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Paper for the House Committee meeting on 13 November 2020

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 the Judicial Officers Recommendation Commission ("JORC"), an independent commission established under section 3 of the Judicial Officers Recommendation Commission Ordinance (Cap. 92). Section 9(2) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) also provides that judges from other common law jurisdictions of the Court of Final Appeal ("CFA") shall be appointed by CE acting in accordance with the recommendation of JORC.

3. In the case of the appointment of judges of the 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 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 CFA 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 the Chief Justice ("CJ") as the Chairman, the Secretary for Justice and seven other members appointed by CE (including 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.

Appointment of non-permanent judges of the Court of Final Appeal

5. CFA is the final appellate court in Hong Kong hearing both civil and criminal appeals. It consists of CJ and the permanent judges ("PJs"). Non-permanent judges ("NPJs") may be invited to sit. There are two lists of NPJs, namely, the list of non-permanent Hong Kong judges ("HKNPJs"), and the list of non-permanent judges from other common law jurisdictions ("CLNPJs"). Under section 10 of Cap. 484, the maximum number of non-permanent judges is 30. At present, there are 17 NPJs comprising 4 HKNPJs and 13 CLNPJs.

6. When hearing and determining appeals, CFA is constituted by five judges, namely, CJ (where he is not available to sit, he designates a PJ to preside), three PJs (where a PJ is not available, CJ nominates a HKNPJ to sit in his place), and one HKNPJ or one CLNPJ. A CLNPJ is normally required to come to Hong Kong for a period of four weeks at a time to sit on CFA.

7. Section 12(4) of Cap. 484 provides that a person shall be eligible to be appointed as a CLNPJ 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 Judge or a permanent magistrate, in Hong Kong.

8. According to the Administration, from 1 July 1997, apart from very few exceptions, CLNPs were nominated to CFA to hear substantive appeals. JORC also notes that the availability of the 13 incumbent CLNPs to come to Hong Kong for four weeks to sit on CFA is somewhat limited as all of them have extensive professional commitments including arbitration, mediation and/or lecturing work for which they are in huge demand, as well as personal and family commitments. There are also other logistical considerations affecting the availability of CLNPs to sit on CFA. In addition, most of the judges have particular expertise in certain areas. When a judge who has an expertise in a particular area of law is not available to sit on CFA, the listing of the case may have to be delayed.

9. JORC notes that it is important that substantive appeals are heard within a reasonable time and it would assist the listing of cases considerably if the pool of judges is enlarged. JORC agrees that the number of CLNPs should be increased to give CFA greater flexibility in dealing with its caseload and ensure its effective operation.

The current appointment exercise

10. The Director of Administration wrote to the Chairman of the House Committee on 5 October 2020 advising that CE had accepted the recommendation of JORC on the appointment of the Right Honourable Lord Patrick Hodge ("Lord Hodge") as a CLNP of CFA ("the proposed senior judicial appointment") and, subject to LegCo's endorsement, CE will make the appointment under BL 88.

The Subcommittee

11. In accordance with the LegCo procedure endorsed by the House Committee in May 2003 for endorsement of judicial appointments under BL 73(7), at its meeting held on 16 October 2020, the House Committee formed the Subcommittee to consider the proposed senior judicial appointment.

12. Under the chairmanship of Dr Hon Priscilla LEUNG Mei-fun, the Subcommittee held one meeting on 28 October 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 I**.

Deliberations of the Subcommittee

13. Members of the Subcommittee generally support the proposed senior judicial appointment. The views and concerns expressed by members are set out in the ensuing paragraphs.

The appointment of the Right Honourable Lord Patrick Hodge

14. Some members question whether the proposed senior judicial appointment is related to the resignation of Mr Justice Spigelman, a former CLNPJ of CFA, on 2 September 2020. The Administration replies in the negative and advises that the process to appoint CFA judges is unlikely to take place within such a short period of time. Furthermore, under section 10 of Cap. 484, the maximum number of NPJs is 30 and there are at present only 17 NPJs comprising 4 HKNPJs and 13 CLNPJs. With LegCo's endorsement of the proposed senior judicial appointment, the number of NPJs will only increase to 18.

