

立法會
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Paper for the House Committee meeting on 13 May 2011

Subcommittee on Proposed Senior Judicial Appointments

Purpose

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

Background

Constitutional and statutory provisions

2. Article 48(6) of the Basic Law ("BL") confers on the Chief Executive ("CE") the power and function to appoint judges of the courts at all levels in accordance with legal procedures. In accordance with BL 88, judges shall be appointed by CE on the recommendation of an independent commission, namely, the Judicial Officers Recommendation Commission ("JORC").

3. In the case of the appointment of judges of the Court of Final Appeal ("CFA") and the Chief Judge of the High Court ("CJHC"), BL 90 provides that CE shall, in addition to following the procedures prescribed in BL 88, obtain the endorsement of the Legislative Council ("LegCo"). Subject to the endorsement of LegCo, CE shall report such appointment to the Standing Committee of the National People's Congress for the record. BL 73(7) correspondingly confers on LegCo the power and function to endorse the appointment of CFA judges and CJHC.

4. Pursuant to BL 88 and the JORC Ordinance (Cap. 92), JORC is entrusted with the function of making recommendations to CE regarding the filling of vacancies in judicial offices. As prescribed in the JORC Ordinance, JORC consists of the Chief Justice of CFA ("CJ") as the Chairman, the Secretary for Justice and seven other members appointed by

CE comprising two judges, one barrister, one solicitor and three other persons who are not connected with the practice of law. CE is required by the JORC Ordinance to consult the Bar Council of the Hong Kong Bar Association and the Council of the Law Society of Hong Kong regarding the appointment of the barrister and the solicitor respectively.

The current appointment exercise

5. In a letter dated 11 April 2011 to the Chairman of the House Committee, the Director of Administration advised that in accordance with BL 88, CE had accepted the recommendations of JORC to appoint -

- (a) The Right Honourable the Lord Collins of Mapesbury and the Right Honourable the Lord Clarke of Stone-cum-Ebony as non-permanent judges from other common law jurisdictions to CFA; and
- (b) Mr Justice Andrew CHEUNG Kui-nung as CJHC.

Appointment of non-permanent judges to CFA

6. The CFA is the final appellate court in Hong Kong hearing both civil and criminal appeals. It consists of CJ 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 six non-permanent Hong Kong judges and 11 non-permanent common law judges.

7. When hearing and determining appeals, CFA is constituted by five judges, namely, CJ (where he is not available to sit, he designates a permanent judge to preside), three permanent judges (where a permanent judge is not available, CJ nominates a non-permanent Hong Kong judge to sit in his place), and one non-permanent Hong Kong judge or one non-permanent common law judge. From 1997, apart from very few exceptions, the "fifth judge" has invariably been drawn from the list of non-permanent common law judges to hear a substantive appeal.

8. Section 12(4) of the Hong Kong CFA Ordinance (Cap. 484) provides that a person shall be eligible to be appointed as a non-permanent common law judge to CFA if he is -

- (a) a judge or retired judge of a court of unlimited jurisdiction in either civil or criminal matters in another common law jurisdiction;
- (b) a person who is ordinarily resident outside Hong Kong; and
- (c) a person who has never been a judge of the High Court, a District Court or a permanent magistrate, in Hong Kong.

9. As it is anticipated that two non-permanent common law judges would unlikely be available to sit in the near future and having regard to the extensive professional and personal commitments of the other non-permanent common law judges, JORC proposed and CE accepted the appointment of Lord Collins and Lord Clarke as non-permanent common law judges with a view to expanding the number of non-permanent common law judges to give greater flexibility for dealing with CFA caseload and to ensure its effective operation.

Appointment of CJHC

10. CJHC is the court leader of the High Court comprising the Court of Appeal ("CA") and the Court of First Instance. Under section 5(3) of the High Court Ordinance (Cap. 4), CJHC is also the President of CA. CJHC will preside in CA in the more important appeals as well as other appeals. As court leader of the High Court, CJHC has to lead the High Court administratively.

11. The professional qualifications for CJHC are the same as those for a judge of the High Court, which are stipulated in section 9 of the High Court Ordinance. In addition, BL 90 requires that CJHC shall be a Chinese citizen who is a permanent resident of the Hong Kong Special Administrative Region with no right of abode in any foreign country.

12. The office of CJHC became vacant on 1 September 2010 when the incumbent CJ, Mr Justice Geoffrey MA, who was the CJHC immediately prior to that date, assumed the position of CJ and vacated the office of CJHC on the same date. Mr Justice Robert TANG Ching, Justice of Appeal and

Vice-President of CA, has been acting as CJHC from 1 September 2010 until the CJHC vacancy is substantively filled.

The Subcommittee

13. In accordance with the procedure for LegCo to endorse judicial appointments under BL 73(7), which was endorsed by the House Committee in May 2003, the House Committee formed a subcommittee to consider the proposed senior judicial appointments at its meeting on 15 April 2011.

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

Deliberations of the Subcommittee

Procedure for considering judicial appointments

15. Members have expressed views on the procedure for considering judicial appointments by LegCo. Members agree that the fundamental principles of separation of powers and judicial independence should be respected in considering judicial appointments and it is vital that the appointment process of judges should not be politicized. Members generally are of the view that LegCo should as a matter of convention respect and accept the nominations made by JORC unless it has serious concerns with them. While LegCo's power to endorse judicial appointments is substantive, it should only act as the final gatekeeper not to endorse a judicial appointment which is manifestly contrary to public interest. Members consider it important to adhere to these principles in considering judicial appointments.

16. Members generally share the view that it is not intended that LegCo should duplicate the elaborate process JORC has gone through in coming up with recommended judicial appointments. Members note that a barrister and a solicitor are sitting on JORC and views from the legal profession have been taken into account in the consideration of the proposed appointments. The Subcommittee considers it not necessary to invite views from relevant organizations as there is no controversy over the proposed appointments.

The proposed senior judicial appointments

17. Members have considered the curriculum vitae of the recommended appointees provided by the Administration covering various aspects including personal background, education, legal experience, judicial experience, services and activities, publications and awards. In response to the Subcommittee's request, the Judiciary Administration has provided further information on the major publications of and judgments made by the recommended appointees. The Subcommittee supports the proposed appointments of Lord Collins and Lord Clarke as non-permanent judges from other common law jurisdictions to CFA and Mr Justice Andrew CHEUNG Kui-nung as CJHC. The Subcommittee has no objection to the Administration giving notices of motions to seek the endorsement of LegCo on the recommended appointments.

Advice sought

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

Council Business Division 2
Legislative Council Secretariat
11 May 2011

Appendix

Subcommittee on Proposed Senior Judicial Appointments

Membership list

Chairman Dr Hon Margaret NG

Members Hon Albert HO Chun-yan
Hon LAU Kong-wah, JP
Hon Emily LAU Wai-hing, JP
Hon Paul CHAN Mo-po, MH, JP
Dr Hon Priscilla LEUNG Mei-fun
Hon LEUNG Kwok-hung

(Total : 7 Members)

Clerk Ms Amy YU

Legal Adviser Mr KAU Kin-wah