立法會
Legislative Council

LC Paper No. CB(2)2545/01-02
(These minutes have been
seen by the Administration)

Ref : CB2/PL/AJLS

Legislative Council
Panel on Administration of Justice and Legal Services

Minutes of meeting
held on Monday, 22 April 2002 at 4:30 pm
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 Miriam LAU Kin-yee, JP Hon Mr Ambrose LAU Hon-chuen, GBS, JP Hon Emily LAU Wai-hing, JP Hon Audrey EU Yuet-mee, SC, JP
Member Absent	:	Hon James TO Kun-sun
Public Officers Attending	:	Item IV Mr Wilfred TSUI Judiciary Administrator Ms Emma LAU Deputy Judiciary Administrator Miss Eliza LEE Deputy Director of Administration Mr James CHAN Assistant Director of Administration

Mr Peter WONG
Senior Assistant Solicitor General

Item V

Mr Michael SCOTT
Senior Assistant Solicitor General

Ms Kitty FUNG
Senior Government Counsel
Legal Policy Division

Item VI

Mr Darryl SAW, SC
Deputy Director of Public Prosecutions

Mr Michael SCOTT
Senior Assistant Solicitor General

By Invitation : Item IV

The Hong Kong Bar Association

Mr JAT Sew-tong

Item V

The Law Society of Hong Kong

Mr Herbert TSOI
President

Mr Anthony CHOW

Mr Patrick MOSS
Secretary General

Item VI

The Hong Kong Bar Association

Ms Corinne REMEDIOS

Clerk in Attendance	**:**	Mrs Percy MA Chief Assistant Secretary (2)3
Staff in Attendance	**:**	Mr Jimmy MA, JP Legal Adviser Mr Paul WOO Senior Assistant Secretary (2)3

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I. Confirmation of minutes of meeting
(LC Paper No. CB(2)1622/01-02)

The minutes of the special meeting held on 14 March 2002 were confirmed.

II. Information papers issued since last meeting
(LC Paper No. CB(2)1574/01-02(01) - (04))

2. Members noted that the above papers had been issued.

III. Items for discussion at future meeting
(LC Paper Nos. CB(2)1431/01-02(01) and 1617/01-02(01))

3. Members agreed that the following items should be discussed at the next regular meeting on 27 May 2002 -

(a) Reciprocal enforcement of judgments in commercial disputes between the Hong Kong Special Administrative Region and the Mainland;

(b) Incorporation of solicitors' practices; and

(c) Proposed creation of posts for the Labour Tribunal.

(*Post-meeting note* - At the request of the Administration, item (c) above was deferred to a future meeting.)

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IV. Process of appointment of judges
(LC Paper Nos. CB(2)1617/01-02(02) - (05); 1624/01-02(01) & (02); Consultation Paper on Process of Appointment of Judges issued under LC Paper No. CB(2)662/01-02))

4. The Chairman informed members that in response to the Consultation Paper on Process of Appointment of Judges (issued by the Panel in December 2001), the Director of Administration, the Judiciary Administration, the Bar Association, the Law Society and a legal professional (Mr Tony YUEN), had submitted written views to the Panel. At the invitation of the Panel, the respondents (except the Law Society and Mr Tony YUEN) attended the meeting to give views on the Consultation Paper.

5. The Chairman invited the deputations to make an oral presentation on their written submissions (the submissions were issued to the Panel under LC Paper Nos. CB(2)1617/01-02(02) - (05) and 1624/01-02(01). A summary of the views of the respondents is in **Appendix**.

Membership of the Judicial Officers Recommendation Commission (JORC)

6. Ms Audrey EU noted that the Director of Administration had responded in his submission that the membership of Secretary for Justice (SJ) in JORC would not undermine the independence of JORC. Ms EU said that she tended to hold a different view. She pointed out that under the proposed accountability system for principal officials, the post of SJ would be filled by a political appointee. SJ would become a member of the Executive Council (ExCo) and bound by collective responsibility of ExCo. In her opinion, as the function of JORC was to recommend to the Chief Executive (CE) the appointment of senior judicial officers, which included the appointment of judges of the Court of Final Appeal (CFA) and the Chief Judge of the High Court, there would be a potential conflict for a politically appointed principal official to serve as a member of JORC. She said that this would give rise to concern that the executive would interfere with judicial independence, particularly when one recalled the former incidence of the Government seeking interpretation of certain provisions of the Basic Law from the Standing Committee of the National People's Congress, following the CFA judgment.

