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Paper for the House Committee

Report of the Subcommittee on Proposed Senior Judicial Appointment

Purpose

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

Background

Constitutional and statutory provisions on senior judicial appointments

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 of the courts of the Hong Kong Special Administrative Region ("HKSAR") shall be appointed by CE on the recommendation of an independent commission, namely, the Judicial Officers Recommendation Commission ("JORC") established under section 3 of the Judicial Officers Recommendation Commission Ordinance (Cap. 92). Section 6(1) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) also provides that the Chief Justice of the Court of Final Appeal ("CJ") shall be appointed by CE acting in accordance with the recommendation of JORC.

3. In the case of the appointment of judges of the Court of Final Appeal 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 the Legislative Council ("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 judges of the Court of Final Appeal

and the Chief Judge of the High Court. Such procedure is also stipulated in section 7A of Cap. 484.

4. Pursuant to BL 88 and Cap. 92, JORC is entrusted with the function of advising or making recommendations to CE regarding the filling of vacancies in judicial offices. Under BL 88, JORC as the independent commission shall be composed of local judges, persons from the legal profession and eminent persons from other sectors. As prescribed in Cap. 92, JORC consists of CJ as the Chairman, the Secretary for Justice and seven other members appointed by CE (two judges, one barrister appointed after consultation with the Bar Council of the Hong Kong Bar Association, 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). CE is required by section 3(1A) of Cap. 92 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.

Statutory requirements on eligibility for appointment as the Chief Justice

5. Section 12(1) of Cap. 484 provides that a person shall be eligible to be appointed as CJ if he is:

- (a) a permanent judge;
- (b) the Chief Judge of the High Court;
- (c) a Justice of Appeal;
- (d) a judge of the Court of First Instance; or
- (e) a barrister who has practised as a barrister or solicitor in Hong Kong for a period of at least 10 years.

6. BL 90 stipulates that CJ shall be a Chinese citizen who is a permanent resident of the HKSAR with no right of abode in any foreign country ("the nationality requirement"). This requirement is reflected in section 6(1A) of Cap. 484. Thus, for appointment as CJ, a candidate must meet the eligibility requirements laid down by law, i.e. both the nationality requirement and professional qualifications.

The current appointment exercise

7. In a letter dated 24 March 2020 from the Director of Administration ("DoA") to the Chairman of the House Committee ("DoA's letter"), DoA advised that CE had accepted the recommendation of JORC on the appointment of the Honourable Mr Justice Andrew CHEUNG Kui-nung ("Mr Justice CHEUNG") as CJ with effect from 11 January 2021 ("the proposed senior judicial appointment"). Subject to the endorsement of the LegCo, CE will make the appointment under BL 88.

The Subcommittee

8. In accordance with the LegCo procedure endorsed by the House Committee in May 2003 for endorsement of judicial appointments under BL 73(7), the House Committee formed a subcommittee at its special meeting held in the afternoon of 8 May 2020 to consider the proposed senior judicial appointment.

9. Under the chairmanship of Dr Hon Priscilla LEUNG Mei-fun, the Subcommittee held one meeting on 26 May 2020 with the Administration and the Judiciary Administrator (also in her capacity as Secretary to JORC ("SJORC")) to discuss the proposed senior judicial appointment and related issues. The membership list of the Subcommittee is in **Appendix**.

Deliberations of the Subcommittee

Proposed appointment of the Honourable Mr Justice Andrew CHEUNG Kui-nung as the Chief Justice

10. Members note that Mr Justice CHEUNG is a judge of high integrity and commands respect within the Judiciary and from the legal profession, and has written many important and landmark judgments on major and complicated cases, including constitutional and public law cases. Some members are impressed by the rich administrative experience of Mr Justice CHEUNG, who has taken up various administrative duties to help reform the Judiciary in different areas such as the judicial remuneration, retirement ages of Judges and Judicial Officers ("JJOs") and the application of information technology in the Judiciary.

11. Members also note that Mr Justice CHEUNG, who has served as members or chairpersons on various committees in the Judiciary relating to the above administrative duties, is the key adviser to CJ on strategic matters and court operation issues, and is considered to have proven leadership and could confidently discharge the responsibilities as the head of the Judiciary. Members express support to the proposed senior judicial appointment.

Expectations for the next Chief Justice to be appointed

12. Members have expressed various expectations for the next CJ. Some members hope that Mr Justice CHEUNG would be forward-looking in bringing about reforms in the Judiciary to address issues in various areas. These include being more proactive in recruitment of talents to the Judiciary to address the shortage of judicial manpower, clearing up the backlog of cases especially those related to recent social events and judicial review cases arising from non-refoulement claims, expediting the use of technology in courts, and upholding an impartial judiciary as CJ has stressed time and again.

Procedures of the Judicial Officers Recommendation Commission for selecting the candidate to be recommended for appointment as the Chief Justice

Statutory disclosure by members of Judicial Officers Recommendation Commission

13. Noting that CJ shall meet the nationality requirement, some members question why a non-ethnic Chinese JORC member was apparently regarded as an eligible candidate for appointment as CJ and was asked to indicate in writing whether he/she wished to be considered as a candidate, as stated in paragraphs 23 and 24 in Enclosure B of DoA's letter.

