

立法會
Legislative Council

LC Paper No. CB(4)1041/17-18

Ref : CB4/HS/1/17

Paper for the House Committee meeting on 11 May 2018

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 appointments 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 ("NPJs") may be invited to sit on CFA. There are two lists of NPJs:

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

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 NPJs 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).

Where CJ is not available to hear an appeal, he designates a PJ to preside at the appeal in his place. Where a sufficient number of PJs are not available to hear an appeal, CJ nominates a HKNPJ to sit in place of PJ.

Tenure of office of permanent judges and non-permanent judges

Permanent judges

4. Under section 14(1) and (11) of Cap. 484, PJs shall vacate their offices when they attain the retiring age of 65 years.

Non-permanent judges

5. 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

6. 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")). By virtue of the Judicial Officers Recommendation Commission Ordinance (Cap. 92), JORC is entrusted with the function of making recommendations to CE regarding the appointment of judges under Article 88 of BL. 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.

7. As prescribed in section 3(1) of Cap. 92, JORC consists of CJ as Chairman, Secretary for Justice 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 section 3(1A), 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. Under section 3(3A), a resolution at a meeting of JORC is not effective if there are more than two votes not in favour.

The current appointment exercise

8. In a letter dated 21 March 2018 to the Chairman of the House Committee, Director of Administration advised that, in accordance with Article 88 of BL and sections 7(1), 8(2) and 9(2) of Cap. 484, CE has accepted the recommendations of JORC to appoint:

- (a) the Honourable Mr Justice Andrew CHEUNG Kui-nung ("Mr Justice CHEUNG") as a PJ of CFA;
- (b) the Honourable Mr Justice Robert TANG Ching ("Mr Justice TANG") as a HKNPJ of CFA; and
- (c) the Right Honourable the Baroness Brenda HALE of Richmond ("Baroness HALE") and the Right Honourable Beverley McLACHLIN, P.C. ("Ms McLACHLIN") as CLNPs of CFA.

Appointment of permanent judges to the Court of Final Appeal

9. Under section 12(1A) of Cap. 484, a person shall be eligible to be appointed as a PJ if he is:

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

10. As a PJ vacancy will arise on 25 October 2018 when Mr Justice TANG vacates his judicial office upon the expiry of his current (final) extended term of office on 24 October 2018, JORC held a meeting in the fourth quarter of 2017 to consider the recommendation of the person to be appointed as a PJ. After deliberation, JORC recommends the appointment of Mr Justice CHEUNG, CJHC, as a PJ of CFA with effect from 25 October 2018.

Appointment of non-permanent judges to the Court of Final Appeal

11. At present, there are 15 NPJs comprising three HKNPJs and 12 CLNPJs. In particular, the list of 12 CLNPJs comprises a serving Justice of the Supreme Court of the United Kingdom ("UK") and 11 retired judges from 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.

Non-permanent Hong Kong judges

12. Section 12(3) of Cap. 484 provides that a person shall be eligible to be appointed as a HKNPJ if he is:

- (a) a retired CJHC;
- (b) a retired CJ of CFA;
- (c) a retired PJ of CFA;
- (d) a Justice of Appeal 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.

13. According to the Administration, JORC notes that the existing number of HKNPJs at three is small, which does not allow sufficient flexibility in listing appeals. In addition, having regard to his administrative duties, it is not practicable for CJ to sit in all CFA cases. Moreover, having regard to the need to avoid possible conflict of interest, CJ does not hear any appeals from those cases in which Madam Justice Maria Candace YUEN (the spouse of CJ), a Justice of Appeal, has sat. As Mr Justice TANG will become eligible to be appointed as a HKNPJ under section 12(3) of Cap. 484 on 25 October 2018 by virtue of being a retired PJ and noting that Mr Justice TANG is a judge of the highest quality and utmost integrity, JORC proposes appointing Mr Justice TANG as a HKNPJ of CFA.

Non-permanent judges from other common law jurisdictions

14. 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.

15. According to the Administration, JORC notes that all of the 12 CLNPs have extensive professional commitments. While one of them is a serving Justice of the UK Supreme Court, the other retired judges have various commitments including arbitration, mediation and/or lecturing work for which they are in huge demand.

16. JORC considers that because of the various 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 Baroness HALE and Ms McLACHLIN should be appointed as CLNPs. If appointed, the total number of CLNPs will increase to 14.

The Subcommittee

17. 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 23 March 2018 to consider the proposed senior judicial appointments.

18. Under the chairmanship of Dr Hon Priscilla LEUNG Mei-fun, the Subcommittee held one meeting on 27 April 2018 with the Administration and the Judiciary Administrator ("JA") (also in her capacity as Secretary to JORC) to discuss the proposed senior judicial appointments and related issues. The membership list of the Subcommittee is in **Appendix I**.