7. Ms EU said that she supported the view of the Law Society that SJ should not be a member of JORC. She sought the views of the Bar Association and the Administration.

8. Mr JAT Sew-tong said that he did not consider that a conflict between judicial independence and the interests of the executive would occur in the context of nominating candidates for judicial appointments. He pointed out that as stated in paragraphs 13 and 14 of the Bar Association's submission (LC Paper No. CB(2)1624/01-02(01)), the Bar took the view that it was not

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necessary that SJ should be an ex-officio member of ExCo. There was a majority view within the Bar that in order to ensure the independence of the Judiciary and the appearance of lack of political influence in the appointment of judges, it was appropriate to have a representative of the Department of Justice (D of J), rather than SJ himself/herself, as a member of JORC. Moreover, as members of D of J were one of the three major court users (apart from members of the two legal professional bodies), their views should be adequately reflected in the deliberations of JORC on matters relating to judicial appointments.

9. Mr JAT added that under the existing statutory mechanism, CE should accept a recommendation for judicial appointment made by JORC. The Bar was of the view that to have a member in JORC who could fully represent the collective, fair and professional opinion of members of D of J on the suitability of candidates to take up judicial appointments would enhance the ability of JORC in fulfilling its function.

10. Mr JAT further said that the Bar took the view that JORC members who were "eminent persons from other sectors" should not include people with political inclinations. Their membership might undermine the independence of JORC.

11. Deputy Director of Administration said that it was appropriate for SJ to continue to be a member of JORC. She highlighted that for the issues set out in the Administration's letter of 13 March 2002, SJ, being the head of D of J which employed a large number of lawyers and briefed out a great deal of work to legal practitioners in the private sector, was in a unique position and had considerable knowledge to contribute to JORC's deliberations. She further said that SJ, just as other members of JORC, was required under section 7 of the JORC Ordinance, on first appointment, to take an oath or make an affirmation that he or she would freely and without fear or favour, affection or ill-will, give counsel and advice to CE in connection with all such matters as might be referred to JORC under the Ordinance. The Administration considered that the membership of SJ in JORC had not in any way undermined the independence and impartiality of JORC.

12. Senior Assistant Solicitor General (SASG) said that there was no suggestion under international and human rights principles of judicial independence, or under the common law, that involvement of the executive in the nomination of judges breached judicial independence, provided that safeguards were in place. He pointed out that the existing system of judicial appointment was established since 1975 and had been working well.

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13. Ms Audrey EU said that the introduction of the new accountability system for principal officials was a major reform of the system of Government in Hong Kong, with political appointees filling the top positions in the Government. She considered that there was an inherent conflict of interest for a politically appointed member of the executive to serve on a body responsible for recommending appointments to senior judicial offices and promotion of incumbent judicial officers.

14. SASG said that the Administration had explained on many occasions that SJ was responsible for policies in respect of the legal system and legal services. Under the new accountability system, the function of D of J to make prosecution decisions and perform other quasi-judicial functions independently and free from interference would not change. The inclusion of SJ in the new accountability system and SJ being a member of ExCo would not affect the independent operation of JORC.

15. The Chairman opined that there was public concern that the promotion prospect of judges who made rulings against the Government in constitutional litigation cases had been adversely affected as a result of their judgments. She said that safeguards should be introduced to the system to address such concern. Mr Albert HO said that it was also necessary to increase the transparency of the nomination and appointment process to ensure that the appointment of judges would not be affected by political considerations. He said that he did not object to having a senior Law Officer of D of J, who was a career civil servant, to be a member of JORC. However, a politically appointed SJ should not be a member of JORC.

16. Ms Emily LAU expressed similar views. She said that executive and political considerations should not influence the operation of JORC. She added that there should be safeguards against political intervention in the operation of other independent bodies including the Monetary Authority, the Securities and Futures Commission and Radio Television Hong Kong.

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17. The Chairman requested SASG to explain in writing the circumstances under which CE might refuse to appoint a person to fill a judicial office as recommended by JORC.

