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Paper for the House Committee meeting on 31 March 2006

Subcommittee on Proposed Senior Judicial Appointment

Purpose

This paper reports on the deliberations of the Subcommittee on Proposed Senior Judicial Appointment.

Background

Constitutional and statutory provisions

2. Pursuant to Article 88 of the Basic Law and the Judicial Officers Recommendation Commission Ordinance (Cap. 92), the Judicial Officers Recommendation Commission (JORC) is entrusted with the function of making recommendation to the Chief Executive regarding the appointment of judges. JORC consists of the Chief Justice as the Chairman, the Secretary for Justice and seven other members appointed by the Chief Executive. These seven members include two judges, one barrister appointed after consultation with the Bar Council, one solicitor appointed after consultation with the Council of the Law Society of Hong Kong and three persons not connected with the practice of law. Under section 3(3A) of Cap. 92, a resolution is not effective if there are more than two votes not in favour. The recommendation of JORC is then communicated to the Chief Executive.

3. Article 48(6) of the Basic Law confers on the Chief Executive the power and function to appoint judges in accordance with legal procedures. Article 88 of the Basic Law provides that judges of the courts of the Hong Kong Special Administrative Region (HKSAR) shall be appointed by the Chief Executive on the recommendation of JORC. Article 73(7) of the Basic Law confers on the Legislative Council (LegCo) the power and function to endorse the appointment of CFA judges and the Chief Judge of the High Court. Article 90 of the Basic Law provides that the Chief Executive shall, in addition to following the procedure prescribed in Article 88, obtain the endorsement of LegCo for the appointment of CFA judges and the Chief Judge of the High Court. The Chief Executive shall also report such appointment to the Standing Committee of the National People's Congress for the record under Article 90. The requirements in relation to the appointment of CFA judges are also stipulated in section 7A of the Hong Kong Court of Final Appeal Ordinance (Cap. 484).

Past appointment exercises

4. Since 1 July 1997, LegCo has exercised its power to endorse the appointment of judges under Article 73(7) of the Basic Law on three occasions, as follows –
- (a) in June 2000, LegCo endorsed seven CFA appointments, comprising two permanent judges, two non-permanent Hong Kong judges, and three non-permanent judges from other common law jurisdictions;
 - (b) in December 2000, LegCo endorsed the appointment of the Chief Judge of the High Court; and
 - (c) in July 2003, LegCo endorsed the appointment of three non-permanent common law judges to CFA and the appointment of the Chief Judge of the High Court.

A set of procedures for obtaining the LegCo endorsement of the appointment of judges has been agreed by the House Committee in May 2003.

The current appointment exercise

5. In a letter dated 6 January 2006 to the Chairman of the House Committee, the Director of Administration advised that in accordance with Articles 88 and 90 of the Basic Law and sections 7A and 9(2) of the Hong Kong Court of Final Appeal Ordinance, the Chief Executive had accepted the recommendation of JORC on the appointment of Mr Michael McHugh AC and Mr Justice Thomas Munro Gault DCNZM as non-permanent common law judges to CFA.

6. Pursuant to Article 90 of the Basic Law and section 7A of the Ordinance, the Administration intends to give notice to move a motion to obtain the endorsement of LegCo on the appointment at the earliest opportunity within this legislative session. Subject to the endorsement of LegCo, the Chief Executive will make the recommended appointment under Article 88 of the Basic Law. The two recommended appointees will be ready to take up appointment in April 2006.

The Subcommittee

7. At the meeting of the House Committee on 13 January 2006, Members formed a subcommittee to consider the proposed judicial appointment.

8. Under the chairmanship of Hon Margaret NG, the Subcommittee has held one meeting with the Administration and the Judiciary Administration to discuss the proposed judicial appointment and related issues. The membership list of the Subcommittee is in the **Appendix**.

Deliberations of the Subcommittee

Appointment of non-permanent judges to CFA

9. The Subcommittee noted that CFA is the final appellate court in Hong Kong, hearing both civil and criminal appeals. It consists of the Chief Justice and the permanent judges. Non-permanent judges may be invited to sit. There are two lists of non-permanent judges, namely, the list of non-permanent Hong Kong judges, and the list of judges from other common law jurisdictions. The maximum number of non-permanent judges is 30. At present, there are 17 non-permanent judges comprising eight non-permanent Hong Kong judges and nine non-permanent common law judges.