Submissions from deputations/members of the public

19. The Subcommittee has received 60 submissions from deputations/members of the public giving views on the proposed appointments of Baroness HALE and Ms McLACHLIN ("the two judges") as CLNPs. They are generally concerned about the two judges' strong stand in supporting lesbian, gay, bisexual, and transgender ("LGBT")'s rights as well as same-sex marriage. Some of the deputations/members of the public have requested the

Subcommittee to hold a public hearing to gauge views from members of the public on the proposed appointments of the two judges. The list of deputations/individuals which/who have provided written submissions is in **Appendix II**.

Deliberations of the Subcommittee

Mechanism in handling bias in judicial proceedings

20. Noting from the submissions that there is wide public concern that the strong stand of the two judges in supporting LGBT's rights and same-sex marriages may affect their judgment on such cases and create apparent bias, members seek information on the existing mechanism in handling bias in judicial proceedings. Some members particularly enquire whether these two judges will sit in CFA if the appeal matters involve LGBT's rights or same-sex marriages.

21. JA advises that, as stipulated in paragraphs 38 to 70 of the Guide to Judicial Conduct, there are established common law principles and practices in dealing with actual, presumed or apparent bias in judicial proceedings. CLNPJs are usually invited to sit as the fifth judge in CFA for hearing appeals. In selecting and inviting a CLNPJ to sit, CJ and CFA will take all relevant circumstances into account, including the availability of the judges, their particular expertise in certain areas of law and the nature of the cases to be heard, etc. CLNPJs when sitting in CFA are functioning as Hong Kong judges and are dealing with cases according to Hong Kong law. When answering enquiries from members, JA replies that under the common law system, judges in Hong Kong will give a fully reasoned judgment as to how they come to the decision in accordance with the law.

Social values and background of candidates

22. Some members are worried that the two judges' values on LGBTs' rights and same-sex marriage will be manifested in their future judgments in relation to issues of LGBT and same-sex marriage and may not be consistent with the core social values of Hong Kong, and the judgments will in turn create an impact on the values of the whole society. They ask if JORC will take into consideration the candidates' social values and background when formulating recommendations to CE on the appointment of CLNPJs. Some other members consider that all judges have their own social values and background. It will not be appropriate to take these factors into account when considering judicial appointments as it may politicize the process of judicial appointments.

23. JA stresses that in accordance with Article 92 of BL, judges of the Hong Kong Special Administrative Region ("HKSAR") shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions. In addition, JORC makes recommendation on the appointment of judges of CFA in strict accordance with Article 92 of BL and the professional qualifications stipulated in Cap. 484. In recommending the proposed appointments of Baroness HALE and Ms McLACHLIN as CLNPs, JORC considers that they fulfil the requirements in terms of judicial and professional qualities. Other considerations, including backgrounds or personal views on political, social or economic issues should not be taken into account because it may run the high risk of politicizing the process of judicial appointments.

24. JA adds that all judges, including CLNPs, will take the judicial oath when they assume office. The Judicial Oath is listed in Schedule 2 of the Oaths and Declarations Ordinance (Cap. 11). In taking the Judicial Oath, the judge swears that he/she will uphold BL of the HKSAR, bear allegiance to the HKSAR of the People's Republic of China, serve the HKSAR conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit.

Suggestion of holding a public hearing

25. Regarding the suggestion of holding a public hearing by the Subcommittee to gauge views from the public on the proposed appointment of the two judges as CLNPs, the Subcommittee notes that of the six subcommittees formed under the House Committee to study proposed senior judicial appointments since 2003, no public hearings had been held to receive public views. Some members consider that the established practice of judicial appointment is found to be effective and they have strong reservation about deviating from the established practice. These members state that as JORC, an independent commission comprises legal professionals from different disciplines, has already considered the judicial and professional qualities of the candidates, LegCo should not hold a public hearing on the proposed appointments of the two judges as CLNPs, but endorse the appointments in accordance with the established practice unless there are strong evidences available suggesting that the proposed appointments are not suitable. If members have any views or concerns about the established mechanism, such as the criteria to be adopted by JORC when considering judicial appointments, they should bring up the issue at the Panel on Administration of Justice and Legal Services for discussion in the future.

26. Some other members consider that the Subcommittee should accede to the suggestion of holding a public hearing since the proposed appointments of the two judges cause grave public concern and members have the obligation to gauge public views on the matter. They do not agree that a public hearing will undermine judicial independence and deviate from the established practice of judicial appointment as LegCo has the duty and power to decide whether to endorse judicial appointments. LegCo should act as the final gatekeeper to scrutinize in details a judicial appointment which causes grave public concern, including receiving public views through public hearings.

