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Background brief prepared by the Legislative Council Secretariat

Subcommittee on Proposed Senior Judicial Appointments

Purpose

This paper provides background information on the procedure for endorsement of senior judicial appointments by the Legislative Council ("LegCo") under Article 73(7) of the Basic Law ("BL 73(7)") and gives a brief account of the relevant discussions by LegCo committees.

Background

2. BL 48(6) 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, BL 90 provides that CE shall, in addition to following the procedures prescribed in BL 88, obtain the endorsement of LegCo and 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 the Chief Judge of the High Court. Such procedure is also stipulated in section 7A of the Hong Kong Court of Final Appeal Ordinance (Cap. 484).

Judicial Officers Recommendation Commission

Membership

4. JORC is established under section 3 of the JORC Ordinance, Cap. 92. According to section 6 of this Ordinance, JORC shall advise or make recommendations to CE regarding, among other things, the filling of vacancies in

judicial offices as specified in the Ordinance. Section 3(1) of Cap. 92 provides that JORC shall consist of the Chief Justice of CFA ("CJ") as the Chairman, the Secretary for Justice ("SJ") and seven other members appointed by CE of whom two shall be judges, one shall be a barrister and one shall be a solicitor and three shall be persons who are not, in the opinion of CE, connected in any way with the practice of law. CE is required by section 3(1A) of Cap. 92 to consult the Council of the Hong Kong Bar Association ("the Bar Association") and the Council of The Law Society of Hong Kong ("the Law Society") regarding the appointment of the barrister and the solicitor respectively.

5. Section 4 of Cap. 92 provides that a person shall not be appointed to be a member of JORC if he is a LegCo Member; or if he holds a pensionable office (other than the office of a judge) the emoluments whereof are payable wholly or partly out of public revenue, unless he is on leave prior to retirement and has already received official notification of the pension which will be payable to him for service which comprises service in the office or post of which he is the holder.

6. The procedure and voting requirements of JORC are laid down in Cap. 92.

Procedure

7. The Chairman and no fewer than six other members may exercise and perform any of the functions, powers and duties of JORC. For the purposes of any meeting of JORC, if CJ is unable to act as Chairman, those members present at that meeting may by resolution appoint any of their members to act in his place and in so acting to exercise and perform all the functions of the Chairman at that meeting. If any appointed member is absent from Hong Kong or is unable to act, CE may appoint another person to act temporarily as a member.

Voting requirements

8. At a meeting of JORC, a resolution is effective if -

- (a) where seven members are present, at least five vote in favour;
- (b) where eight members are present, at least six vote in favour; and
- (c) where nine members are present, at least seven vote in favour.

Disclosure of interests

9. Cap. 92 provides that where JORC is exercising its functions in relation to the filling of vacancies in judicial offices as specified in Schedule 1 to the Ordinance or to the extension of the term of office of CJ under section 14 of

Cap. 484, a member who is or may reasonably be regarded as a candidate for selection to fill any such vacancy or whose term of office is being considered for extension shall disclose whether or not, if he were to be selected or if the extension of his term of office were to be recommended, he is willing to accept appointment or the extension, and that disclosure shall be recorded in the minutes of JORC's meeting.

10. A member who discloses a willingness to accept an appointment or extension shall not take part in any deliberation of JORC with respect to that appointment or extension and shall not vote on any question concerning the same; and shall, with respect to any deliberation of JORC concerning that appointment or extension as the case may be and any question concerning the same, be treated as being unable to act.

11. In reply to a written question raised by a Member at the Council meeting on 19 May 1999, the then Chief Secretary for Administration explained that, in addition to the above statutory requirement, judges on JORC would not participate in deliberations on filling of vacancies if he or she was, or might reasonably be, regarded as a candidate for filling the vacancies. It had been the practice of JORC members to declare their personal association, if any, with any candidate being considered for appointment, and any possible interest in matters laid before JORC.