15. Some members express concerns about press reports regarding a number of parliamentarians in the United Kingdom ("UK") who issued a joint letter raising concerns about the possible impacts of the proposed senior judicial appointment on the reputation of UK's judicial system. Some members question whether the Administration has sought an update on Lord Hodge's willingness to accept the appointment after the abovementioned joint letter was issued and whether it will respond to the parliamentarians' views and concerns.

16. The Administration advises that it is not appropriate to comment on press reports. SJORC advises that the Judiciary has confirmed with Lord Hodge his intention to accept the appointment quite recently. In response to members' request made at the meeting, the Judiciary has recently confirmed with Lord Hodge that he is willing to accept the appointment as a CLNPJ.

17. Some members consider that the Administration should not remain silent or reactive to concerns or criticism against a proposed senior judicial appointment, such as those raised in the parliamentarians' letter which may contain misunderstanding or unsubstantiated allegations. Rather, the Administration should take a proactive stance in responding to such concerns

or criticisms so that public concerns or misunderstanding may be properly addressed at an early stage.

18. The Chairman reiterates her requests made during deliberations of proposed senior judicial appointments in the past that, to help Members better understand the judges recommended, a selection of their judgments should be provided for members' reference. In response, the Administration has provided a selection of judgments given by Lord Hodge in **Appendix II** (English version only).

Knowledge and understanding about the constitutional order of Hong Kong

19. Noting that CLNPs of CFA may participate in hearing and determining appeals relating to constitutional or national security cases, some members express concerns whether CLNPs have adequate knowledge and proper understanding about the Basic Law and the "One Country, Two Systems" principle. They also enquire whether information will be provided to CLNPs to enhance their knowledge and understanding about the constitutional order of Hong Kong and the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("the National Security Law").

20. Some members consider that CLNPs are all senior veteran judges in their respective jurisdictions, they are well versed with the common law principles and there is no doubt about their abilities to make reference to precedent cases and judgments on important legal principles, including the constitutional order of Hong Kong, when hearing cases. These members express confidence that CLNPs have a full grasp of the Hong Kong constitutional order and there is no need to brief them about this. The Chairman suggests that the Hong Kong Judicial Institute may conduct activities to facilitate exchanges between CLNPs and other judges on topics such as "One Country, Two Systems" principle.

21. SJORC advises that as prescribed under BL 82 and section 16 of Cap. 484, it has been a longstanding practice since the handover in 1997 for CFA to invite CLNPs as required to sit for hearing appeal cases. All CLNPs, when assuming office, are required to take oath under BL 104 to swear to uphold the Basic Law and swear allegiance to the HKSAR. They will have to take the Judicial Oath. They have been hearing and determining on appeal cases in accordance with the Laws of Hong Kong. As most substantive appeal cases before the CFA are those involving important legal principles, when hearing and determining appeals, the five CFA judges including the CLNP concerned will normally be provided with relevant information and

references by parties and their legal representatives to facilitate their consideration. SJORC further advises that, given that all CLNPJs are judges from common law jurisdictions who were appointed on the basis of their judicial and professional qualities, there should be no question about their knowledge and understanding about the Basic Law and the "One Country, Two Systems" principle.

Appointing CLNPJs from more varied common law jurisdictions

22. Noting that the appointment of CLNPJs recommended by JORC in the past had only included judges (or retired judges) from UK, Australia, New Zealand and Canada, some members query why judges from other common law jurisdictions apart from the above, such as Singapore, Malaysia and India, are not considered.

23. SJORC advises that as stipulated in BL 92, judges of HKSAR shall be chosen on the basis of their judicial and professional qualities. Of all the other common law jurisdictions, Hong Kong's legal system has the closest affinity to that of UK, Australia and New Zealand. Canada is also a common law jurisdiction with which Hong Kong shares many common legal approaches, particularly in the area of equity, commercial law and criminal law. The legal systems in other jurisdictions such as Singapore and Malaysia have relatively greater differences from that of Hong Kong. In its written response to a member's letter, the Administration advises that of the 13 incumbent CLNPJs, 9 are from UK, 3 are from Australia and 1 is from Canada. Nevertheless, judges from all the above common law jurisdictions will be considered if candidates with suitable judicial and professional qualities are identified in such jurisdictions.

