

立法會
Legislative Council

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**Legislative Council
Panel on Administration of Justice and Legal Services**

**Minutes of special meeting
held on Tuesday, 13 June 2000 at 8:30 am in Conference Room A
of the Legislative Council Building**

Members Present : Hon Margaret NG (Chairman)
Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)
Hon Albert HO Chun-yan
Hon Martin LEE Chu-ming, SC, JP
Hon James TO Kun-sun
Hon Emily LAU Wai-hing, JP

Members Absent : Hon Mrs Miriam LAU Kin-ye, JP
Hon Mr Ambrose LAU Hon-chuen, JP

Public Officers Attending : Mr Wilfred TSUI
Judiciary Administrator

Miss Emma LAU
Deputy Judiciary Administrator

Mrs Carrie YAU
Director of Administration

Ms Miranda CHIU
Deputy Director of Administration

Attendance by : Hong Kong Bar Association

Invitation

Mr Philip DYKES, SC

Clerk in Attendance : Mrs Percy MA
Chief Assistant Secretary (2)3

Staff in Attendance : Mr Jimmy MA, JP
Legal Adviser

Miss Mary SO
Senior Assistant Secretary (2)8

Action
Column

I. Meeting with members of the Judicial Officers Recommendations Commission and the Administration

(LC Paper No. CB(2) 2302/99-00(01) - Letter dated 10 June 2000 from the Secretary, Judicial Officers Recommendations Commission together with a paper

LC Paper No. CB(2) 2302/99-00(02) - Paper provided by the Administration

LC Paper Nos. CB(2) 2302/99-00(03) & (04)) - Press statements issued by the Administration and the Judiciary on 10 May 2000)

The Chairman welcomed representatives of the Judiciary, the Administration and the Bar Association of Hong Kong to the meeting to continue discussion on the appointment of judges of the Court of Final Appeal (CFA).

2. At the invitation of the Chairman, Judiciary Administrator (JA) introduced the Judicial Officers Recommendations Commission (JORC)'s paper which explained the constitutional arrangements for the making of senior judicial appointments, the qualifications of CFA judges and the workings of JORC relating to the appointment of CFA judges generally. In respect of the latter point, JA, who was also the secretary of JORC, explained that due to the constraints of confidentiality under which JORC operated, he was directed by the Chief Justice (CJ), Chairman of JORC, not to disclose information relating to specific judicial appointments. He however would be pleased to answer questions from members relating to the workings of JORC generally.

3. Director of Administration (D of Adm) said that with the permission of the Chief Executive (CE), the Administration had prepared a paper which provided additional information relating to the current exercise of the appointment of the seven

CFA judges. Referring to the Administration's paper, D of Adm pointed out that CE was satisfied that three JORC members who were eligible to be appointed as permanent judges of the CFA had duly complied with section 3(5B) and 3(5C) of the JORC Ordinance (Cap. 92). Section 3(5B) stipulated that any JORC member who was or might reasonably be regarded as a candidate for selection as a permanent judge or a non-permanent judge should disclose whether or not, if he or she was selected, he or she was willing to accept appointment, that disclosure should be recorded in the minutes. Section 3(5C) stipulated that any JORC member disclosing the willingness to accept appointment as a permanent judge or a non-permanent judge should not take part in any deliberation of JORC with respect to that appointment and should not vote on any question concerning it; and should be treated as unable to act. D of Adm further pointed out that CE was also satisfied that the names of a sufficient large number of eligible persons, i.e. over 90, were put before JORC by the secretary of JORC in consultation with the Chairman of JORC, and that the seven persons recommended by JORC for appointment as CFA judges fulfilled the statutory legal qualifications as well as the criteria set out in Article 92 of the Basic Law which required judges to be chosen on the basis of their judicial and professional qualities. In relation to the appointment of non-permanent judges, CE noted that JORC had taken into account various matters as detailed in paragraph 9 of the Administration's paper.