Procedure for endorsement of appointment of judges by the Legislative Council under Article 73(7) of the Basic Law

12. After publication of its Report on Process of Appointment of Judges in September 2002, the Panel on Administration of Justice and Legal Services ("the AJLS Panel") recommended the following procedure for endorsement of appointment of judges by LegCo under BL 73(7) which was endorsed by the House Committee ("HC") on 16 May 2003 and 28 May 2004 –

- (a) the Administration advises HC of the acceptance by CE of the recommendation of JORC and provides sufficient information on the recommended judicial appointee(s) to LegCo (this should take place before CE makes any public announcement of his acceptance of the recommendation);
- (b) HC would decide whether or not a subcommittee should be appointed to consider the appointment(s);
- (c) the subcommittee, if appointed, will discuss the matter as soon as possible;

- (d) the subcommittee reports its deliberation to HC;
- (e) the Administration gives notice of a motion to seek the endorsement of LegCo of the recommended appointment;
- (f) the motion is moved, debated and voted on at a Council meeting;
and
- (g) if the motion is passed by the Council, CE makes the appointment.

13. The AJLS Panel also recommended that in seeking LegCo's endorsement of a judicial appointment under BL73(7), the information provided by the Administration should include as many as possible the items contained in the questionnaire set by the United States Senate Judiciary Committee and the application form for appointment as Justice of the High Court in the United Kingdom (Appendices II and III to LC Paper No. CB(2)2448/08-09(01) issued on 7 September 2009). In this connection, the Judiciary had agreed that in future appointment exercises, JORC would be asked to consider the appropriate information that should be supplied to CE, to enable CE to supply sufficient information to LegCo.

14. The procedure for endorsement of judicial appointment by LegCo set out in paragraph 12 was adopted for the first time for the senior judicial appointment exercise in July 2003 and was adopted in subsequent judicial appointment exercises in 2006, 2008, 2010, 2011, 2012, 2013 and 2017 as set out in **Appendix I**. In each of the above exercises, with the exception for 2008, a subcommittee¹ was formed by HC to consider the relevant senior judicial appointments.

Major views and concerns of Members

15. The major views and concerns raised by Members during their deliberations of senior judicial appointments and related matters are summarized in the ensuing paragraphs.

Procedure for endorsement of judicial appointments by the Legislative Council

16. During the discussion on the procedure to fill the anticipated vacancy of CJ at the meeting of the AJLS Panel on 23 November 2009, members were in general of the view that the process of judicial appointments should not be

¹ In this paper, unless otherwise stated, the subcommittee formed by the House Committee to consider the senior judicial appointments in a particular year, say 2006, is referred to as the subcommittee of that year, say 2006 subcommittee.

politicized as it would violate the fundamental principle of separation of powers. They considered that LegCo should exercise its power of endorsement prudently and that judicial appointments should best be left to JORC, a body with legal professionals as members best equipped to consider the judicial qualities of a candidate. LegCo's power to endorse judicial appointments was substantive in that it could act as the final gatekeeper to stop a judicial appointment which was manifestly contrary to public interest. However, such power should only be exercised in exceptional circumstances, and it should be a constitutional convention for LegCo to accept nominations made by JORC.

17. The Bar Association advised that it was not intended that LegCo should duplicate the elaborate process JORC had gone through in coming up with the recommendation. Hence, LegCo should as a matter of convention accept the recommendation of JORC. The Bar Association considered that LegCo might consider not endorsing an appointment only if it considered that the relevant information provided by the Administration had failed to identify the nominee recommended by JORC as an appropriate candidate for appointment.

18. The 2011 subcommittee considered it important that the fundamental principles of separation of powers and judicial independence should be respected in considering judicial appointments and the appointment process of judges should not be politicized. Members generally shared the view that LegCo should as a matter of convention respect and accept the nominations made by JORC unless it had serious concerns with them.

Information on recommended candidates in the appointment exercises

19. At the AJLS Panel meeting on 23 November 2009, members in general considered that the Administration should provide as much information on a recommended candidate as possible so that LegCo could consider the appointment on an informed basis. The Administration informed the AJLS Panel that in the appointment exercises conducted after the AJLS Panel's review of the process of appointment of judges in 2002, the curriculum vitae of the recommended appointees provided by the Administration had covered more information, including personal background, education, legal experience, judicial experience, services and activities, awards, and publications.

