the opinion of CE, connected in any way with the practice of law. Under Cap. 92, CE is required 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 to JORC respectively.

The current appointment exercise

7. In a letter dated 17 January 2017 to the Chairman of the House Committee, Director of Administration advised that, in accordance with Article 88 of BL and section 9(2) of Cap. 484, CE had accepted the recommendations of JORC to appoint the following persons to CFA as CLNPJ -

- (a) The Honourable Chief Justice Robert FRENCH AC ("Chief Justice FRENCH"); and
- (b) The Right Honourable Lord REED ("Lord REED").

Appointment of non-permanent judges from other common law jurisdictions

8. At present, there are 13 NPJs comprising three HKNPJs and 10 CLNPJs. In particular, the list of 10 CLNPJs comprises the current President and a serving Justice of the Supreme Court of the United Kingdom ("the UK") and eight retired judges from the UK and Australia. A CLNPJ is normally required to come to Hong Kong for a period of not more than four weeks at a time.

9. Section 12(4) of Cap. 484 provides that a person shall be eligible to be appointed as a CLNPJ if he is -

- (a) a judge or retired judge of a court of unlimited jurisdiction in either civil or criminal matters in another common law jurisdiction;
- (b) a person who is ordinarily resident outside Hong Kong; and
- (c) a person who has never been a judge of the High Court, a District Judge or a permanent magistrate, in Hong Kong.

10. As indicated in the Administration's submission to LegCo, JORC notes that one of the 10 CLNPJs, The Right Honourable the Lord NEUBERGER of Abbotsbury ("Lord NEUBERGER") is unlikely to be available to sit on CFA on a frequent basis in the foreseeable future. CFA will have to operate with only nine CLNPJs. These nine CLNPJs comprise a serving Justice of the Supreme Court of the UK and eight retired judges. All of these judges have extensive professional commitments. The serving Justice of the Supreme Court of the UK (namely, The Right Honourable the Lord CLARKE of Stone-cum-Ebony ("Lord CLARKE")) has judicial commitments; the other retired judges have various commitments including arbitration, mediation and/or lecturing work for which they are in huge demand.

11. JORC considers that because of the heavy commitments of incumbent CLNPs, their availability to come to Hong Kong for four weeks to sit on CFA is somewhat limited. Against this background and noting that it is important that substantive appeals are heard within a reasonable time, JORC recommends that Chief Justice FRENCH and Lord REED should be appointed as CLNPs of CFA. If appointed, the total number of CLNPs will increase to 12.

The Subcommittee

12. In accordance with the LegCo procedure endorsed by the House Committee in May 2003 for endorsement of judicial appointments under Article 73(7) of BL, the House Committee formed a subcommittee at its meeting held on 20 January 2017, to consider the proposed senior judicial appointments.

13. Under the chairmanship of Dr Hon Priscilla LEUNG Mei-fun, the Subcommittee has held one meeting on 14 February 2017 with the Administration and the Judiciary Administrator ("JA") (also in her capacity as Secretary to JORC ("SJORC")) to discuss the proposed senior judicial appointments and related issues. The membership list of the Subcommittee is in **Appendix**.

Deliberations of the Subcommittee

Manpower shortage and workload among judges in the Judiciary

Work distribution

14. Some members express concerns about the shortage of judges and uneven distribution of caseloads among judges in the High Court of the Judiciary. One member points out that some judges who specialize in handling criminal cases are not fully occupied when they can in fact be assigned civil cases to relieve the heavy workload of other judges. JA explains that in the High Court, judges with mixed expertise are already assigned both criminal and civil cases. Usually a judge is scheduled to handle one criminal case over a given period of time. Sometimes, the criminal case may finish early in the judicial process due to factors beyond the control of the Judiciary, e.g. the defendant pleads guilty at the start of a long trial, which results in the vacation of many court days which may not be able to be used for other trials within the short lead time. In these case, the Judiciary would try its best to list some

simple and short hearings before the judge concerned as far as practicable and arrange for the judge to deal with paper applications. However, no matter how hard the Judiciary tries to re-schedule another case before the Judge, given the lead time required in listing another case in practice (including the preparedness of the parties to proceed with the case and the availability of counsel), such sudden and unexpected vacation of dates may sometimes lead to some court days incapable of being gainfully utilized.

15. JA further informs the Subcommittee that the Judiciary is tackling the matter. The Chief Judge of the High Court has set up a working group to look into measures to improve case management with a view to achieving better use of judiciary resources. A draft Practice Direction has been prepared in consultation with the legal sector which has expressed general support. The Judiciary is now preparing for the implementation of the Practice Direction.