Information provided to the Legislative Council (LegCo)

18. Concerning information about the nominees which should be made available to LegCo, Mr JAT Sew-tong advised that the Bar considered that sufficient information about the personal and professional background of the candidate should be provided to LegCo to enable LegCo to form an informed view on the suitability of a nominee for appointment. In this regard, Mr JAT said that the Bar felt that the information required for the "Application for appointment as Justice of the High Court in the United Kingdom" (a copy of

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which was attached in Appendix III to the Consultation Paper issued by the Panel), apart from information on personal gross income from practice, could serve as useful reference for Hong Kong.

19. The Chairman said that the Working Group on Review of Process of Appointment of Judges would further consider the views received in the consultation exercise and prepare a final report for the Panel's endorsement. In response to the Chairman, Judiciary Administrator said that the Judiciary would conduct a review of JORC's operation after the issue of the final report.

(*Post-meeting note* - The Bar Association's supplemental response dated 31 May 2002 was circulated to the Panel vide LC Paper No. CB(2)2350/01-02 on 20 June 2002)

Mechanism for handling complaints against judges

20. Concerning the mechanism for handling complaints against judges, the Chairman informed members that the Administration had provided a paper on the existing system in Hong Kong. She added that the Research and Library Services Division was undertaking a research on the systems in Canada, the United States and the United Kingdom. The research was expected to be completed in June 2002. Members agreed that the Panel should discuss the subject when the research report was available.

(*Post-meeting note* : The completion date was later revised to mid July 2002.)

V. Fidelity Fund

(LC Paper Nos. CB(2)1379/01-02(01) - (03); 1617/01-02(06); 1624/01-02(03) and 1689/01-02(01))

21. The Chairman referred members to the paper prepared by the Administration (LC Paper No. CB(2)1617/01-02(06)) and the written submission from the Law Society (LC Paper No. CB(2)1624/01-02(03)) on the establishment of a fidelity fund to protect members of the public from pecuniary loss resulting from fraudulent acts of solicitors. Both the Administration and the Law Society were not opposed to the establishment of a fidelity fund but considered that it was not the opportune time to set up such a fund in view of the present economic downturn and the financial difficulties faced by many members of the legal profession.

22. In response to the Chairman, Mr Herbert TSOI elaborated on the Law Society's position. He said that it was the view of the Law Society that, apart from the financial considerations for the setting up of a fidelity fund, there was not a pressing need for such a fund, given the absence of a large number of

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potential claims from members of the public who suffered losses arising out of dishonesty or fraudulent acts of legal practitioners. The Law Society was also concerned that inevitably the costs of the establishment and maintenance of the fund would have to be borne by solicitors' clients in the form of increased fees. Mr TSOI added that the Law Society considered that if a fidelity fund was to be established, a levy imposed on the users of legal services would be the most appropriate method of funding. He pointed out that there were precedents for the establishment of funds to compensate victims of fraud financed by levies on the users. These included the Travel Industry Compensation Fund, the Stock Exchange Trading Fee and the recent introduction of levy by banks for a deposit insurance scheme.

23. Mr Albert HO declared interest as a practising solicitor. He referred members to a written submission on the subject prepared by the Democratic Party (LC Paper No. CB(2)1689/01-02(01)). He said that recent reports of dishonest acts of a few unscrupulous solicitors had revived public interest in the establishment of a fidelity fund. In his view, clients' losses caused by professional defalcation had been a problem in existence, though the gravity of the problem had yet to be gauged. To protect the public's interest and to safeguard the professionalism of the legal practitioners, there was a need to seriously reconsider the former proposal of the Administration for the establishment of a fidelity fund. Moreover, as funds of a similar nature were established in many overseas jurisdictions, the local profession, in the absence of a fidelity fund, could be criticised of lagging behind others in the offering of protection to the clients.

24. Mr Albert HO added that in his view, a levy imposed on solicitors or users of legal services or both, or the implementation of a reinsurance scheme, could be viable means for the setting up and maintenance of a fidelity fund. Ms Audrey EU said that the possibility of imposing a levy on users of particular types of legal services, such as conveyancing, might be considered.