20. The 2013 subcommittee had urged for greater transparency in the senior judicial appointment process, such as making the criteria for appointment clearer, for better public scrutiny.

Membership of the Judicial Officers Recommendation Commission

21. At the AJLS Panel meeting on 23 November 2009, members noted that during the AJLS Panel's review of the process of appointment of judges in 2002, both the Bar Association and the Law Society had expressed the view that it was not appropriate for SJ, being one of the Principal Officials under the Political Appointment System ("PAS"), to be a member of JORC. Some members also considered that SJ, a political appointee under PAS, should not participate in the appointment process of judges. They were concerned that in the event that the candidate proposed by JORC was highly controversial, the membership of SJ in JORC might further complicate the matter. A member, however, did not consider that there was any problem with SJ's membership in JORC.

22. The Administration responded that apart from being the principal adviser on legal matters to the Government, SJ was also endowed with the constitutional role of being the guardian of public interest in the administration of justice and the upholder of the rule of law. In addition, SJ had the overall responsibility for the Department of Justice ("DoJ") which was one of the three major court users. It was essential that SJ remained a member of JORC to fulfil his important roles in these various respects.

23. At the above meeting, a member expressed concern about the voting power of SJ on JORC. The Administration explained that the voting requirements of JORC was laid down in section 3(3A) of Cap. 92 (paragraph 8 above refers). More than two dissenting votes were required to vote down a resolution of JORC on a recommended appointment. However, deliberations of JORC were confidential and details of its voting results would not be disclosed.

24. Some members of the 2010 and 2012 subcommittees expressed their reservations about the membership of SJ, being a Principal Official under PAS, in JORC. The 2010 subcommittee referred the issue to the AJLS Panel for follow-up. At its meeting on 28 February 2011, the AJLS Panel discussed the item of "Membership of SJ in JORC" with the Administration. Some members reiterated the view that it was not appropriate for SJ, being a political appointee, to serve on JORC.

25. The Administration, however, maintained its view that it was appropriate and necessary for SJ to continue to serve on JORC. The Administration explained that the membership of SJ in JORC would not undermine the independence of the senior judicial appointment process. Being the principal adviser on legal matters to CE and the head of DoJ, SJ was in a unique position and had considerable knowledge to contribute to the JORC's deliberations in respect of judicial appointments. According to the Administration, such views were also shared by the Judiciary Administration ("JA").

Manpower shortage and the distribution of workload among judges in the Judiciary

26. Some members of the 2017 subcommittee expressed concerns about the shortage of judges and the uneven distribution of caseloads among judges in the High Court of the Judiciary. There were views that some judges who specialized in handling criminal cases could in fact be assigned civil cases to relieve the heavy workload of other judges, and the Judiciary should implement a policy of filling senior positions through internal promotion to address manpower shortage.

27. In reply, JA explained that judges with mixed expertise had been assigned both criminal and civil cases. JA also pointed out that in the open recruitment of judges at the levels of the District Courts and the Court of First Instance, some of the vacancies were filled by internal candidates from the lower levels of court. However, as CJ had repeatedly stressed, it was also important for the Judiciary to continue to attract talents from the legal practitioners from outside the Judiciary so as to sustain a positive long term development of the Hong Kong's judicial service.

28. The 2017 subcommittee also suggested that more new blood should be introduced to the pool of non-permanent judges from other common law jurisdictions ("CLNPJs") and more judges from other common law jurisdictions apart from the United Kingdom ("UK"), such as Australia or New Zealand, etc., should be appointed. In addition, when the term of an incumbent CLNPJ was due for renewal, consideration should be given to his or her age and the period served in determining whether the tenure should be extended.

29. In response, the Secretary of JORC ("SJORC") pointed out that since 1997, CLNPJs had been appointed from among judges and retired judges in UK. Given the relatively smaller size of their jurisdictions, Australia and New Zealand only agreed to make available retired judges to serve as CLNPJs. Regarding the tenure of CLNPJs, SJORC pointed out that there was no retirement age for CLNPJs. Furthermore, all CLNPJs had made important and valuable contributions to CFA, and Hong Kong would benefit from their expertise and experience if these CLNPJs could continue to serve if they were willing and available and their health permitted.

