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Background brief prepared by the Legislative Council Secretariat

Subcommittee on Proposed Senior Judicial Appointments

Purpose

This paper provides background information on the procedure for endorsement of senior judicial appointments by the Legislative Council ("LegCo") under Article 73(7) of the Basic Law ("BL 73(7)") and gives a brief account of the relevant discussions by LegCo committees.

Relevant provisions of the Basic law and the Hong Kong Court of Final Appeal Ordinance (Cap. 484)

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").

3. 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 and 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 the High Court. Such procedure is also stipulated in section 7A of the Hong Kong Court of Final Appeal Ordinance, Cap. 484.

Judicial Officers Recommendation Commission

Membership

4. JORC is established under section 3 of the JORC Ordinance, Cap. 92. According to section 6 of this Ordinance, JORC shall advise or make recommendations to CE regarding, among other things, the filling of vacancies in judicial offices as specified in the Ordinance. Section 3(1) of Cap. 92 provides that JORC shall consist of the Chief Justice of CFA ("CJ") as the Chairman, the Secretary for Justice ("SJ") and seven other members appointed by CE of whom two shall be judges, one shall be a barrister and one shall be a solicitor and three shall be persons who are not, in the opinion of CE, connected in any way with the practice of law. CE is required by section 3(1A) of Cap. 92 to consult the Council of the Hong Kong Bar Association ("Bar Association") and the Council of the Law Society of Hong Kong regarding the appointment of the barrister and the solicitor respectively.

5. Section 4 of Cap. 92 provides that a person shall not be appointed to be a member of JORC if he is a LegCo Member; or if 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 comprises service in the office or post of which he is the holder.

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

Operation

Procedure

7. The procedure and voting requirements of JORC are laid down in the Cap. 92. 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.

Voting requirements

8. 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

9. Cap. 92 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 Ordinance or to the extension of the term of office of CJ under section 14 of Cap. 484, 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.

10. 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 or she 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.

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

Procedure for Legislative Council's endorsement agreed by the House Committee

11. After publication of its Report on Process of Appointment of Judges in September 2002, the Panel on Administration of Justice and Legal Services ("the AJLS Panel") recommended the following procedure for endorsement of

appointment of judges by LegCo under BL 73(7) which was endorsed by the House Committee ("HC") on 16 May 2003 and 28 May 2004 –

- (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 would decide whether or not a subcommittee should be appointed to consider the appointment(s);
- (c) the subcommittee, if appointed, will discuss 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.

12. The AJLS 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 United States Senate Judiciary Committee and the application form for appointment as Justice of the High Court in the United Kingdom (Appendices II and III to LC Paper No. CB(2)2448/08-09(01) issued on 7 September 2009). 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.

Recent discussions held by the AJLS Panel on the procedure for endorsement of judicial appointments by LegCo

13. During the discussion on the procedure to fill the anticipated vacancy of CJ at the meeting of the AJLS Panel on 23 November 2009, members expressed views on the procedure for endorsement of judicial appointments by LegCo.

Panel members in general were of the view that the process of judicial appointments should not be politicized as it would violate the fundamental principle of separation of powers. They considered that LegCo should exercise its power of endorsement prudently and that judicial appointments should best be left to JORC, a body with legal professionals as members best equipped to consider the judicial qualities of a candidate. LegCo's power to endorse judicial appointments was substantive in that it could act as the final gatekeeper to stop a judicial appointment which was manifestly contrary to public interest. However, such power should only be exercised in exceptional circumstances, and it should be a constitutional convention for LegCo to accept nominations made by JORC.

14. The Bar Association advised that it was not intended that LegCo should duplicate the elaborate process JORC had gone through in coming up with the recommendation. Hence, LegCo should as a matter of convention accept the recommendation of JORC. The Bar Association considered that LegCo might consider not endorsing an appointment only if it considered that the relevant information provided by the Administration had failed to identify the nominee recommended by JORC as an appropriate candidate for appointment.

15. Panel members in general considered that the Administration should provide as much information on a recommended candidate as possible so that LegCo could consider the appointment on an informed basis. The Administration informed the AJLS Panel that in the appointment exercises conducted after the AJLS Panel's review of the process of appointment of judges in 2002, the curriculum vitae of the recommended appointees provided by the Administration had covered more information, including personal background, education, legal experience, judicial experience, services and activities, awards, and publications.