Duties and workload of CLNPJs

24. In order to gain a better understanding about the actual work of CLNPJs, the Administration is requested to provide more information on the types of cases that may be heard by CLNPJs, the information on whether CLNPJs will be designated to hear cases concerning offence endangering national security, whether a list of such designated CLNPJs is available, and the statistics on CLNPJs' caseloads in CFA.

25. In its written response, the Administration advises that CLNPJs have been hearing all types of appeals, including both criminal and civil appeals. It also advises that according to Article 44 of the National Security Law, CE shall designate a number of judges from the magistrates, the judges of the District Court, the judges of the Court of First Instance and the Court of

Appeal of the High Court, and the judges of CFA, and may also designate a number of judges from deputy judges or recorders, to handle cases concerning offence endangering national security. Before making such designation, CE may consult the Committee for Safeguarding National Security of the HKSAR (the National Security Committee) and CJ. The Administration further advises that CE is the authority to designate judges and may consult the National Security Committee and CJ. In designating the first batch of magistrates on 3 July 2020, CE has consulted both. CE will proceed to designate judges of other courts as appropriate, and in that context will consider the publication of the designations.

26. As regards the statistics on CLNPIs' caseloads, the Administration advises that during the past five years from 2015 to 2019, 148 substantive appeal cases were disposed of in CFA (including 4 cases dealt with without hearing and one case withdrawn), and CLNPIs sat in all the 148 cases heard.

27. A member considers that, besides hearing and determining appeals, CLNPIs also play the important role of monitoring the rule of law situation in Hong Kong. Another member disagrees and considers that CLNPIs only form part of CFA which exercises judicial power independently under the Basic Law.

Judicial independence and separation of powers

28. Referring to a public statement recently made by the Right Honourable Lord Reed of Allermuir, President of the Supreme Court of UK and a CLNPI of CFA in expressing concerns about the National Security Law, and CE's declaration that there was no separation of powers in Hong Kong, some members express concerns that international community's confidence in Hong Kong's judicial independence has been undermined, which will also affect judges in other common law jurisdictions to decide whether to accept appointments as CLNPIs.

29. In response, the Administration advises that it would not comment on a judge's comments. BL 85 has clearly provided that the courts of HKSAR shall exercise judicial power independently, free from any interference. Furthermore, the fact that both the President and Deputy President of the Supreme Court of UK have accepted or indicated willingness to accept the appointments as CLNPIs of CFA should speak for itself.

30. Members express different views about whether there is separation of powers in Hong Kong. Some members express that prior to the establishment of HKSAR in 1997 and during the transition, the notion that

there is separation of powers in Hong Kong is not contested by the British or Chinese administrations, which is also frequently referred to in court judgments handed down after the establishment of HKSAR in 1997. The Chairman and a member disagree to this view and stress that separation of powers is a political concept rather than a legal concept, and is neither found in the pre-handover era of Hong Kong or after the establishment of HKSAR. Both the Chairman and the member raise for discussion whether the political structure of HKSAR is an executive-led system. The Chairman urges the Administration to make clarifications on these issues to the public more frequently to remove any misconceptions.

Number of permanent judges of the Court of Final Appeal

31. In his letter to the Subcommittee, a member suggests increasing the number of PJs from four to five or more to cope with the CFA caseload. In its written response to the Subcommittee, the Administration advises that as the workload of CFA has been quite stable over the past few years, with a sufficient number of NPJs and flexibility in their deployment, CJ takes the view that there should not be any undue difficulty in coping with the CFA caseload with one panel for the time being. There is no imminent need for increasing the number of PJs.

Conclusion

32. The Chairman concludes that the Subcommittee has completed deliberation on the proposed senior judicial appointment and will report its deliberations to the House Committee at its meeting on 13 November 2020. Members also note that the Administration intends to move a resolution to seek the Council's endorsement of the proposed appointment in accordance with BL 73(7) at the Council meeting of 2 December 2020.