Vetting of candidates' suitability for judicial appointments by the Judicial Officers Recommendation Commission

30. The 2017 subcommittee expressed concern that unlike the appointment of judges from Hong Kong on whose appointment checking was conducted, JORC relied on the curricula vitae and relevant information provided by persons being

considered for appointment as CLNPs in its deliberation. The subcommittee commented that for senior positions such as CLNPs of CFA, there should be a more rigorous process in appointment checking to ensure that the candidates were suitable for appointment and that they could be entrusted to handle important legal cases in Hong Kong. The subcommittee suggested the Judiciary implemented a due diligence process; and that JORC would then consider the due diligence report from the Judiciary when making a recommendation to CE for appointment of CLNPs.

31. A member of the 2017 subcommittee asked whether JORC would research into candidates' political stance, political background and past involvement in political activities, and took those factors into consideration when formulating recommendations to CE on the appointment of CLNPs. In reply, SJORC said that JORC would base its recommendations on candidates' judicial and professional qualities according to BL92, as well as the professional qualifications as described in Cap. 484.

Latest development

32. The Director of Administration wrote to the HC Chairman on 21 March 2018 advising that CE had accepted the recommendations of JORC to appoint:

- (a) the Honourable Mr Justice Andrew CHEUNG Kui-nung as a Permanent Judge of CFA;
- (b) the Honourable Mr Justice Robert TANG Ching as a non-permanent Hong Kong judge of CFA; and
- (c) the Right Honourable the Baroness Brenda Hale of Richmond and the Right Honourable Beverley McLachlin, P.C. as CLNPs of CFA.

33. At the HC meeting on 23 March 2018, members agreed to appoint a subcommittee to consider the proposed senior judicial appointments.

Relevant papers

34. A list of the relevant papers available on the LegCo website (<http://www.legco.gov.hk>) is in **Appendix II**.

**Senior Judicial Appointments considered
by the Legislative Council since 2003**

Appointment exercise in 2003

- A subcommittee was formed under the House Committee ("HC") to consider the proposed judicial appointments of three non-permanent judges from other common law jurisdictions ("CLNPs") to the Court of Final Appeal ("CFA") and the Chief Judge of the High Court. The 2003 subcommittee held one meeting with the Administration and the Judiciary Administration ("JA") to discuss the proposed judicial appointments and related issues.
- In that appointment exercise, the curriculum vitae of the recommended appointees provided by the Administration had covered various aspects, including personal background, education, legal experience, judicial experience, services and activities, awards, and publications. In response to the subcommittee's request, the Administration had provided the following supplementary information for members' reference -
 - (a) copies of major publications of the recommended appointees; and
 - (b) a selection of judgments given by the recommended appointees.
- Having considered all the available information, the 2003 subcommittee agreed that the recommended appointees had extensive legal and judicial experience and eminent standing and supported the proposed appointments, which were subsequently endorsed by the Legislative Council ("LegCo") on 3 July 2003.

Appointment exercise in 2006

- In her letter dated 6 January 2006 to the HC Chairman, the Director of Administration ("D of Admin") advised that the Chief Executive ("CE") had accepted the recommendation of the Judicial Officers Recommendation Commission ("JORC") on the appointment of two CLNPs to CFA. Attached to the above-mentioned letter were -
 - (a) an advance copy of the press statement on the appointment; and

- (b) a paper entitled "Appointment of Non-Permanent Judges to the Court of Final Appeal" which contained the curriculum vitae of the proposed appointees and information on the relevant appointment exercise.
- At the meeting on 13 January 2006, a subcommittee was formed by HC to consider the proposed judicial appointments. The 2006 subcommittee held one meeting with the Administration and JA to discuss the proposed judicial appointment and related issues. At the subcommittee's request, the Administration had provided additional information on the appointees. The subcommittee supported the proposed appointments, which were subsequently endorsed by LegCo on 3 May 2006.