Membership of SJ on JORC

16. Panel members noted that during the AJLS Panel's review of the process of appointment of judges, both the Bar Association and the Law Society had expressed the view that it was not appropriate for SJ, being one of the Principal Officials under the Political Appointment System ("PAS"), to be a member of JORC. Dr Margaret NG and Ms Emily LAU were of the view that SJ, a political appointee under PAS, should not participate in the appointment process of judges. 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.

17. The Administration responded 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. It was essential that SJ remained a member of JORC to fulfil his important roles in these various respects.

18. Mr LEUNG Kwok-hung expressed concern about the voting power of SJ on JORC. The Administration explained that according to the voting requirements of JORC as laid down in section 3(3A) of Cap.92, 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. However, deliberations of JORC were confidential and details of its voting results would not be disclosed.

Appointment exercises since the adoption of the procedure for endorsement of judicial appointment by LegCo under BL 73(7)

The appointment exercise in 2003

19. The procedure for endorsement of judicial appointment by LegCo set out in paragraph 11 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. The subcommittee held one meeting with the Administration and the Judiciary Administration ("JA") to discuss the proposed judicial appointments and related issues.

20. 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. 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.

21. 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 appointment exercise in 2006

22. In her letter dated 6 January 2006 to the HC Chairman, the Director of Administration ("D of Admin") advised that CE had accepted the recommendation of JORC on the appointment of two 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 Final Appeal" which contained the curriculum vitae of the proposed appointees and information on the relevant appointment exercise.

23. At the meeting on 13 January 2006, a subcommittee was formed by HC to consider the proposed judicial appointments. The subcommittee held one meeting with the Administration and JA to discuss the proposed judicial appointment and related issues. At the subcommittee's request, the Administration had provided additional information on the appointees. The subcommittee supported the proposed appointments, which were subsequently endorsed by LegCo on 3 May 2006.

The appointment exercise in 2008

24. In her letter dated 7 November 2008 to the HC Chairman, D of Admin advised that CE had accepted the recommendation of JORC on the appointment of three non-permanent common law judges to CFA. Attached to the letter were also -

- (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 Final Appeal".

25. The letter was considered at the HC meeting on 14 November 2008. Members did not raise objection to the proposed appointments, which were subsequently endorsed by LegCo on 7 January 2009.

The appointment exercise in 2010

26. D of Admin wrote to the HC Chairman on 8 April 2010 advising that CE had accepted the recommendation 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.

27. At its meeting on 16 April 2010, HC formed a subcommittee to consider the proposed senior judicial appointments. The subcommittee raised no objection to the Administration's giving notices of motions to seek the endorsement of LegCo on the recommended appointments. The motion was passed at the Council meeting of 9 June 2010.

28. During its consideration of the proposed senior judicial appointments, some members of the subcommittee had reiterated their reservations about the membership of SJ, being a Principal Official under PAS, on JORC. The subcommittee referred the issue to the AJLS Panel for follow-up. At its meeting on 28 February 2011, the AJLS Panel discussed the item of "Membership of SJ in JORC" with the Administration. Some members reiterated their view that it was not appropriate for SJ, being a political appointee, to serve on JORC. The Administration, however, maintained its view that it was appropriate and necessary for SJ to continue to serve on JORC.

The appointment exercise in 2011

29. In her letter dated 11 April 2011 to the HC Chairman, D of Admin advised that CE had accepted the recommendations of JORC to appoint -

- (a) The Right Honourable the Lord COLLINS of Mapesbury and the Right Honourable the Lord CLARKE of Stone-cum-Ebony as non-permanent judges from other common law jurisdictions to CFA; and
- (b) Mr Justice Andrew CHEUNG Kui-nung as the Chief Judge of the High Court.

30. At its meeting on 15 April 2011, HC formed a subcommittee to study the proposed senior judicial appointments. In response to the request made by the subcommittee, JA had provided further information on the major publications of

and judgments made by the recommended appointees. The subcommittee supported the proposed appointments, which were subsequently endorsed by LegCo on 8 June 2011.

31. During its deliberations, the subcommittee had expressed views on the procedure for considering judicial appointments by LegCo. Members considered it important that the fundamental principles of separation of powers and judicial independence should be respected in considering judicial appointments and the appointment process of judges should not be politicized. Members generally shared the view that LegCo should as a matter of convention respect and accept the nominations made by JORC unless it had serious concerns with them.

The appointment exercise in 2012

32. In her letter dated 28 March 2012 to the HC Chairman, D of Admin advised that in accordance with BL 88, CE had accepted the recommendations of JORC to appoint -

- (a) Mr Justice Robert TANG Ching as a Permanent Judge of CFA;
- (b) Mr Justice Syed Kemal Shah BOKHARY as a non-permanent Hong Kong judge of CFA; and
- (c) The Right Honourable The Lord PHILIPS of Worth Matravers as a non-permanent judge from another common law jurisdiction of CFA.