Filling senior judicial positions through internal promotion

16. The Chairman suggests that, to address manpower shortage, the Judiciary should implement a policy of filling senior positions through internal promotion. JA said that in the open recruitment of judges at the levels of the District Courts and the Court of First Instance, some of the vacancies are filled by internal candidates from the lower levels of court. However, as CJ has repeatedly stressed, it is also important for the Judiciary to continue to attract talents from the legal practitioners from outside the Judiciary so as to sustain a positive long term development of the Hong Kong's judicial service.

Expanding the pool of non-permanent judges

17. A member notes that section 10 of Cap. 484 has set a ceiling of 30 as the total number of persons holding office as NPJ at any one time. However, even if Chief Justice FRENCH and Lord REED are to be appointed, the number of NPJs would only be 15, which is far below the maximum size of the permissible pool of NPJs under Cap. 484. He suggests that the Judiciary should make an effort to appoint more persons as NPJ. Secretary to the Judicial Officers Recommendation Commission ("SJORC") explains that whether more NPJs will be appointed depends on the availability of suitable persons with the relevant experience and qualification, taking into consideration the prevailing operational requirements of the CFA.

Widening the mix of non-permanent judges from other common law jurisdictions and introducing more new blood

18. One member observes that judges in the CLNPJ list are predominantly from the UK. He suggests that if the pool of CLNPJs is to be expanded, more judges from other common law jurisdictions such as Australia or New Zealand, etc., should be appointed. SJORC responds that since 1997, CLNPJs have been appointed from among judges and retired judges in the UK, and retired judges from Australia and New Zealand where the legal systems have the closest affinity to that in Hong Kong. Given the relatively smaller size of their jurisdictions, Australia and New Zealand only agree to make available retired judges to serve as CLNPJs. The present list of CLNPJs comprises judges and retired judges from the UK and Australia. There have been CLNPJs from New Zealand but there is none at the moment. Recently, one has passed away. The Judiciary would continue to look for judges from other common law jurisdictions for CLNPJ appointment as appropriate.

19. Members note that some CLNPJs, such as The Right Honourable The Lord MILLETT, have served for quite a long time, and more new blood should be introduced to the pool of CLNPJs. A member suggests that when the term of an incumbent CLNPJ is due for renewal, consideration should be given to his or her age and the period served in determining whether the tenure should be extended. SJORC responds that there is no retirement age for CLNPJs. Furthermore, all CLNPJs have made important and valuable contributions to the CFA, and Hong Kong would benefit from their expertise and experience if these CLNPJs could continue to serve if they are willing and available and their health permits.

Criteria of identifying the two candidates

20. Members have queried how overseas judges are identified and by what criteria are they considered suitable for appointment as CLNPJ. SJORC explains that CFA is constituted by five judges when hearing and determining appeals. These include CJ (or a permanent judge designated to sit in his place), three permanent judges and one local NPJ or one CLNPJ. The selected NPJ is the so-called "the fifth judge". In most substantive appeal cases heard by CFA, a CLNPJ is usually selected to sit as the fifth judge, having regard to the availability and expertise of the CLNPJs. Therefore, more experienced judges with different areas of expertise from other common law jurisdictions would provide greater flexibility for CJ in inviting a CLNPJ to sit as the fifth judge without causing delays to waiting times of the appeals.

21. In response to a member's enquiry, SJORC states that Chief Justice FRENCH and Lord REED are nominated by CJ for JORC's consideration. The Chairman suggests that in the submission to LegCo on proposed appointments

in future, the Administration should provide details of the areas of expertise of the incumbent CLNPIs for reference of this Subcommittee.

Procedure of vetting as a matter of due diligence

22. The Chairman queries whether the Judiciary has conducted due diligence on the appointment checking of Chief Justice FRENCH and Lord REED, and she also queries the role JORC plays in the identification of persons for consideration of appointment as CLNPJ. SJORC advises that all judicial appointments are made in accordance with Article 92 of the Basic Law, i.e. judges should be chosen on the basis of their professional and judicial qualities, and having regard to the relevant professional qualification requirements, and in this case as stipulated under Cap. 484. In practice, all CLNPIs are judges or retired judges of the most eminent standing with profound judicial experience and enjoy high professional status and reputation, with good track records of judicial services in their respective jurisdictions. SJORC adds that, unlike the appointment of judges from Hong Kong on whose appointment checking (such as checking against criminal and ICAC records) is conducted, persons being considered for appointment as CLNPIs are non-local residents and it is expected that there may not be such records on CLNPIs as they are not residing in Hong Kong. JORC relies on the curricula vitae and relevant information provided by these persons in its deliberation.

