

立法會
Legislative Council

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by the Administration and
cleared with the Chairman)

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

**Minutes of special meeting
held on Saturday, 17 June 2000 at 11:00 am
in Conference Room A of the Legislative Council Building**

- Members Present** : Hon Margaret NG (Chairman)
Hon Albert HO Chun-yan
Hon Martin LEE Chu-ming, SC, JP
Hon James TO Kun-sun
Hon Mrs Miriam LAU Kin-yee, JP
Hon Emily LAU Wai-hing, JP
Hon Ambrose LAU Hon-chuen, JP
- Member Attending** : Hon Ronald ARCULLI, JP
- Member Absent** : Hon Jasper TSANG Yok-sing, JP (Deputy Chairman)
- 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 : Mrs Percy MA
Attendance Chief Assistant Secretary (2)3

Staff in : Mr Jimmy MA, JP
Attendance Legal Adviser

Miss Mary SO
Senior Assistant Secretary (2)8

Action
Column

I. Meeting with representatives of the Judicial Officers Recommendation Commission (JORC) and the Administration

(LC Paper No. CB(2)2387/99-00(01) - Letter dated 13 June 2000 to the Administration and JORC on issues raised by the Panel on 13 June 2000

LC Paper No. CB(2)2387/99-00(02) - Letter dated 16 June 2000 from the Secretary, JORC

LC Paper Nos. CB(2)2387/99-00(03) & (04) - Letter dated 16 June 2000 from the Director of Administration and a LegCo Brief on the resolution under section 7A of the Hong Kong Court of Final Appeal Ordinance)

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

Response to concerns raised by the Panel on 13 June 2000

2. Director of Administration (D of Adm) introduced the Administration's letter dated 16 June 2000 which enclosed a LegCo Brief on the resolution under section 7A of the Hong Kong Court of Final Appeal Ordinance (CFA Ordinance) (LC Paper Nos. CB(2)2387/99-00(03) and (04)). These documents set out the Administration's response to queries and concerns raised by the Panel at the last special meeting held on 13 June 2000, which was summarized as follows -

- (a) the appointment of the seven CFA judges in the current exercise was made in accordance with section 7(1) of the CFA Ordinance;
- (b) the lawfulness of the Chief Executive (CE)'s actions not to appoint persons recommended by JORC as CFA judges could not be dealt with in the abstract and would depend on the particular factual circumstances at the time;
- (c) the detailed dates of appointments of the seven judges were set out in paragraph 14 of the LegCo Brief and would also be repeated in the speech to be made by the Chief Secretary for Administration (CS) when moving the motion; and
- (d) the Administration could not accede to the request to make available to Members all papers that JORC had provided to CE to facilitate his consideration of the recommendations of the seven CFA Judges because the Administration had a limit in providing information which involved the names of and discussions concerning individual eligible persons involved in the exercise, the list of eligible persons, and the deliberations of JORC leading to its recommendation of the seven appointments.

3. In response to the Chairman, D of Adm confirmed that line 6 of paragraph 3 of the LegCo Brief should be revised to add ", this" after the word "JORC".

Discretionary power of CE

4. Pointing out that CE was empowered to appoint judges of the courts at all levels in accordance with legal procedures under Article 48(6) of the Basic Law, Mr Philip DYKES asked whether apart from legal procedural objections, CE had the discretionary power to refuse to act in accordance with the recommendation of JORC, and if so, the nature of the discretionary power. In response to the Chairman, Mr DYKES said that his view was that CE had no such discretionary power. If CE was satisfied that the legal statutory procedures and the legal statutory qualifications of the appointees were in order, he had to follow the recommendation of JORC. Mr DYKES further said that Article 48(6) indicated that the role of CE was a procedural one, not a decision-making one.

5. D of Adm reiterated that the lawfulness of CE's actions not to appoint a person recommended by JORC could not be dealt with in the abstract and had to be considered on the particular factual circumstances of the case concerned. One scenario that she could think of for CE not appointing a person recommended by JORC was that something very controversial had happened to the appointee subsequent to JORC making a recommendation to CE. Nevertheless, she cautioned

against giving speculative advice on the matter.

6. Mr Ronald ARCULLI was of the view that CE should have the discretionary power not to appoint a person recommended by JORC under certain circumstances, e.g. the person did not satisfy the requisite judicial and professional qualities in contrary to Article 92 of the Basic Law. The Chairman opined that if JORC had not followed the statutory requirements in making its recommendations, such recommendations would not be valid. In the circumstances, the question of CE exercising his discretion not to act in accordance with JORC's recommendations would not arise, as such recommendations were flawed in the first place. Mr Albert HO concurred with the Chairman.