10. When hearing and determining appeals, CFA is constituted by five judges as follows –

- (a) the Chief Justice (where the Chief Justice is not available to sit, he designates a permanent judge to preside);
- (b) three permanent judges (where a permanent judge is not available, the Chief Justice nominates a non-permanent Hong Kong judge to sit in his place); and
- (c) one non-permanent Hong Kong judge or one non-permanent common law judge selected by the Chief Justice and invited by the Court. A non-permanent common law judge has usually been selected and invited to sit, and the Chief Justice's intention is to continue this arrangement.

11. Under section 14(4) of the Hong Kong Court of Final Appeal Ordinance, a non-permanent judge 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 acting in accordance with the recommendation of the Chief Justice. There is no retirement age for a non-permanent judge.

Requirements and qualifications for non-permanent common law judges

12. The Subcommittee has noted that Article 92 of the Basic Law provides that judges of the HKSAR shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions.

13. 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. He must also be a person who 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.

The current appointment exercise

14. The Administration has explained in its letter that the availability of non-permanent common law judges for sittings of CFA is limited as they have other commitments. In the light of the caseload of CFA and in order to give greater flexibility for dealing with the caseload, the Chief Justice considers that the number of non-permanent common law judges should be increased from nine to 11. The Chief Justice had therefore invited JORC to consider the appointment of Mr Michael McHugh AC and Mr Justice Gault DCNZM as non-permanent common law judges of CFA. The appointments were recommended by JORC and accepted by the Chief Executive.

15. Members have asked whether non-permanent common law judges appointed to CFA are mostly retired judges in their home jurisdictions. The Judiciary Administration has explained that Mr Michael McHugh AC is a citizen of Australia, and Mr Justice Gault DCNZM a citizen of New Zealand. Due to the relatively small number of judges in the appellate courts in Australia and New Zealand, it is the policy of these appellate courts not to make available their serving judges to serve concurrently in other jurisdictions. In view of this, non-permanent common law judges of CFA who are appointed from these two jurisdictions are retired judges.

16. In response to members' request, the Judiciary Administration has provided information on the date of appointment of the nine serving non-permanent common law judges of CFA, and their year/date of retirement as judges in their home jurisdictions. Members have noted that five judges from Australia and New Zealand were appointed as non-permanent judges to CFA within one to two years after their retirement in their home jurisdictions. Two judges are serving Law Lords in the United Kingdom, and two judges from the United Kingdom have retired subsequent to their appointment as non-permanent judges to CFA.

17. The Subcommittee has also noted the curriculum vitae (CV) on Mr Michael McHugh AC and Mr Justice Gault DCNZM provided by the Administration. Their CV covers various aspects, including personal background, education, legal experience, judicial experience, services and activities related to the legal field, awards and publications. In response to the request of the Subcommittee, the Judiciary Administration has made available a number of publications of Mr Michael McHugh AC and Mr Justice Gault DCNZM for members' perusal.

18. The Subcommittee has also sought the views of the two legal professional bodies on the proposed appointment. The Hong Kong Bar Association is of the view that the possibility of an unacceptable candidate being put forward by JORC is remote. The Law Society of Hong Kong has responded that it has noted the standing and reputation of the two recommended appointees, and considers that their appointment will be of advantage to CFA.

19. The Subcommittee supports the proposed judicial appointment. The Subcommittee has no objection to the Administration giving notice of a motion to seek the endorsement of LegCo on the proposed appointment under Article 73(7) of the Basic Law.

Advice sought

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

Council Business Division 2
Legislative Council Secretariat
30 March 2006

Subcommittee on Proposed Senior Judicial Appointment

Membership List

Chairman	Hon Margaret NG
Members	Hon Martin LEE Chu-ming, SC, JP Hon James TO Kun-sun Hon Miriam LAU Kin-yee, GBS, JP Hon Audrey EU Yuet-mee, SC, JP Hon LI Kwok-ying, MH Hon Alan LEONG Kah-kit, SC (Total : 7 Members)
Clerk	Mrs Percy MA
Legal Adviser	Mr Arthur CHEUNG
Date	16 February 2006