

For discussion
on 3 June 2000

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

**Legal and Administrative Matters Relating to the
Appointment of Judges of the Court of Final Appeal**

Purpose

This paper sets out the comments of the Administration on a number of issues in connection with the appointment of judges of the Court of Final Appeal (CFA), in response to the invitation of the Legislative Council Panel on Administration of Justice and Legal Services (AJLS Panel) to attend the special meeting on Saturday 3 June 2000.

Background

2. The Administration gave notice on 10 May 2000 to move a motion, at the Legislative Council meeting to be held on 31 May 2000, to seek the Council's endorsement pursuant to section 7A of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) for-

- (a) the appointment of Mr Justice Patrick Chan Siu Oi and Mr Justice Roberto Alexandre Vieira Ribeiro as permanent judges of the CFA;
- (b) the appointment of Mr Justice Henry Denis Litton and Mr Justice Charles Ching as non-permanent Hong Kong judges of the CFA; and
- (c) the appointment of Sir Gerard Brennan, Sir Thomas Eichelbaum and Lord Millett as judges of the CFA from other common law jurisdictions.

It should be noted that the appointment of Mr Justice Litton and Mr Justice Ching as non-permanent Hong Kong judges of the CFA will take effect upon their ceasing to hold office as permanent judges of the CFA.

3. At the meeting of the AJLS Panel held on 16 May 2000, members

agreed that the Administration should be requested to brief the Panel on legal and administrative matters relating to the appointment of CFA judges so as to assist members to consider the motion. Members also agreed that the Administration should be requested to withdraw the notice for moving the motion on 31 May 2000 pending discussion of the Panel at a meeting to be held on 3 June 2000. The Administration subsequently withdrew the notice on 22 May 2000.

Composition and Appointment Procedures of CFA Judges

4. The Court of Final Appeal is the final appellate court in Hong Kong, hearing both civil and criminal appeals. It consists of the Chief Justice and the three permanent judges. The CFA is required to invite one non-permanent judge to sit in each appeal. The Hong Kong Court of Final Appeal Ordinance provides for a list of non-permanent Hong Kong judges and a list of non-permanent judges from other common law jurisdictions. The maximum number of non-permanent judges is 30.

5. In accordance with Articles 88 and 90 of the Basic Law and sections 7, 7A, 8 and 9 of the Hong Kong Court of Final Appeal Ordinance, both permanent and non-permanent judges of the Court of Final Appeal shall be appointed by the Chief Executive in accordance with the recommendation of the Judicial Officers Recommendation Commission (JORC) and the Chief Executive shall obtain the endorsement of the Legislative Council on such appointments.

6. Under section 12(2) of the Hong Kong Court of Final Appeal Ordinance, a person shall be eligible to be appointed as a permanent judge if he is the Chief Judge of the High Court, a Justice of Appeal or a judge of the Court of First Instance; or a barrister who has practised as a barrister or solicitor in Hong Kong for a period of at least 10 years.

7. Under section 12(3) of the Hong Kong Court of Final Appeal Ordinance, a person shall be eligible to be appointed as a non-permanent Hong Kong judge if he is a retired Chief Judge of the High Court; a retired Chief Justice of the Court; a retired permanent judge of the Court; a Justice or retired Justice of Appeal; or 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 resided in Hong Kong. At present, there are 11 non-permanent Hong Kong judges.

8. Under section 12(4) of the Hong Kong Court of Final Appeal Ordinance, a person shall be eligible to be appointed as a non-permanent judge from another common law jurisdiction if he is a judge or retired judge of a court of unlimited jurisdiction in either civil or criminal matters in another common law jurisdiction; provided he is ordinarily resident outside Hong Kong and has never been a judge of the High Court, a District Court or a permanent magistrate in Hong Kong. At present, there are 6 non-permanent judges from other common law jurisdictions.

Judicial Officers Recommendation Commission

9. Under the Judicial Officers Recommendation Commission Ordinance (Cap 92), the Commission is entrusted with the function to advise or make recommendations to the Chief Executive regarding the filling of vacancies in judicial offices. The Commission consists of the Chief Justice as the chairman, the Secretary for Justice and 7 other members appointed by the Chief Executive (2 judges, 1 barrister, 1 solicitor and 3 persons not connected with the practice of law). It is noted under section 3(3A) of the JORC Ordinance, a resolution is not effective if there are more than 2 votes not in favour. The advice or recommendation of the Commission is then communicated to the Chief Executive, and subject to endorsement by the Legislative Council, the Chief Executive shall make appointment in accordance with the recommendation of the Commission.

10. In accordance with the Basic Law and the Hong Kong Court of Final Appeal Ordinance, the JORC has unanimously recommended the appointment of Mr Justice Patrick Chan and Mr Justice Ribeiro as permanent judges of the Court of Final Appeal, Mr Justice Litton and Mr Justice Ching as non-permanent Hong Kong judges of the Court of Final Appeal, and Sir Gerard Brennan, Sir Thomas Eichelbaum and Lord Millett as non-permanent CFA judges from other common law jurisdictions. The Chief Executive has accepted the recommendations of the Commission and the Council's endorsement of these appointments will be sought in due course.

Role of the Legislative Council

11. Article 90 of the Basic Law provides that the Chief Executive shall obtain the endorsement of the Legislative Council as regards the appointment of CFA judges and the Chief Judge of the High Court. Article 73(7) correspondingly confers on the Legislative Council the power and function to endorse the appointment of CFA judges and the Chief Judge of the High Court.

12. The system of judicial appointment by the Chief Executive acting in accordance with the recommendation of an independent commission, the JORC, laid down in Article 88 of the Basic Law, together with the additional requirement of endorsement by the Legislative Council of the appointment of CFA judges and the Chief Judge of the High Court under Article 90 of the Basic Law, reinforces the constitutional guarantee of the independence of the judiciary stipulated in Article 85 of the Basic Law.

13. Against this background, particularly the role of the independent commission, the Administration considers that Article 73(7) and Article 90 of the Basic Law provide the necessary checks and balances to ensure that the independence of the judiciary is maintained and that the requirements set out in the Basic Law regarding judicial appointments have been followed.

14. The Administration therefore considers that the Council should endorse a judicial appointment if there has indeed been a recommendation of the JORC for the appointment and that the Chief Executive has accepted the recommendation. The Council's endorsement should only be withheld where it is satisfied that the requirements set out in the Basic Law regarding judicial appointments have not been followed.

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