Role of LegCo

4. Noting that the appointment of the seven CFA judges had been made and announced by the Administration and the Judiciary in their respective press statements issued on 10 May 2000, the Chairman enquired about the proper sequence of events in order for the appointments to have legal effect, i.e. whether appointment by CE should be made prior to or after obtaining the endorsement of the Legislative Council (LegCo).

5. Legal Adviser said that although provisions of the Basic Law and the Hong Kong Court of Final Appeal Ordinance (CFA Ordinance) concerning the role and authority of JORC, CE and LegCo in the appointment of CFA judges were not procedural provisions as such, they were nevertheless clear on one point i.e. CE was required to obtain LegCo's endorsement of the appointment. As to whether the appointment would only have legal effect after endorsement of LegCo, Legal Adviser pointed out that it had been consistently mentioned in the speeches of the movers of the motions on appointment of CFA judges in the past that the appointment would only take legal effect after LegCo had given its endorsement.

6. Mr Philip DYKES of the Hong Kong Bar Association shared the Legal Adviser's view that the appointment of CFA judges would only be legally effective after endorsement by LegCo. Referring to the requirement for CE to report the appointment of CFA judges to the Standing Committee of the National People's Congress of the People's Republic of China (NPCSC) "for the record" under Article

90 of the Basic Law and section 7A of the CFA Ordinance, Mr DYKES enquired whether "for the record" meant that NPCSC would simply file the report with no follow-up action.

7. D of Adm confirmed that unless and until LegCo's endorsement had been given, the appointment of CFA judges would not have legal effect. Responding to the question raised by Mr DYKES, D of Adm said that the Administration had no knowledge of what NPCSC would do with the report. It was a matter entirely for NPCSC to decide.

List of eligible persons

8. In reply to the Chairman's enquiry as to how the list of over 90 eligible persons was compiled, JA said that in general the names of eligible persons were usually put before the JORC by the secretary of JORC in consultation with the Chairman of JORC. Any JORC member was also at liberty to put forward further names.

9. Mr James TO enquired whether all persons who met the statutory legal requirements for appointment as CFA judges had been included in the list of eligible persons compiled by the secretary of JORC for the current appointment exercise. Mr TO further enquired about the number of candidates who had been shortlisted for consideration by JORC.

10. D of Adm replied in the positive to the first question. On the second question, JA reiterated that he could not comment on specific judicial appointments. However, generally speaking, as the intention of persons willing to join the bench was often known within the legal profession, the general approach in selecting the candidates for senior judicial appointments such as CFA judges would be to ascertain from those legal professionals whether they would be willing to accept the appointment if selected. The secretary of JORC, in consultation with the Chairman of JORC, would then prepare a paper with recommendations for the consideration of JORC.

Working of JORC

11. Ms Emily LAU expressed dissatisfaction at the reluctance of JORC and the Administration to provide information on the procedures and criteria adopted by JORC in arriving at the recommendations in the current appointment exercise. Ms LAU said that the denial of such information to LegCo would render it not being able to make an informed decision as to whether it should endorse the appointments. Given the lack of transparency on the workings of JORC, Ms LAU echoed the view expressed by the Chairman at the last special meeting of the Panel held on 3 June 2000 that a revamp of the JORC Ordinance was necessary in order to improve the transparency of JORC. Ms LAU said that the Administration's view that LegCo's endorsement should only be withheld if the requirements set out in the Basic Law regarding judicial appointments had not been followed would relegate the role of

LegCo to that of a rubber-stamp.

12. D of Adm responded that JORC, CE and LegCo each had its/his role to play under the existing constitutional arrangements for the appointment of CFA judges. Given that the appointment of CFA judges would not have legal effect unless and until LegCo's endorsement had been given, she therefore could not agree with Ms LAU's comment that the role of LegCo in the appointment of CFA judges was one of a rubber-stamp. D of Adm further said that the Administration would endeavour to provide as much information to Members as far as possible with regard to the appointment of the seven CFA judges. There was however a limit in providing information relating to the deliberation of JORC leading to its recommendations, since it involved the names of and discussions concerning the eligible persons in the exercise. D of Adm pointed out that the practice of non-disclosure of information relating to judicial appointments was also adopted by other jurisdictions. JA also reiterated that due to the constraints of confidentiality under which JORC operated, he could only provide information on the workings of JORC relating to the appointment of CFA judges generally outside the context of particular judicial appointments.