23. The Chairman comments that for senior positions such as CLNPIs of CFA, there should be a more rigorous process in appointment checking to ensure that the candidates are suitable for appointment and that they can be entrusted to handle important legal cases in Hong Kong. She adds that many large organizations including the universities would institute a thorough and in-depth vetting process for the appointment of senior positions. The Chairman considers that JORC should not solely base its recommendations on the information provided by the candidates, and suggests that the Judiciary implement a due diligence process; and that JORC would then consider the due diligence report from the Judiciary when making a recommendation to CE for appointment of CLNPIs.

Political neutrality of judges

24. Subcommittee members consider that judges should be politically neutral. SJORC states that all judges of the Judiciary are politically neutral, and judicial decisions are made according to the law applicable in Hong Kong.
Transparency in the appointment of judges

25. Members comment that the current appointment process in the Judiciary and the deliberation on recommendations for senior judicial appointments by

JORC lack transparency. SJORC explains that judicial positions at the Magistrates' Courts, the District Court and the Court of First Instance of the High Court are filled by open recruitment. The Judiciary however takes the view that such procedure is not suitable for the filling of vacancies at the appellate courts, given the small size of the Hong Kong Judiciary and the consideration that it would be desirable for appellate judges to have judicial experiences. For such senior judicial appointments to the CFA, the Judiciary does not consider open recruitment an appropriate option. SJORC adds that JORC comprises serving judges and legal practitioners who have knowledge of the candidates and are in a position to make considered recommendations to CE.

Professional and political background of candidates

The Honourable Chief Justice Robert FRENCH AC

26. One member notes that Chief Justice FRENCH has participated in political activities and has run for political offices many years ago before pursuing a legal and judicial career. He also notes that Chief Justice FRENCH has openly expressed his position on the constitutional development of Australia. He asks if JORC would, as a matter of routine, take the initiative to research into candidates' political stance, political background and past involvement in political activities, and take these factors into consideration when formulating recommendations to CE on the appointment of CLNPs. In particular, he asks if Chief Justice FRENCH is retired as a judge of the High Court of Australia.

27. SJORC advises that JORC's deliberations are not open to the public, and JORC would base its recommendations on the candidates' judicial and professional qualities according to Article 92 of BL, as well as the professional qualifications as prescribed in Cap. 484. SJORC adds that according to the policy of the Judiciary in Australia, an incumbent High Court judge would not be made available to serve as CLNP in Hong Kong. Chief Justice FRENCH was appointed as the Chief Justice of the High Court of Australia in September 2008 and he retired from his judicial office in end January 2017. Chief Justice FRENCH is a retired judge now and would remain a retired judge by the time he serves as CLNP if his appointment is made effective.

The Right Honourable Lord REED

28. One member observes that Lord REED is currently a Justice of the Supreme Court in the UK, he sits on the Judicial Committee of the Privy Council and he occasionally serves as an ad hoc judge of the European Court of

Human Rights. The member asks whether Lord REED can spare the time to serve as CLNPJ in CFA. SJORC replies that there are on-going arrangements with the UK Judiciary for serving judges (including Lord NEUBERGER and Lord CLARKE who are on the CLNPJ list) to sitting as CLNPJs in CFA for about four weeks to one month in a year.

Way forward

29. A Member states that he supports the proposed appointments as these Judges are jurists with high reputation from other common law jurisdictions and are well known to the legal community. All other Members also support the proposed appointments.

30. The Chairman concludes that the Subcommittee has completed deliberation on the Administration's proposed appointment of Chief Justice FRENCH and Lord REED as CLNPJs, and would report to the House Committee on 24 February 2017. Members also note that the Administration intends to move a resolution to seek the Council's endorsement of the proposed appointments in accordance to BL 73(7) at the Council meeting scheduled for 29 March 2017.

Advice sought

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

Council Business Division 4
Legislative Council Secretariat
22 February 2017

Appendix

Subcommittee on Proposed Senior Judicial Appointments

Membership list

Chairman Dr Hon Priscilla LEUNG Mei-fun, JP

Members Hon Paul TSE Wai-chun, JP
Hon Dennis KWOK Wing-hang
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding

(Total : 5 Members)

Clerk Daniel SIN

Legal adviser Rachel DAI

Date 14 February 2017