14. SJORC has clarified that under section 3(5B) of Cap. 92, where JORC is exercising its functions in relation to the filling of vacancies in judicial offices under section 6(a) of Cap. 92, a JORC member who is or may reasonably be regarded as a candidate for selection to fill any such vacancy shall disclose whether or not he/she is willing to accept appointment if he/she were to be selected. As the JORC member concerned is professionally qualified to be appointed as CJ in accordance with section 12(1) of Cap. 484 as set out in paragraph 5 above, in compliance with the statutory requirement under section 3(5B) of Cap. 92, he/she has been asked to make the disclosure of his/her willingness to accept appointment if he/she were to be selected.

15. SJORC has further explained that the above procedure aims to prevent conflict of interest by ensuring that any JORC member, who is professionally qualified for and willing to accept appointment as CJ, if he/she were to be selected, will not take part in any deliberation of JORC with respect to the proposed appointment and will not vote on any matters concerning the same. SJORC stresses that the JORC member concerned will not automatically be shortlisted for consideration to be recommended for appointment as CJ since JORC will still have to go through the subsequent procedures including compilation of long list and short list of candidates and the consultation with the relevant parties including JJOs in the Judiciary, Law Officers in the Department of Justice and barristers and solicitors.

Nationality requirement for candidates for appointment as the Chief Justice

16. The Subcommittee notes that JORC has compiled the long list of candidates after the first JORC meeting having regard to the professional qualifications requirement for appointment but leaving aside the nationality requirement. Some members have raised concerns about the above procedure and considered that JORC should not recommend a candidate even though he/she is professionally qualified for appointment as CJ if he/she cannot meet the nationality requirement. Therefore, JORC should consider reviewing the procedures to ensure that only those candidates who have fulfilled the nationality requirement should be shortlisted for further consideration.

17. A member holds a different view, expressing that a candidate, who is not a Chinese citizen but professionally qualified for appointment as CJ may still be able and willing to comply with the nationality requirement if appointed. Another member points out that even if a candidate is willing to take measures to comply with the nationality requirement, the legal or administrative procedures involved may cause delays to the appointment of the next CJ.

18. SJORC explains that the selection procedures are decided by JORC at its first meeting, which is generally in line with the practice adopted by JORC in its last exercise of recommending a candidate for appointment as CJ. She also stresses that following the procedures, CJ has ascertained from each of the four persons shortlisted for further consideration whether the person is willing to serve as CJ and, if the answer is in the affirmative, whether the person complies or is able and willing to comply with the nationality requirement if appointed.

Criteria for the selection of candidates to fill vacancies in judicial offices

19. Citing a recent statement made by the incumbent CJ in which he has stressed the importance of the impartiality of the judiciary, some members point out that certain JJOs have openly or anonymously stated their political stance on the social events in 2019, which appears to go against the above principle. To maintain public's confidence in the independence and impartiality of the Judiciary, they suggest that when considering the suitability of a candidate for filling a vacancy in judicial offices, including the promotion of JJOs, JORC should take into account whether the concerned candidate is politically neutral.

20. A member suggests that judicial temperament of candidates should also be taken into account when JORC assesses the judicial quality of candidates. There is however another view that checking the political stance of candidates would politicize the process of judicial appointments.

21. SJORC has replied that in accordance with BL 92, JJOs shall be chosen on the basis of their judicial and professional qualities. In making recommendations for judicial appointments, JORC has considered all relevant factors in a fair manner, including the judicial temperament of candidates.

Article 73(7) of the Basic Law

22. A member considers that, as the Subcommittee is to assist LegCo in exercising its powers and functions under BL 73(7), members should focus their discussion on whether or not they support the senior judicial appointment to be endorsed by LegCo, and should not engage in lengthy discussions on a broad range of issues. There is also a view that LegCo should as a matter of convention accept the recommendation of JORC, unless it considers that the relevant information provided by the Administration has failed to identify the nominee recommended by JORC as an appropriate candidate for appointment.

23. Another member considers that it has been a long-standing practice for members of former subcommittees on proposed senior judicial appointments to express their views and concerns on various matters, and there should be no exception to the Subcommittee. The Chairman also considers that all matters raised at the Subcommittee meeting, including the JORC procedures, JORC's criteria for the selection of candidates to fill vacancies in judicial offices as well as members' expectations for the next CJ, are all relevant to the subject matter under deliberation by the Subcommittee.

24. The Chairman concludes that the Subcommittee has completed deliberation on the proposed senior judicial appointment and members have expressed unanimous support to the proposed appointment of Mr Justice CHEUNG as CJ.

Advice sought

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

Council Business Division 4
Legislative Council Secretariat
12 June 2020

Subcommittee on Proposed Senior Judicial Appointment

Membership list

Chairman Dr Hon Priscilla LEUNG Mei-fun, SBS, JP

Members Hon Abraham SHEK Lai-him, GBS, JP
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon CHAN Kin-por, GBS, JP
Hon Mrs Regina IP LAU Suk-yee, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon Elizabeth QUAT, BBS, JP
Hon CHUNG Kwok-pan
Dr Hon Junius HO Kwan-yiu, JP
Hon CHEUNG Kwok-kwan, JP

(Total : 10 members)

Clerk Mr Lemuel WOO

Legal adviser Ms Vanessa CHENG