33. At its meeting on 13 April 2012, HC formed a subcommittee to consider the proposed senior judicial appointments. The subcommittee raised no objection to the Administration's giving notices of motions to seek the endorsement of LegCo on the recommended appointments. The motion was passed at the Council meeting of 11 July 2012.

34. During its deliberations on the proposed senior judicial appointments, the subcommittee was advised that any complaint lodged against the judicial conduct of a judge might be made directly to the Judiciary. All complaints against judicial conduct were handled by CJ and/or the relevant Court Leaders as appropriate. If the complaints were against judicial decisions made by judges, the complainants would be advised to pursue his case through appropriate appeal procedures under the existing legal system.

The appointment exercise in 2013

35. In her letter dated 8 April 2013 to the HC Chairman, the D of Admin advised that in accordance with BL 88, CE had accepted the recommendations of JORC to appoint –

- (a) The Honourable Mr Justice Joseph Paul FOK as a Permanent Judge of the CFA;
- (b) The Honourable Mr Justice Patrick CHAN Siu-oi as a non-permanent Hong Kong judge of the CFA; and
- (c) The Honourable James SPIGELMAN and the Honourable William GUMMOW as non-permanent judges from other common law jurisdictions of the CFA.

36. At its meeting on 12 April 2013, HC formed a subcommittee to consider the proposed senior judicial appointments. In response to the request made by the subcommittee during the meeting held on 23 April 2013, the Administration had provided supplementary information on (a) one of the appointees; (b) the length of judicial experience and the age of the judges appointed as Permanent Judges of the CFA since 1997; and (c) the respective jurisdictions of judges currently serving as non-permanent judges from other common law jurisdictions of CFA. The subcommittee raised no objection to the Administration's giving notices of motions to seek the endorsement of LegCo on the recommended appointments. The motion was passed at the Council meeting of 26 June 2013.

37. During its deliberations on the proposed senior judicial appointments, the subcommittee had urged for greater transparency in the senior judicial appointment process, such as making the criteria for appointment clearer, for better public scrutiny. A member had also urged the JA to review its existing mechanism for handling complaints against judicial conduct.

38. Members again reiterated concern about the appropriateness of SJ, being a Principal Official under PAS, to be a member of the JORC. The Administration had explained that the membership of SJ in the JORC would not undermine the independence of the senior judicial appointment process. Being the principal adviser on legal matters to the CE and the head of DoJ, SJ was in a unique position and had considerable knowledge to contribute to the JORC's deliberations in respect of judicial appointments. According to the Administration, such views were also shared by the JA.

Latest development

39. The D of Admin wrote to the HC Chairman on 17 January 2017 advising that CE had accepted the recommendation of JORC to appoint the Honourable Chief Justice Robert FRENCH AC and the Right Honourable Lord REED to the CFA as non-permanent judges from other common law jurisdictions.

40. At the HC meeting on 20 January 2017, members agreed to appoint a subcommittee to consider the proposed senior judicial appointments.

Relevant papers

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

Council Business Division 4
Legislative Council Secretariat
13 February 2017

**Current membership of the
Judicial Officers Recommendation Commission**

Ex officio chairman and member

The Honourable Chief Justice Geoffrey MA Tao-li (Chairman)

The Honourable Rimsky YUEN Kwok-keung, SC, JP (Secretary for Justice)

Judges

The Honourable Mr Justice Robert TANG Ching

The Honourable Mr Justice Andrew CHEUNG Kui-ning

Barrister and solicitor

Ms. Winnie TAM Wan-chi, S.C. (barrister)

Mr. Stephen HUNG Wan-shun (solicitor)