13. D of Adm said that she could not agree to members' comment that the workings of JORC lacked transparency because the functions and the composition of JORC were clearly prescribed in the Basic Law and the JORC Ordinance. She further said that since the formation of JORC some three years ago, JORC had been operating smoothly and persons recommended by it for appointment as CFA judges were held in high esteem by the legal profession both in Hong Kong and overseas. Nevertheless, she would convey members' concern in this regard to the Administration for consideration.

Adm

14. The Chairman considered JA's claim of confidentiality was based on section 11(1) of the JORC Ordinance which stipulated that any member of JORC or other person who, without the permission of CE, published or disclosed to any unauthorized person any information coming to his/her knowledge or in the course of duties would be liable to criminal sanctions. In this connection, the Chairman wondered whether the reason for JA not being able to disclose further information on the appointment of the seven CFA judges was because LegCo Members were considered as "unauthorized person" referred to in section 11(1).

15. JA clarified that he was prohibited from disclosing information pertaining to particular judicial appointments to Members because there was no interface between JORC and LegCo under the existing constitutional arrangements. He referred members to paragraph 5 of the JORC's paper which explained the views of the Chairman of JORC in this regard, i.e. JORC's interface was only with CE because JORC made recommendations to and only to CE, and LegCo's interface was with CE only because CE had to obtain LegCo's endorsement of his appointments.

16. In further response to the Chairman, JA replied that it was undesirable to reveal recommendations of specific judicial appointments to LegCo. This was to safeguard the independence of the judiciary and to avoid any risk of politicizing judicial appointments which would seriously erode that independence.

17. Ms Emily LAU considered JA's explanation that an interface between JORC and LegCo would politicize judicial appointments unconvincing, pointing that all matters brought up for consideration by LegCo would inevitably be politicized. On D of Adm's comment relating to overseas practice in paragraph 12 above, Ms LAU said that a research on the judicial appointment system in other foreign countries should be conducted so as to see how they compared with that of Hong Kong.

Effective dates of appointments

18. Mr Martin Lee drew members' attention to section 7(1) and (2) of the CFA Ordinance. Section 7(1) of the CFA Ordinance stipulated that the permanent judges of the CFA should be appointed by CE acting in accordance with the recommendation of JORC. Section 7(2) of the CFA Ordinance stipulated that if the office of any permanent judge became vacant, by death or otherwise and the number of permanent judges was thereby reduced to less than three, CE acting in accordance with the recommendation of JORC should as soon as reasonably possible after the office became vacant, appoint another permanent judge to fill the vacancy. Referring to the press statements issued by the Administration and the Judiciary on 10 May 2000 which indicated that the appointment of the two permanent CFA judges was made to fill the offices of the two incumbent permanent judges who would resign or retire in September and October 2000 respectively, Mr Martin LEE asked whether these appointments were made under section 7(2) of the CFA Ordinance. Mr LEE however pointed out that the appointments would not be valid if they were made under section 7(2) because they were made prior to the offices concerned had become vacant. Mr LEE further raised a query about the appointment of the two non-permanent Hong Kong judges, pointing out that the persons appointed to such offices were currently holding the offices of permanent judges.

19. Legal Adviser said that the appointment of the two permanent judges could well be made under section 7(1) of the CFA Ordinance, given that the Ordinance did not prescribe a maximum number for permanent judges at any one time. However, Legal Adviser said that since under section 16 of the Ordinance, in the event of an appeal, the CFA would be heard by CJ or a permanent judge designated to sit in his place; three permanent judges nominated by CJ; and one non-permanent Hong Kong judge or one judge from another common law jurisdiction selected by CJ and invited by CFA, the Ordinance had envisaged the need to have more than three permanent judges at any given time.