7. Mr DYKES said that section 7(1) of the CFA Ordinance which stated that the permanent judges shall be appointed by CE "acting in accordance with the recommendation of JORC" reinforced his view that CE had no discretion in not implementing the recommendation of JORC.

8. Referring to Mr DYKES's comment, Legal Adviser advised members that there was an apparent discrepancy between the English and Chinese texts of Article 88 of the Basic Law i.e. the former was expressed along the line that CE had to appoint judges "on the recommendation of JORC", whereas the latter was expressed along the line that CE had to appoint CFA judges "in accordance with the recommendation of JORC" (根據司法人員推薦委員會的推薦). The Bills Committee on the CFA Bill was of the view that as it was not possible to amend the English text of Article 88 to bring it exactly in line with its corresponding Chinese text, the only alternative would be to reflect the meaning of the Chinese text of Article 88 in the CFA Bill. Hence the phrase "in accordance with" was used in section 7(1) of the CFA Ordinance.

9. Mr ARCULLI said that he personally had no reservations about the seven appointments in the current exercise. However, he did not agree with the Administration's advice that the lawfulness of CE's actions not to appoint persons recommended by JORC would depend on the particular factual circumstances at the time. The Administration should have a view as to whether CE had the discretionary power or not under the law.

Adm 10. D of Adm said that as the matter involved complex legal and constitutional issues, she would need to seek legal advice before reverting to members. The Chairman suggested and members agreed that the matter should be discussed by the Panel or other committees of the Council in the next legislative session.

Use of the word "appointment"

11. Ms Emily LAU queried whether it was appropriate to use the word "appointment" in the LegCo Brief before LegCo's endorsement of the appointment of

the seven CFA judges had been obtained. The Chairman added that the fact that the "appointment" was not stated as the "appointment subject to endorsement" had created some confusion.

12. D of Adm explained that the same word was used in the relevant provisions of the Basic Law. She stressed that although the word "appointment" was used, the Administration had made it abundantly clear that the appointment of the seven CFA judges would not have legal effect unless and until LegCo's endorsement had been obtained.

13. Legal Adviser said that although provisions of the Basic Law and the 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. In his view, the use of the word "appointment" prior to obtaining LegCo's endorsement was merely to reflect CE's actions to appoint persons recommended by JORC as CFA judges and would not pre-empt LegCo's endorsement of the appointments.

14. In response to Ms Emily LAU, the Chairman said that while the matter raised was debatable, she considered that on the face of it, the use of the word "appointment" was not wrong. As far as the substance and effect were concerned, the appointment could not have any legal effect without the endorsement of LegCo.

LegCo Brief

15. Ms Emily LAU expressed regret that the Administration had only provided the LegCo Brief on the motion to seek LegCo's endorsement of the appointment of the seven CFA judges after repeated requests made by the Panel. She further expressed dissatisfaction that the information contained in the LegCo Brief was not entirely accurate. For example, it only mentioned that CS gave notice on 5 June 2000 to move the motion at the Council meeting on 21 June 2000 to obtain LegCo's endorsement of the seven appointments, without any reference to the press statement issued by the Administration on 10 May 2000 and the motion originally scheduled to be moved on 31 May 2000.

16. D of Adm responded that as the LegCo Brief was about the motion to be moved at the Council meeting on 21 June 2000, the Administration did not consider it necessary to make reference to the previous motion, the notice of which was withdrawn in response to Members' request for more time to consider the motion.

Recommendations of JORC

17. Referring to paragraph 18 of the LegCo Brief which merely stated that "CE noted that JORC based the criteria of selection on Article 92 of the Basic Law which

required judges to be chosen on the basis of their judicial and professional qualities", Ms Emily LAU expressed disappointment at the Administration's reluctance to disclose information on the selection criteria adopted by JORC for recommending persons to be appointed as CFA judges. To enable LegCo to exercise its power meaningfully and responsibly under Article 73(7) of the Basic Law, Ms LAU was of the view that the Committee on Rules of Procedure should study the matter in the next legislative session.

18. D of Adm responded that apart from the LegCo Brief, both the Administration and JORC had to date provided a number of documents to the Panel, namely, the Administration's paper on "Legal and administrative matters relating to the appointment of judges of the CFA"; the curriculum vitae of the seven judges; the Judiciary Administrator's paper on "Constitutional arrangements and workings of JORC relating to appointment of CFA judges generally"; and the Administration's paper on the "Current appointment exercise of the seven CFA judges". She hoped that members would appreciate that there was a limit for the Administration to provide information with regard to particular judicial appointments, due to the constraints of confidentiality under which JORC operated.

19. The Chairman was of the view that how LegCo had dealt with the CFA appointments in this exercise would not set a precedent for future. LegCo had a substantive power in endorsement of judicial appointments which could be exercised as and when necessary, even without the establishment of special procedures beforehand.