25. The Chairman pointed out that the need of introducing "top up" cover to meet exigencies where the amount in the fund was insufficient to meet liabilities should be considered. Senior Assistant Solicitor General advised that in some jurisdictions such as New Zealand, there was a cap put on the total amount payable (levy and annual fee combined) for each claim.

26. Mr Herbert TSOI informed the Panel that in 2000, the Law Society had asked the brokers of its mandatory solicitors professional indemnity scheme to identify claims that had been refused on the basis of fraud by a principal in the solicitors' firms. The findings then showed some four cases between 1991 and 2002 in which indemnity had been refused. Since then there had been six instances in which solicitors had ceased to practise in circumstances which might give rise to claims by former clients. However, the number of such claims and the extent of losses were not known to the Law Society. On the

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issue of reinsurance, Mr TSOI said that no insurance indemnity cover could be provided in respect of losses brought about by dishonesty, fraudulent act or omission. Such exception to indemnity followed the well-established legal principle that it was not possible to insure against one's own fraud.

27. Ms Miriam LAU doubted the viability of establishing a fidelity fund in view of the adverse business situation faced by practitioners in the legal profession. She said that to set up a fidelity fund by means of levies on the users or through contributions from solicitors' firms would inevitably create added hardship to the contributors. She also cautioned that the availability of a fidelity fund might create the undesirable effect of inducing laxity in management and encouraging fraudulent activities of practitioners. She stressed that the Law Society should step up regulation and introduce additional safeguards to avoid chances of defalcation committed by practitioners, such as misappropriation of clients' moneys.

28. Mr Herbert TSOI responded that the Law Society was constantly examining ways to achieve better regulation of the conduct of legal practitioners and improve risk management for the profession. He opined that there were alternative methods to enhance protection offered to users of legal services and a fidelity fund was not the only solution.

29. Mr Albert HO reiterated his view that the establishment of a fidelity fund should be seriously considered to protect members of the public who had full trust on the integrity of the legal profession and yet suffered losses because of fraudulent acts committed by legal practitioners. He opined that the Administration should study the systems operating in other jurisdictions and start undertaking a consultation exercise to solicit the views of the public and interested parties, including, for instance, the Consumer Council, on how to devise a model suitable for Hong Kong.

The way forward

30. The Chairman concluded that there was no objection in principle to the setting up of a fidelity fund in due course for the better protection of users of legal services in Hong Kong. However, as noted from the views and concerns expressed, there were genuine issues which warranted detailed consideration by parties concerned before decisions could be made and steps be taken to implement the proposal. She said that although it would not be desirable to impose a timeframe for dealing with the matter, the Administration and the Law Society should commence discussion and consultation as soon as possible. The Panel could follow up the matter as and when necessary.

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VI. Persistent sexual abuse of a child
(LC Paper Nos. CB(2)1617/01-02(08); 1689/01-02(02) and 908/00-01(02))

31. The Chairman reminded members that the proposal to create a new statutory offence of persistent sexual abuse of a child was last discussed by the Panel at a meeting on 20 February 2001. She drew members' attention to the paper prepared by the Administration (LC Paper No. CB(2)1617/01-02(08)) which responded to a previous joint submission from the Bar Association and the Law Society made to the Panel in February 2001 (LC Paper No. CB(2)908/00-01(02)). The two legal professional bodies had prepared another joint submission (LC Paper No. CB(2)1689/01-02(02)) in response to the Administration's paper.

32. Deputy Director of Public Prosecutions (DDPP) briefed members on the Administration's paper. The views held by the Administration on the proposed new offence were summarised as follows -

(a) as evidenced by the judgment in the prosecution case in HKSAR v Chim Hon-man [1999] 1 HKLRD 764, the stringencies of the rules of indictment requiring the prosecution to prove one offence as the basis of one count charged presented difficulties in the case of a child victim of sexual abuse spanning a long period. The victim might be able to describe the nature of the sexual attacks but unable to particularise precisely each act of abuse. For this type of offences, it was artificial to attempt to compartmentalise abuse incidents and adduce evidence only to those specified incidents;