20. D of Adm apologized that the press statements might have misled Members

into thinking that the appointment of the seven CFA judges had already taken effect. She reiterated that these appointments would not have legal effect unless and until LegCo had given its endorsement. It was the Administration's intention to obtain LegCo's endorsement before expiry of the current legislative term so that these appointments could take effect sometime in the summer. On the question of whether the appointment of the two permanent judges was made under section 7(1) or 7(2) of the CFA Ordinance, D of Adm undertook to provide a written reply.

21. Regarding the query raised by Mr Martin LEE in paragraph 18 above concerning the same persons concurrently holding the offices of permanent judges and non-permanent Hong Kong judges, D of Adm said that there was no question of such a situation as the two incumbent permanent judges would only take up their appointment as non-permanent Hong Kong judges upon their ceasing to be permanent judges in September and October 2000 respectively. This point was made clear in the press statement issued by the Administration on 10 May 2000 which stated that "Mr Justice Litton and Mr Justice Ching are willing to serve as non-permanent Hong Kong judges upon their ceasing as permanent judges."

22. Mr Martin LEE said that he would be very surprised if the appointment of the two permanent judges was not made under section 7(2) of the CFA Ordinance, bearing in mind the languages used in the press statements and the fact that the number of permanent judges had all along stood at three. In order to meet the requirement of section 7(2), i.e. for LegCo to endorse the appointments only after the offices concerned had become vacant, Mr LEE suggested that a special Council meeting could be convened for such purpose immediately following the forthcoming LegCo elections to be held on 10 September 2000, or the incumbent permanent judge who intended to resign in September 2000 could be asked to defer his resignation after the next legislative session had commenced. In respect of the latter suggestion, D of Adm responded that when a permanent judge would like to resign was not a matter which could be dictated by the Judiciary or the Administration. Nevertheless, she could seek the view of the permanent judge concerned.

23. The Chairman said that the queries raised by Mr Martin LEE concerning the validity of the appointments could be addressed if LegCo was advised of the effective dates of the appointments. Mr TSANG Yok-shing said that according to the press statement issued by the Administration, it was the intention of the Administration to seek the endorsement of LegCo on these appointments for them take effect in the next few months. Legal Adviser advised that contrary to the usual practice in relation to important issues to be dealt with in LegCo, the Administration had yet to provide to LegCo a LegCo Brief on details of the motion and a draft speech to be made by CS when moving the motion to seek LegCo's endorsement of the appointment of the seven CFA judges.

24. Mr Albert HO was of the view that it would be appropriate to stipulate the effective dates of the appointments in the motion. The Chairman said that she had no

objection to Mr HO's suggestion, but pointed out that the Administration would need to seek the President's approval for dispensing with the notice requirement for amending the motion, in order to incorporate the dates.

Adm 25. D of Adm advised that the effective dates of appointment of the seven CFA judges would be set out in the LegCo Brief to be provided to Members, and would be repeated in the speech to be made by CS when moving the motion. She however requested members to give the Administration the leeway to specify only the month and not the exact days on which the appointments would take effect in case of unforeseen circumstances which might render the appointments not being able to take effect on a specified date as intended.

26. Mr James TO cautioned that the appointment of the two permanent judges should tie in with the resignation or retirement of the two incumbent permanent judges, so as to ensure that the effective functioning of the CFA would not be adversely affected. D of Adm noted Mr TO's views.

Role of CE

27. Referring to paragraph 19 of the Administration's paper which stated that "CE would be informed of the detailed procedures which have been undertaken in each particular exercise so that he can be satisfied that the recommendations are in order", Mr Albert HO enquired about the sort of information which had been communicated to CE and CE's role in the appointment process.

28. JA replied that the information provided by JORC to CE included details of the deliberation of JORC leading to its recommendations of the appointments, attendance list of each meeting and declaration of interest by JORC members. As regards the latter question, JA said that while JORC made the recommendations, it was the role of CE to make the appointments.