Persons not connected with the practice of law

Professor Joseph SUNG Jao-yiu, SBS, JP

Mrs Eleanor LING LEE Ching-man, SBS, JP

Mr Christopher CHENG Wai-chee, GBS, JP

Appendix II

Subcommittee on Proposed Senior Judicial Appointments Relevant papers

| Committee | Date of meeting | Paper |
|--|---------------------------------|---|
| Provisional Legislative Council | 24.5.1997 | <u>Official Record of Proceedings (Motion)</u> |
| | 19.5.1999 | <u>Official Record of Proceedings (Written question No. 19)</u> |
| Panel on Administration of Justice and Legal Services ("AJLS Panel") | 28.11.2000 (Item V) | <u>Agenda</u> <u>Minutes</u> <u>RP01/00-01</u> <u>RP02/00-01</u> |
| | 24.4.2001 (Item V) | <u>Agenda</u> <u>Minutes</u> <u>RP07/00-01</u> <u>RP08/00-01</u> |
| | 15.5.2001 (Item IV) | <u>Agenda</u> <u>Minutes</u> |
| | -- | <u>Consultation Paper on Process of Appointment of Judges published by the AJLS Panel on 12 December 2001</u> |
| | 22.4.2002 (Item IV) | <u>Agenda</u> <u>Minutes</u> <u>CB(2)2350/01-02(01)</u> |
| | 22.7.2002 (Item V) | <u>Agenda</u> <u>Minutes</u> |
| | -- | <u>Report on Process of Appointment of Judges prepared by the AJLS Panel</u> |
| | Committee on Rules of Procedure | 6.3.2003 |

| Committee | Date of meeting | Paper |
|---|-------------------------|---|
| House Committee | 16.5.2003 (Item VII) | <u>Agenda</u> <u>Minutes</u> <u>CB(2)2135/02-03(04)</u> |
| Subcommittee on proposed senior judicial appointments under the House Committee | 27.5.2003 | <u>Agenda</u> <u>Minutes</u> |
| House Committee | 13.6.2003 | <u>Report of the Subcommittee on Proposed Senior Judicial Appointments</u> |
| Legislative Council | 3 July 2003 | <u>Official Record of Proceedings</u> <u>Pages 60 - 68 (Motion)</u> |
| House Committee | 28.5.2004 | <u>Minutes</u> (Paragraph 43) |
| | 13.1.2006 | <u>Minutes</u> |
| Subcommittee on Proposed Senior Judicial Appointments under the House Committee | 16.2.2006 | <u>Agenda</u> <u>Minutes</u> <u>CB(2)1256/05-06(01)</u> <u>CB(2)1280/05-06(01)</u> <u>CB(2)1288/05-06(01)</u> <u>CB(2)1288/05-06(02)</u> <u>CB(2)1397/05-06(01)</u> |
| House Committee | 31.3.2006 | <u>Report of the Subcommittee on Proposed Senior Judicial Appointments</u> |
| Legislative Council | 3.5.2006 | <u>Official Record of Proceedings</u> <u>Pages 124 - 127 (Motion)</u> |
| House Committee | 14.11.2008 (Item VI) | <u>Agenda</u> <u>Minutes</u> |

| Committee | Date of meeting | Paper |
|---|--------------------------|--|
| Legislative Council | 7.1.2009 | <u>Official Record of Proceedings</u> <u>Pages 109 - 111 (Motion)</u> |
| AJLS Panel | 23.11.2009 | <u>Agenda</u> <u>Minutes</u> |
| House Committee | 16.4.2010 (Item VIII) | <u>Agenda</u> <u>Minutes</u> |
| Subcommittee on Proposed Senior Judicial Appointments under the House Committee | 4.5.2010 | <u>Agenda</u> <u>Minutes</u> |
| House Committee | 14.5.2010 | <u>Report of the Subcommittee on Proposed Senior Judicial Appointments</u> |
| Legislative Council | 9.6.2010 | <u>Official Record of Proceedings</u> <u>Pages 139 - 166 (Motion)</u> |
| AJLS Panel | 28.2.2011 (Item VI) | <u>Agenda</u> <u>Minutes</u> |
| Subcommittee on Proposed Senior Judicial Appointments under the House Committee | 21.4.2011 | <u>Agenda</u> <u>Minutes</u> |
| Legislative Council | 8.6.2011 | <u>Official Record of Proceedings</u> <u>Pages 218-228 (Motion)</u> |
| Subcommittee on Proposed Senior Judicial Appointments under the House Committee | 7.5.2012 | <u>Agenda</u> <u>Minutes</u> |

| Committee | Date of meeting | Paper |
|---|------------------------|--|
| House Committee | 18.5.2012 | <u>Report of the Subcommittee on Proposed Senior Judicial Appointments</u> |
| Legislative Council | 17.7.2012 | <u>Official Record of Proceedings Pages 136-173 (Motion)</u> |
| Subcommittee on Proposed Senior Judicial Appointments under the House Committee | 23.4.2013 | <u>Agenda</u> <u>Minutes</u> |
| House Committee | 24.5.2013 | <u>Report of the Subcommittee on Proposed Senior Judicial Appointments</u> |
| Legislative Council | 26.6.2013 | <u>Official Record of Proceedings Pages 156-190 (Motion)</u> |

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