(b) under the proposed statutory offence, the offence of persistent sexual abuse of a child would be committed if a person engaged in a course of conduct involving the commission of a sexual offence against a particular child on at least three occasions, falling on separate days. It was not necessary to specify or to prove the dates or exact circumstances of the alleged sexual offences. This would alleviate the problems generated by the rules of indictment and rules of evidence in the prosecution of alleged offences which extended over a long period of time;

(c) the proposed new offence would not place the accused at any greater risk of conviction. The judge or the jury must be satisfied beyond reasonable doubt regarding the material facts of the three occasions in question. What determined the offence was the strength of the evidence. Where evidence had been led regarding more than three occasions, the jury must be so satisfied about the same three occasions and the trial judge must warn the jury of the

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requirement. If there were multiple allegations of a different nature, the judge was required to ask the jury upon which allegations their verdict was based; and

(d) the Administration's enquiries did not reveal problems in jurisdictions where the offence had been established. In particular, the offence was in use properly and effectively in New South Wales (NSW) and all other Australian states. The NSW offence was the model for the proposed legislation.

33. At the invitation of the Chairman, Ms Corinne REMEDIOS elaborated on the joint response of the Bar Association and the Law Society. She said that the two legal professional bodies were not satisfied that the Administration had made out a justifiable case for creating a new statutory offence of persistent sexual abuse of a child. The views detailed in the joint submission were summarised as follows -

(a) the difficulties in bringing prosecution, if any, were merely procedural. As noted in paragraphs 14 and 37 of the Administration's paper, there had so far been no case in which a prosecution could not be advanced or was unsuccessful adopting the approach in Chim. The approach had not presented problems to date;

(b) the problem of artificial compartmentalising of offences raised by the Administration could be overcome by charging a representative number of counts. Also, the evidentiary difficulty could be solved by using the method mentioned by Justice Patrick Chan in the case of HKSAR v Kwok Kau-kan [2000] 1 HKC 789, i.e. the trial judge giving direction and warning, where necessary, to the jury that it should disregard certain parts of the evidence if such evidence had a prejudicial effect on the accused;

(c) the legal professional bodies did not consider it appropriate to permit alternative verdicts of up to two substantive offences where not all three allegations were established under the proposed statutory offence. The prosecution should be made to select between offences under the new legislation and alternative substantive offences. If the prosecution failed on the former, verdicts on the latter should not be permissible;

(d) the trial judge's enquiry about the basis of a jury's verdict, whether at the stage of taking the verdict or prior to sentencing, would increase the scope for appeals where, for instance, the jury's answers were equivocal and/or where the defence counsel then sought further clarification of the jury's answers; and

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(e) it would be dangerous to dispense with the normal rules of evidence and adopt a three-instance "magic formula" approach, i.e. once three allegations were established then a verdict of guilty to the proposed offence of persistent sexual abuse was entered. Sentencing based on a mathematical formula would be artificial.

34. In response to Ms Audrey EU's question on the basis for sentencing, DDPP advised that a jury would inevitably be directed that it could only convict any offence if it was satisfied to the requisite standard that the elements of the offence had been established. The elements of the offence were three acts of a sexual nature which were defined for the jury. Where the alleged offences were not all of the same nature, it would require more specific investigation by the trial judge and questions to be asked of the jury as to the basis of its verdict.

35. The Chairman said that in her view, a major difficulty with the proposed offence of persistent abuse of a child was proof of the element of "persistence" by going beyond the normal established parameters. She said that she found it difficult to accept the proposal that a persistent sexual offence would be established by proving three allegations of abuse of a sexual nature.

36. Mr Martin LEE said that he had noted the points raised by both the Administration and the legal professional bodies and had yet to come to a stance himself. He considered that the issue would require more detailed discussion.

37. The Chairman said that it was a matter for the Administration to decide whether it should introduce a bill for the creation of the proposed statutory offence of persistent sexual abuse of a child, after taking into account the views expressed on the matter. She said that in the event of the introduction of a bill, in view of the complexity of the issue, it was expected that a bills committee would be formed by the House Committee to scrutinise the legislative proposal in detail.