Appointment exercise in 2008

- In her letter dated 7 November 2008 to the HC Chairman, D of Admin advised that CE had accepted the recommendation of JORC on the appointment of three CLNPs to CFA. Attached to the letter were also -
 - (a) an advance copy of the press statement on the appointment; and
 - (b) a paper entitled "Appointment of Non-Permanent Judges to the Court of Final Appeal".
- The letter was considered at the HC meeting on 14 November 2008. Members did not raise objection to the proposed appointments, which were subsequently endorsed by LegCo on 7 January 2009.

Appointment exercise in 2010

- D of Admin wrote to the HC Chairman on 8 April 2010 advising that CE had accepted the recommendation of JORC to appoint -
 - (a) Mr Justice Geoffrey MA Tao-li as the Chief Justice of CFA; and
 - (b) Mr Justice Robert TANG Ching, Mr Justice Frank STOCK and Mr Justice Michael John HARTMANN as non-permanent Hong Kong judges to CFA.
- At its meeting on 16 April 2010, HC formed a subcommittee to consider the proposed senior judicial appointments. The 2010 subcommittee raised no objection to the Administration's giving notices of motions to seek the endorsement of LegCo on the recommended appointments. The motion was passed at the Council meeting of 9 June 2010.

Appointment exercise in 2012

- In her letter dated 28 March 2012 to the HC Chairman, D of Admin advised that CE had accepted the recommendations of JORC to appoint -
 - (a) Mr Justice Robert TANG Ching as a Permanent Judge of CFA;
 - (b) Mr Justice Syed Kemal Shah BOKHARY as a non-permanent Hong Kong judge of CFA; and
 - (c) The Right Honourable The Lord PHILIPS of Worth Matravers as a CLNPJ of CFA.
- At its meeting on 13 April 2012, HC formed a subcommittee to consider the proposed senior judicial appointments. The 2012 subcommittee raised no objection to the Administration's giving notices of motions to seek the endorsement of LegCo on the recommended appointments. The motion was passed at the Council meeting of 11 July 2012.

Appointment exercise in 2013

- In her letter dated 8 April 2013 to the HC Chairman, D of Admin advised that CE had accepted the recommendations of JORC to appoint –
 - (a) The Honourable Mr Justice Joseph Paul FOK as a Permanent Judge of CFA;
 - (b) The Honourable Mr Justice Patrick CHAN Siu-oi as a non-permanent Hong Kong judge of CFA; and
 - (c) The Honourable James SPIGELMAN and the Honourable William GUMMOW as CLNPJs of CFA.
- At its meeting on 12 April 2013, HC formed a subcommittee to consider the proposed senior judicial appointments. The 2013 subcommittee raised no objection to the Administration's giving notices of motions to seek the endorsement of LegCo on the recommended appointments. The motion was passed at the Council meeting of 26 June 2013.

Appointment exercise in 2017

- In her letter dated 17 January 2017 to the HC Chairman, D of Admin advised that CE had accepted the recommendations of JORC to appoint the following persons to CFA as CLNPIs -
 - (a) The Honourable Chief Justice Robert FRENCH AC; and
 - (b) The Right Honourable Lord REED.
- At its meeting on 20 January 2017, HC formed a subcommittee to consider the proposed senior judicial appointments. The 2017 subcommittee raised no objection to the Administration's giving notices of motions to seek the endorsement of LegCo on the recommended appointments. The motion was passed at the Council meeting of 29 March 2017.

Appendix II

Subcommittee on Proposed Senior Judicial Appointments

Relevant papers

Committee	Date of meeting	Paper
Provisional Legislative Council	24.5.1997	<u>Official Record of Proceedings (Motion)</u>
	19.5.1999	<u>Official Record of Proceedings (Written question No. 19)</u>
Panel on Administration of Justice and Legal Services ("AJLS Panel")	28.11.2000 (Item V)	<u>Agenda</u> <u>Minutes</u> <u>RP01/00-01</u> <u>RP02/00-01</u>
	24.4.2001 (Item V)	<u>Agenda</u> <u>Minutes</u> <u>RP07/00-01</u> <u>RP08/00-01</u>
	15.5.2001 (Item IV)	<u>Agenda</u> <u>Minutes</u>
	--	<u>Consultation Paper on Process of Appointment of Judges published by the AJLS Panel on 12 December 2001</u>
	22.4.2002 (Item IV)	<u>Agenda</u> <u>Minutes</u> <u>CB(2)2350/01-02(01)</u>
	22.7.2002 (Item V)	<u>Agenda</u> <u>Minutes</u>
	--	<u>Report on Process of Appointment of Judges prepared by the AJLS Panel</u>