Advice sought

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

Subcommittee on Proposed Senior Judicial Appointment

Membership list*

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

Members Hon James TO Kun-sun
Hon Abraham SHEK Lai-him, GBS, JP
Hon Starry LEE Wai-king, SBS, JP
Hon Mrs Regina IP LAU Suk-ye, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon Claudia MO
Dr Hon Fernando CHEUNG Chiu-hung
Hon Elizabeth QUAT, BBS, JP
Ir Dr Hon LO Wai-kwok, SBS, MH, JP
Hon CHUNG Kwok-pan
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding
Hon CHEUNG Kwok-kwan, JP

(Total : 14 members)

Clerk Mr Lemuel WOO

Legal adviser Ms Clara TAM

* Changes in membership are shown in Annex to Appendix I.

Annex to Appendix I

Subcommittee on Proposed Senior Judicial Appointment

Changes in membership

Member	Relevant date
Hon IP Kin-yuen	Up to 10 November 2020
Hon HUI Chi-fung	Up to 11 November 2020

Subcommittee on Proposed Senior Judicial Appointment

A selection of judgments given by the Right Honourable Lord Patrick Hodge

Tax Law

1	<i>Cotter v Commissioners for Her Majesty's Revenue & Customs</i> [2013] UKSC 69 https://www.supremecourt.uk/cases/docs/uksc-2012-0062-judgment.pdf
2	<i>Shop Direct Group v Commissioners for Her Majesty's Revenue and Customs</i> [2016] UKSC 7 https://www.supremecourt.uk/cases/docs/uksc-2014-0110-judgment.pdf
3	<i>RFC 2012 Plc (in liquidation) (formerly The Rangers Football Club Plc) v Advocate General for Scotland (Scotland)</i> [2017] UKSC 45 https://www.supremecourt.uk/cases/docs/uksc-2016-0073-judgment.pdf
4	<i>Project Blue Limited v Commissioners for Her Majesty's Revenue and Customs</i> [2018] UKSC 30 https://www.supremecourt.uk/cases/docs/uksc-2016-0137-judgment.pdf
5	<i>Commissioners for Her Majesty's Revenue and Customs v Frank A Smart & Son Ltd (Scotland)</i> [2019] UKSC 39 https://www.supremecourt.uk/cases/docs/uksc-2018-0073-judgment.pdf

Intellectual Property

6	<i>Actavis Group PTC EHF and others v ICOS Corporation and another</i> [2019] UKSC 15 https://www.supremecourt.uk/cases/docs/uksc-2017-0214-judgment.pdf
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Public Law

7	<i>R (ZH and CN) v London Borough of Newham and London Borough of Lewisham</i> [2014] UKSC 62 https://www.supremecourt.uk/cases/docs/uksc-2013-0194-judgment.pdf
8	<i>Moohan and another v The Lord Advocate</i> [2014] UKSC 67 https://www.supremecourt.uk/cases/docs/uksc-2014-0183-judgment.pdf
9	<i>Edenred (UK Group) Limited and another v Her Majesty's Treasury and others</i> [2015] UKSC 45 https://www.supremecourt.uk/cases/docs/uksc-2015-0080-judgment.pdf
10	<i>Trump International Golf Club Scotland Limited and another v The Scottish Ministers (Scotland)</i> [2015] UKSC 74 https://www.supremecourt.uk/cases/docs/uksc-2015-0160-judgment.pdf
11	<i>Aberdeen City and Shire Strategic Development Planning Authority v Elsick Development Company Limited (Scotland)</i> [2017] UKSC 66 https://www.supremecourt.uk/cases/docs/uksc-2016-0157-judgment.pdf

General Commercial Law

12	<i>Wood v Capita Insurance Services Limited</i> [2017] UKSC 24 https://www.supremecourt.uk/cases/docs/uksc-2015-0212-judgment.pdf
13	<i>Barnardo's v Buckinghamshire and others</i> [2018] UKSC 55 https://www.supremecourt.uk/cases/docs/uksc-2016-0210-judgment.pdf
14	<i>R&S Pilling t/a Phoenix Engineering v UK Insurance Ltd</i> [2019] UKSC 16 https://www.supremecourt.uk/cases/docs/uksc-2017-0096-judgment.pdf
15	<i>MacDonald and another v Carnbroe Estates Ltd (Scotland)</i> [2019] UKSC 57 https://www.supremecourt.uk/cases/docs/uksc-2018-0092-judgment.pdf