38. There being no other business, the meeting ended at 7:05 pm.

Council Business Division 2
Legislative Council Secretariat
11 July 2002

Appendix

Panel on Administration and Legal Services

Consultation Paper on Process of Appointment of Judges

Summary of Written Submissions

	Issues for Consultation (Paragraph no. in the Consultation Paper)	**Judiciary Administrator (LC Paper No. 1617/01-02(03))**	**Director of Administration (LC Paper No. 1617/01-02(02))**	**Hong Kong Bar Association (LC Paper No. CB(2)1624/01-02(01))**	**Law Society of Hong Kong (LC Paper No. 1617/01-02(04))**	**Mr Tony YUEN (LC Paper No. 1617/01-02(05))**
	Procedure for LegCo to endorse judicial appointments under BL 73(7)					
(1)	Options for endorsement procedure (paras. 2.5 - 2.6) Option 1 - to maintain the status quo, subject to adequate information to be provided by the Administration on a judicial nominee	Option 1 is preferred as it enables cases to be dealt with flexibly and appropriately having regard to its features.	--	Option 1 is strongly supported as extending the endorsement procedure beyond the present system would tend to politicise the process to an unacceptable level. LegCo was given the power of endorsing judicial appointments, not making recommendations for appointment. LegCo should not sit on "appeal" from JORC or conduct a "re-hearing" of the recommendation exercise. LegCo should as a matter of convention normally accepts the recommendation of JORC and will only exercise its powers under the	--	--

	Issues for Consultation (Paragraph no. in the Consultation Paper)	**Judiciary Administrator (LC Paper No. 1617/01-02(03))**	**Director of Administration (LC Paper No. 1617/01-02(02))**	**Hong Kong Bar Association (LC Paper No. CB(2)1624/01-02(01))**	**Law Society of Hong Kong (LC Paper No. 1617/01-02(04))**	**Mr Tony YUEN (LC Paper No. 1617/01-02(05))**
				Legislative Council (Powers and Privileges) Ordinance when the recommended candidate is highly controversial.		
	Option 2 - to expand upon Option 1 by having a set procedure to deal with cases which may be controversial	Difficult to establish a prior procedure which would be satisfactory for all cases.	--	Does not support Option 2. Option 1 is sufficient to deal with any controversial cases.	--	--
	Option 3 - to adopt certain features of the system in the US e.g. the practice of the Senate Judiciary Committee of holding open hearings to question nominees	The institution of JORC distinguishes Hong Kong from many other jurisdictions and is a most important safeguard for judicial independence. The US system would be totally inappropriate and objectionable in Hong Kong's context as it would - - deter candidates from being considered for permanent positions as well as non permanent positions, including non-permanent judges from common law jurisdictions, most of which do not have features of the US system; and - have an adverse impact on recruitment at lower levels of the Judiciary.	--	Option 3 is not suitable for Hong Kong. It tends to politicise the appointment and also runs the risk of duplicating the process gone through by JORC.	The US system is considered to be inappropriate for Hong Kong for the following reasons - - the necessary investigations are best done by JORC on a confidential basis, with LegCo exercising a supervisory role by way of its power of endorsement; - the process of judicial appointment must not become politicised; - any public intrusion into the private life of a candidate must be strictly controlled;	--

	Issues for Consultation (Paragraph no. in the Consultation Paper)	**Judiciary Administrator (LC Paper No. 1617/01-02(03))**	**Director of Administration (LC Paper No. 1617/01-02(02))**	**Hong Kong Bar Association (LC Paper No. CB(2)1624/01-02(01))**	**Law Society of Hong Kong (LC Paper No. 1617/01-02(04))**	**Mr Tony YUEN (LC Paper No. 1617/01-02(05))**
					- a system which might cause unnecessary embarrassment to candidates is objectionable; and - suitable candidates might be deterred from applying.	
	Any other variations	--	--	--	--	--
(2)	Whether the information provided to LegCo on a judicial nominee should be expanded to include as many of the items in the documents set out in Appendices I -IV (para. 2.17)	In future exercises, JORC will be asked to consider the appropriate information that should be supplied to CE to enable CE to supply the same information to LegCo. Careful consideration will have to be given to whether any distinction should be drawn between proposed appointments as CFA non-permanent judges, particularly those from common law jurisdictions, and proposed appointments to senior permanent posts.	--	LegCo should be provided with sufficient information about the personal and professional background of the candidate to enable LegCo to reach an informed decision based on the candidates' experience and integrity.	All candidates should be required to complete a detailed application form which would include a detailed description of their legal experience and expertise.	--
(3)	Whether LegCo should be exempt explicitly from the application of section 11(1) of the JORC Ordinance in exercising its duty under BL 73(7) (para. 2.17)	--	--	--	Does not agree that LegCo should be explicitly exempt from the application of section 11(1). As disclosure "in the course of duty" is permissible, any amendment to section 11(1) is considered unnecessary.	--