Committee	Date of meeting	Paper
Committee on Rules of Procedure	6.3.2003	<u>Progress Report of the Committee on Rules of Procedure for the period from July 2002 to June 2003 (pages 16 to18)</u>
House Committee	16.5.2003 (Item VII)	<u>Agenda</u> <u>Minutes</u> <u>CB(2)2135/02-03(04)</u>
Subcommittee on proposed senior judicial appointments under the House Committee	27.5.2003	<u>Agenda</u> <u>Minutes</u>
House Committee	13.6.2003	<u>Report of the Subcommittee on Proposed Senior Judicial Appointments</u>
Legislative Council	3 July 2003	<u>Official Record of Proceedings</u> <u>Pages 60 - 68 (Motion)</u>
House Committee	28.5.2004	<u>Minutes</u> (Paragraph 43)
	13.1.2006	<u>Minutes</u>
Subcommittee on Proposed Senior Judicial Appointments under the House Committee	16.2.2006	<u>Agenda</u> <u>Minutes</u> <u>CB(2)1256/05-06(01)</u> <u>CB(2)1280/05-06(01)</u> <u>CB(2)1288/05-06(01)</u> <u>CB(2)1288/05-06(02)</u> <u>CB(2)1397/05-06(01)</u>
House Committee	31.3.2006	<u>Report of the Subcommittee on Proposed Senior Judicial Appointments</u>
Legislative Council	3.5.2006	<u>Official Record of Proceedings</u> <u>Pages 124 - 127 (Motion)</u>

Committee	Date of meeting	Paper
House Committee	14.11.2008 (Item VI)	<u>Agenda</u> <u>Minutes</u>
Legislative Council	7.1.2009	<u>Official Record of Proceedings</u> <u>Pages 109 - 111 (Motion)</u>
AJLS Panel	23.11.2009	<u>Agenda</u> <u>Minutes</u>
House Committee	16.4.2010 (Item VIII)	<u>Agenda</u> <u>Minutes</u>
Subcommittee on Proposed Senior Judicial Appointments under the House Committee	4.5.2010	<u>Agenda</u> <u>Minutes</u>
House Committee	14.5.2010	<u>Report of the Subcommittee on Proposed Senior Judicial Appointments</u>
Legislative Council	9.6.2010	<u>Official Record of Proceedings</u> <u>Pages 139 - 166 (Motion)</u>
AJLS Panel	28.2.2011 (Item VI)	<u>Agenda</u> <u>Minutes</u>
Subcommittee on Proposed Senior Judicial Appointments under the House Committee	21.4.2011	<u>Agenda</u> <u>Minutes</u>
Legislative Council	8.6.2011	<u>Official Record of Proceedings</u> <u>Pages 218-228 (Motion)</u>
Subcommittee on Proposed Senior Judicial	7.5.2012	<u>Agenda</u> <u>Minutes</u>

Committee	Date of meeting	Paper
Appointments under the House Committee		
House Committee	18.5.2012	<u>Report of the Subcommittee on Proposed Senior Judicial Appointments</u>
Legislative Council	17.7.2012	<u>Official Record of Proceedings Pages 136-173 (Motion)</u>
Subcommittee on Proposed Senior Judicial Appointments under the House Committee	23.4.2013	<u>Agenda</u> <u>Minutes</u>
House Committee	24.5.2013	<u>Report of the Subcommittee on Proposed Senior Judicial Appointments</u>
Legislative Council	26.6.2013	<u>Official Record of Proceedings Pages 156-190 (Motion)</u>
Subcommittee on Proposed Senior Judicial Appointments under the House Committee	14.2.2017	<u>Agenda</u> <u>Minutes</u>
House Committee	24.2.2017	<u>Report of the Subcommittee on Proposed Senior Judicial Appointments</u>
Legislative Council	29.3.2017	<u>Official Record of Proceedings Pages 160-174 (Motion)</u>