27. JA advises that the Judiciary objects to the holding of public hearings on the proposed senior judicial appointments which will run the high risk of politicizing the process and undermining judicial independence or the perception of it. The Administration also considers that a public hearing is not included in the established procedure for endorsement of appointment of judges by LegCo which was endorsed by the House Committee in 2003 and objects to the holding of a public hearing on the proposed senior judicial appointments.

28. The Subcommittee decides that whether a public hearing shall be held is within the jurisdiction of the Subcommittee as LegCo has substantial power as to how the recommendation of judicial appointments shall be vetted. The Chairman put the proposal of holding a public hearing to vote, but the proposal could not get the simple majority of members present. Accordingly, the Subcommittee has decided not to hold a public hearing on the matter.

Proposed senior judicial appointments

29. Members note that all four recommended appointees have profound judicial experience and are judges of high standing. The Subcommittee supports the proposed appointments of Mr Justice CHEUNG as a PJ of CFA, Mr Justice TANG as a HKNPJ of CFA and Baroness HALE and Ms McLACHLIN as CLNPIs of CFA.

Conclusion

30. The Chairman concludes that the Subcommittee has completed deliberation on the Administration's proposed senior judicial appointment. Members also note that the Administration intends to move a resolution to seek the Council's endorsement of the proposed appointments in accordance with Article 73(7) of BL at the Council meeting of 30 May 2018.

Advice sought

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

Council Business Division 4
Legislative Council Secretariat
10 May 2018

Subcommittee on Proposed Senior Judicial Appointments

Membership list

Chairman	Dr Hon Priscilla LEUNG Mei-fun, SBS, JP
Members	Hon James TO Kun-sun Hon Tommy CHEUNG Yu-yan, GBS, JP Hon Jeffrey LAM Kin-fung, GBS, JP Hon Starry LEE Wai-king, SBS, JP Hon Paul TSE Wai-chun, JP Hon YIU Si-wing, BBS Hon Charles Peter MOK, JP Hon CHAN Chi-chuen Hon Kenneth LEUNG Hon Alice MAK Mei-kuen, BBS, JP Dr Hon KWOK Ka-ki Hon Dennis KWOK Wing-hang Hon Christopher CHEUNG Wah-fung, SBS, JP Dr Hon Fernando CHEUNG Chiu-hung Hon IP Kin-yuen Hon Martin LIAO Cheung-kong, SBS, JP Hon Alvin YEUNG Hon CHU Hoi-dick Dr Hon Junius HO Kwan-yiu, JP Hon Holden CHOW Ho-ding Hon SHIU Ka-fai Hon YUNG Hoi-yan Hon CHAN Chun-ying Hon Tanya CHAN Hon CHEUNG Kwok-kwan, JP Hon HUI Chi-fung Hon Kenneth LAU Ip-keung, BBS, MH, JP Hon Jeremy TAM Man-ho Hon AU Nok-hin Hon Vincent CHENG Wing-shun, MH Hon Tony TSE Wai-chuen, BBS
	(Total : 32 Members)
Clerk	Ms Wendy JAN
Legal adviser	Mr YICK Wing-kin

Appendix II

Subcommittee on Proposed Senior Judicial Appointments

List of deputations/individuals which/who have provided written submissions

1. Parents for the Family Association
2. Family School Sodo Concern Group
3. Mr CHU
4. Winnie LEUNG
5. 梁偉明
6. CHAN Yin Fan
7. Rebecca Kallioniemi
8. 個別人士
9. Parental Rights Alliance
10. 楊小姐
11. Mable
12. 林欣儀
13. 蔡宇霞
14. Millie TSE
Vienna TSE
Chalotte TSE
Mr CHOI
Daniel TANG
15. Grace CHAN
Mei CHAN
LEUNG Man
LEUNG Kwan Chak
LEUNG Kwan Ho
16. 梁淑英
17. 張靖雯
18. 楊麗娟
19. YIP pui mei
20. Cindy KAN
21. 劉懿德
22. Ms TUNG Wing Wa
23. 個別人士
24. Ricky WONG
25. Clement HAU

26. CHIM Wing Yam
27. Joy
28. Fiona CHEUK wai ping
29. 梁樂琳
30. 溫曉彤
31. Unily
32. 張泳茵
33. 黃碧蓮
34. LEUNG Kwong Chi
35. 梁美玲
36. Priscilla LEUNG
37. 石婉恩女士
38. 林向東
39. 徐碧燕
40. KO Lai Kam
41. Michael TSE
42. 李幸婷
43. 蔡子弘
44. LEE Pui Wah
45. 李先生
46. 錢麗儀
47. Betty YU
48. 陳慧貞
49. Revonie LUI
50. 黃沛斤
51. 張惠明
52. LAM Ying Tung
53. CHAN Yim Fan
54. 張小姐
55. 關先生
56. Joanna
57. 張穎嫻
58. 黃彩霞
59. 個別人士
60. Neko CHAN