	Issues for Consultation (Paragraph no. in the Consultation Paper)	**Judiciary Administrator (LC Paper No. 1617/01-02(03))**	**Director of Administration (LC Paper No. 1617/01-02(02))**	**Hong Kong Bar Association (LC Paper No. CB(2)1624/01-02(01))**	**Law Society of Hong Kong (LC Paper No. 1617/01-02(04))**	**Mr Tony YUEN (LC Paper No. 1617/01-02(05))**
	Process of appointment of judges					
(4)	Membership of JORC - whether any changes should be introduced in respect of the composition of JORC, e.g. the membership of SJ and the criteria for appointing members to JORC (paras. 3.5 - 3.12)	--	Membership of SJ It is appropriate for SJ to be involved as a member of JORC in judicial appointments because of her role - - as guardian of the public interest in the administration of justice and upholder of the rule of law; - as the principal adviser on legal matters to CE; and - as the head of Department of Justice which employs a large number of lawyers and briefs out a great deal of work to the private sector.	Membership of SJ Majority view is that SJ (or a representative of DOJ) should be a member of JORC. It is not necessary for SJ to be an "ex-officio" member. If SJ will be politically appointed under the proposed accountability system, there is a strong feeling within the Bar that in order to ensure the independence of the judiciary and the appearance of lack of political influence in the appointment of judges, it is more appropriate to have a representative of DOJ, rather than SJ, as a member of JORC.	Membership of SJ As a principal adviser to CE, SJ should advise CE on the recommendation of JORC, but should no longer be a member of JORC.	Membership of SJ The presence of SJ as a member of JORC undermines the independence of Judiciary. It is advisable to remove SJ from the membership of JORC to show that JORC is independent from the executive branch of the government.

	Issues for Consultation (Paragraph no. in the Consultation Paper)	**Judiciary Administrator (LC Paper No. 1617/01-02(03))**	**Director of Administration (LC Paper No. 1617/01-02(02))**	**Hong Kong Bar Association (LC Paper No. CB(2)1624/01-02(01))**	**Law Society of Hong Kong (LC Paper No. 1617/01-02(04))**	**Mr Tony YUEN (LC Paper No. 1617/01-02(05))**
			There is no suggestion under international and human rights principles of judicial independence, or under the common law, that involvement of the executive in the nomination of judges breaches judicial independence, provided safeguards are in place. In Hong Kong, such safeguards include the security of tenure of judges. <u>Other members</u> Appointments are based on merits and relevant attributes of individual members. No reason to discriminate against the membership of a particular member simply on the ground that he is a deputy to the NPC.	A sizable minority expresses the strong view that SJ, being a member of the Executive, should not be a member of JORC at all. <u>Other members</u> The criteria for appointment of such members should be more clearly set out in the JORC Ordinance. The number of such members should be two, instead of three. Procedures should be provided for LegCo and the legal profession to be consulted on a confidential basis on the appointment of these members. There are also views within the Bar that the appointments must be endorsed by LegCo.	<u>Other members</u> There should be two members from each branch of the legal profession on the JORC. Practising lawyers are best placed to assess the quality of judicial candidates and to offer assistance to other members of JORC in their assessment. Appointments to JORC should be for a term of two years only.	<u>Other members</u> There are now three members of JORC who are not connected in any way with the practice of law. However, these three members are all from the upper middle class. Consideration should be given to appointing a prominent leader who represents the interests of the grass root class as a member of JORC.