29. Mr Martin LEE said that it would be totally unacceptable if CE had the power not to appoint persons recommended by JORC as CFA judges, given that it was stipulated in section 7(1) of the CFA Ordinance that "The permanent judges of CFA shall be appointed by CE acting in accordance with the recommendation of JORC".

Adm 30. Deputy Judiciary Administrator (DJA) clarified that CE could not appoint persons not recommended by JORC. JA confirmed that DJA's advice was really the emphasis of his statement. D of Adm added that the existing constitutional arrangements for the appointment of CFA judges were designed to provide the necessary checks and balances for upholding the independence of the judiciary. In her view, CE would only turn down a recommendation of JORC where there was a procedural flaw in the appointment process. For the avoidance of doubt, the Chairman requested the Administration to provide a written reply on whether CE had the power not to appoint persons recommended by JORC as CFA judges, and if so,

under what circumstances and on what basis. The Administration agreed.

31. Mr HO further enquired whether CE had met with the seven persons recommended by JORC for appointment as CFA judges and/or had requested for further information before accepting JORC's recommendations. JA replied that to his knowledge, CE would not normally meet with the persons recommended by JORC for certain judicial appointments. As to whether CE had actually met with the persons concerned in the current appointment exercise, the question should best be directed to the CE's office. D of Adm supplemented that CE had the right to meet with the persons recommended by JORC. As a general rule, depending on the information provided, CE might decide whether there was a need to request for further information and/or to meet with the persons recommended by JORC for certain judicial appointments.

Adm

32. In reply to Mr James TO's request for the Administration/JORC to make available to LegCo papers which had been provided to CE to facilitate his consideration of the recommendations in the current exercise, D of Adm said that she would need to seek CE's view on the request. However, D of Adm expressed concern that the request, if acceded to, would set a precedent for future CFA appointment exercises. This might not be conducive to the smooth processing of judicial appointments. Mr TO said that he had taken this factor into consideration when making the request.

Conclusion

33. Ms Emily LAU expressed dissatisfaction about the lack of preparation on the part of the Administration in seeking LegCo's endorsement of the appointment of the seven CFA judges. She pointed out that if the Administration had prepared a LegCo Brief setting out all the essential details concerning the appointments, much confusion and queries from members could be avoided. Ms LAU reiterated that the fact that LegCo was denied information on the procedures and criteria adopted by JORC in arriving at its recommendations in the current appointment exercise would make it difficult for LegCo to perform its constitutional duty conferred by Article 73(7) of the Basic Law in a responsible manner. Mr Martin LEE echoed Ms LAU's views.

34. The Chairman said that it was the constitutional duty of LegCo to uphold the independence of the judiciary and that was a duty which LegCo would perform whether together with or in spite of the judiciary. As such, she could not agree with the comments made by JA earlier at the meeting that the underlying rationale of not disclosing the recommendations of JORC to LegCo was to safeguard the independence of the judiciary. In her view, it was precisely the fact that all JORC members were appointed by CE which called for the need for LegCo to have an interface with JORC so as to uphold the independence of the judiciary. To this end, the Chairman was of the view that the term "unauthorized person" referred to in section 11(1) of JORC Ordinance should not apply to LegCo Members. Mr Martin

LEE concurred with Miss NG.

35. Mr Martin LEE said that as there were quite a number of important legal and constitutional issues which had yet to be addressed, another special meeting of the Panel should be held ahead of the Council meeting on 21 June 2000. Members agreed that a further special meeting should be held at 10:00 am on 17 June 2000. Representatives of the Administration and JORC would be invited to attend. Other non-Panel members would also be invited to attend.

(Post-meeting note : The special meeting on 17 June 2000 was subsequently postponed to 11:00 am to avoid a clash with another meeting.)

36. There being no other business, the meeting ended at 10:16 am.

Legislative Council Secretariat
31 August 2000