20. Mr James TO said that it was unclear from the LegCo Brief as to how JORC had come up with the recommendation of the seven persons out of a list of 90 eligible persons, e.g. whether the seven persons were the most suitable candidates among those who were willing to accept the appointment. He enquired whether the seven persons were among those shortlisted or were the only ones shortlisted, and whether they had been interviewed by JORC.

21. Judiciary Administrator (JA) replied that as people who were interested in taking up senior judicial offices such as CFA judges were generally well known in the legal and judicial circles, the established practice was for those who met the statutory legal qualifications and possessed the requisite professional and judicial qualities to be approached as to whether they would be willing to accept the appointment if selected. If the replies were in the positive, the Secretary in consultation with the Chairman of JORC would put the names forward to JORC for consideration. He added that it was the long-standing practice that senior judicial appointments would not be made through an open advertised exercise. In reply to the Chairman, JA said that newspaper advertisement would only be placed for recruitment of judicial officers at District Court level and below.

22. Mr TO expressed concern at the lack of transparency of the workings of JORC

and urged that the matter be followed up by the Panel in the next legislative session.

Other issues

23. Mr Albert HO said that in the light of recent press reports concerning the appointment of the seven CFA judges as a result of queries raised by the Panel, he would like to clarify that the Democratic Party supported the CFA appointments in the current exercise. He said that the reasons for various concerns and queries raised by the Panel about these appointments were partly due to the scanty information provided by the Administration and JORC, particularly on how JORC had come up with its recommendations of the seven CFA Judges, and partly due to inaccurate information contained in the press statements released by the Judiciary and the Administration. On the first point, Mr HO said that while it might not be necessary for LegCo to be provided with detailed information relating to the current appointment exercise, he stressed that LegCo had the right to request for such information, including names of eligible persons and deliberations of JORC, if considered necessary in future exercises. On the second point, Mr HO said that the fact that it was mentioned in the press statements that the two permanent judges were appointed to fill vacancies would imply that the appointments were made in accordance with section 7(2) of the CFA Ordinance. Mr Martin LEE had raised queries on this arrangement at the last meeting. It was noted that the Administration had now clarified that the appointments were made under section 7(1). Another major concern of members was that the press statements had failed to state clearly that the appointments were subject to LegCo's endorsement in order to have legal effect. He hoped that the Administration would better prepare itself in seeking LegCo's endorsement on judicial appointments in future. As the current legislative session would end on 30 June 2000, Mr HO was of the view that the Panel should follow up on the workings of JORC relating to judicial appointments and its interface with LegCo in the next session.

24. D of Adm agreed that there was room for improvement and assured members that the Administration would strive to provide LegCo with as much information as possible in seeking LegCo's endorsement of judicial appointments in future.

25. In reply to Mr TO's enquiry as to whether the judges and judicial officers were subject to security checks on appointment, JA undertook to provide the reply in writing after the meeting.

(Post-meeting note : JA's reply advising that appropriate level of appointment checks were carried out on all judges and judicial officers before their joining the Judiciary was issued to members vide LC Paper No. CB(2)2449/99-00 on 23 June 2000.)

26. In response to Ms Emily LAU about the arrangement to deal with the situation where a sufficient number of permanent judges were not available to hear an appeal,

JA replied that the Chief Justice was empowered to nominate a non-permanent Hong Kong judge to sit in place of a permanent judge under section 16(4) of the CFA Ordinance.

27. Ms Emily LAU enquired about the reason for creating two supernumerary posts of permanent judges of the CFA for the periods from 1 to 13 September 2000 and 1 to 6 September respectively, since the appointment of the two permanent CFA judges would take effect on 1 September 2000. Deputy Director of Administration explained that it was necessary to create the supernumerary posts as the two incumbent permanent CFA judges still held the offices of the permanent CFA judges whilst they were on pre-retirement and pre-resignation leave.

28. The Chairman said that from the press statements and other documents made available to Members, it appeared that CE had already made the appointment of the seven CFA judges. She enquired whether the appointments had been reduced to writing; and if so, in what form. D of Adm responded that under the normal circumstances, CE would indicate his acceptance of JORC's recommendation in the submission from the Secretary to JORC if he was satisfied that all the necessary procedures had been followed. Mr James TO enquired whether the submission showing CE's acceptance of JORC's recommendations could be made available to the Panel. D of Adm responded that it was not necessary since CS's notice to move a motion to seek LegCo's endorsement of the appointments was sufficient testimony of CE's acceptance of JORC's recommendation. In further response to some members, D of Adm said that a formal letter of appointment would be issued to the seven appointees after LegCo's endorsement had been obtained.

29. There being no other business, the meeting ended at 12:44 pm.