	Issues for Consultation (Paragraph no. in the Consultation Paper)	**Judiciary Administrator (LC Paper No. 1617/01-02(03))**	**Director of Administration (LC Paper No. 1617/01-02(02))**	**Hong Kong Bar Association (LC Paper No. CB(2)1624/01-02(01))**	**Law Society of Hong Kong (LC Paper No. 1617/01-02(04))**	**Mr Tony YUEN (LC Paper No. 1617/01-02(05))**
			LegCo Members After the reunification, LegCo has a separate role under Article 73(7) of the Basic Law to endorse appointment of senior judges.	--	LegCo Members Any person who has specific political affiliations or appointments should not be a member of JORC.	LegCo Members Appointment of a LegCo Member who is directly elected as a member of JORC should not pose a problem. Section 4(1) of the JORC Ordinance should be amended.
(5)	Accountability of JORC - whether JORC should be required to publish an annual report (paras 3.13 - 3.14)	The Judiciary will conduct a review of JORC's operation after the Panel has issued its final report.	--	The proposal to require JORC to publish an annual report is supported.	--	JORC should publish an annual report to enhance its transparency and accountability. The report should contain the appointments made or considered and the voting of JORC members.
(6)	Open recruitment for judicial vacancies -whether open recruitment should be extended to judicial vacancies at the High Court level and above (paras. 3.15 - 3.17)	The Judiciary will conduct a review of JORC's operation after the Panel has issued its final report. Observations at this stage - the pros and cons have to be carefully weighed.	--	Open recruitment for all judicial vacancies is supported. There are merits in adopting the present English system in Hong Kong.	Open recruitment should be adopted for judicial vacancies at the High Court level and above.	Open recruitment should be adopted for judicial vacancies at all levels.

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(7)	Consultation by JORC members - whether section 11(1) of the JORC Ordinance should be reviewed and amended (paras. 3.18 - 3.20)	The Judiciary will conduct a review of JORC's operation after the Panel has issued its final report. Observations at this stage - - JORC papers and minutes could not be published or disclosed; - there is nothing to preclude or inhibit a JORC member from undertaking consultation on a continuous basis; and - Section 11(1) is in similar terms to section 12(1) of the Public Service Commission Ordinance which recognises the need for confidentiality in matters relating to appointment and promotion.	--	Section 11(1) of the JORC Ordinance is too widely drawn and should be amended to enhance the proper and effective discharge of the functions of JORC members. This would also address the problems experienced by LegCo in exercising its power in endorsing judicial appointments. However, confidentiality of the information provided to LegCo must be preserved --	--	--

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(8)	Voting of JORC - whether any changes should be made to the existing provision governing the number of dissenting votes permissible for a resolution of JORC to be effective (paras. 3.21 - 3.23)	--	There is no reason why any two members of JORC should have, in effect, a veto power over appointments that enjoy the support of the remaining majority. The current voting rules are uniformly applied to all members, irrespective of their background. There is no reason to change it.	There is more or less equal support on the following two options in relation to appointments to the CFA and Chief Judge of the High Court - (a) a majority vote is permitted but the dissenting votes must not exceed two and must not include a dissenting vote from the representatives of the judiciary, the SJ (or the representative from DOJ) or the legal profession; or (b) voting shall be unanimous given the importance of the appointments. The majority of the Bar supports the first option.	--	--

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	Mechanism for handling complaints against judges					
(9)*	Preliminary views on the desirability and feasibility of establishing a mechanism for handling complaints against judges (paras. 4.1 - 4.2)	The present system is satisfactory. (A separate paper has been provided to the Panel vide LC Paper No. CB(2)1388/01-02(02).)	--	The Judiciary Administrator's paper on the present system is supported. However, the system should be published to increase transparency.	It is appropriate to establish a system to address instances of poor or inappropriate judicial performance. However, the matter should be fully debated before specific proposals are put forward.	The move to establish a formal system in handling complaints against judges must proceed with great prudence. There is no need to establish such a formal system and status quo should be maintained.

Council Business Division 2
Legislative Council Secretariat
11 July 2002

Abbreviations

CE - Chief Executive
CFA - Court of Final Appeal
BL - Basic Law
DOJ - Department of Justice
JORC - Judicial Officers Recommendation Commission
LegCo - Legislative Council
SJ - Secretary for Justice
US - United States

* The Research and Library Services Division of LegCo is undertaking a research on the systems adopted in Canada, the Untied States and the United Kingdom for handling complaints against judges. The research is expected to be completed in July 2002.