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Paper for the House Committee meeting on 18 June 2021

**Report of the Subcommittee on Proposed Senior Judicial Appointment
(Formed on 21 May 2021)**

Purpose

This paper reports on the deliberations of the Subcommittee on Proposed Senior Judicial Appointment (Formed on 21 May 2021) ("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. The independent commission is the Judicial Officers Recommendation Commission ("JORC") established under section 3 of the Judicial Officers Recommendation Commission Ordinance (Cap. 92). Section 7(1) of the Hong Kong Court of Final Appeal Ordinance (Cap. 484) also provides that the permanent judges ("PJs") 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 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") 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 CFA and CJHC.

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 of CFA ("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 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 PJs. Non-permanent judges ("NPs") may be invited to sit. There are two lists of NPs, namely, the list of non-permanent Hong Kong judges ("HKNPs"), and the list of non-permanent judges from other common law jurisdictions ("CLNPs").

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 HKNP to sit in his place), and one HKNP or one CLNP.

7. Under section 7(2) of Cap. 484, if the office of any PJ becomes vacant, by death or otherwise and the number of PJs is thereby reduced to less than 3, CE acting in accordance with the recommendation of JORC shall as soon as reasonably possible after the office becomes vacant appoint another PJ to fill the vacancy.

8. Section 12(1A) of Cap. 484 provides that a person shall be eligible to be appointed as a PJ if he is -

- (a) CJHC, a Justice of Appeal or a judge of the Court of First Instance; or

- (b) a barrister who has practised as a barrister or solicitor in Hong Kong for a period of at least 10 years.

The current appointment exercise

9. The Director of Administration wrote to the Chairman of the House Committee on 12 May 2021 advising that CE had accepted the recommendation of JORC on the appointment of the Honourable Mr Justice Johnson LAM Man-hon ("Mr Justice LAM") as a PJ of CFA ("the proposed senior judicial appointment") and, subject to LegCo's endorsement, CE will make the appointment under BL 88.

The Subcommittee

10. In accordance with the procedure endorsed by the House Committee in May 2003 for LegCo's endorsement of judicial appointments under BL 73(7), at its meeting held on 21 May 2021, the House Committee formed the Subcommittee to consider the proposed senior judicial appointment.

11. Under the chairmanship of Dr Hon Priscilla LEUNG Mei-fun, the Subcommittee held one meeting on 7 June 2021 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

The appointment of the Honourable Mr Justice Johnson LAM Man-hon

12. Members consider that Mr Justice LAM has profound judicial experience and a high reputation, in particular in respect of the constitutional law and administrative law. The Chairman and members are impressed by the many important and landmark judgments written by Mr Justice LAM, and his multifarious experiences in other areas as detailed in the curriculum vitae such as civil justice reforms, mediation, implementation of information technology in the Judiciary, family arbitration and family proceedings. Members hold a very positive view of Mr Justice LAM and expressed full support for the proposed senior judicial appointment.

13. The Chairman appreciates the Judiciary Administration's efforts in providing a list of major judgments by Mr Justice LAM to help Members and public better understand the recommended appointee. She is of the view that in future, the number of major judgments by the proposed appointees for senior judicial appointments may be reduced to say five to ten, including mainly the more important ones generating significant public concerns. She also suggests that extracts of those judgments if possible and hyperlinks to them should be provided.

Composition of the Court of Final Appeal required for hearing and determining an appeal

14. In response to the enquiries about the reasons behind the composition of CFA as provided in section 16 of Cap. 484, and whether it is consistent with BL 82, the Administration explains that the composition of CFA required for hearing and determining an appeal has been stipulated in the law of Hong Kong following the establishment of HKSAR in 1997 which has taken into account the implementation of the provisions in the Basic Law. As CJ may select a HKNPJ or CLNPJ to sit on CFA to hear and determine an appeal, the Administration considers that there is no inconsistency with BL 82.

15. SJORC further advises that since 1 July 1997, apart from very few exceptions, CLNPJs were nominated to CFA to hear substantive appeals. CLNPJs are retired or senior judges with eminent reputation in other common law jurisdictions, and are having particular expertise in certain areas. Inviting CLNPJs to sit on CFA will not only enable them to make an important contribution to the work of CFA, but also enhance the Judiciary's exchanges of judicial expertise and experience with other common law jurisdictions. This is also conducive to sustaining public confidence in Hong Kong's judicial independence under the Basic Law.

16. Some members are of the view that, in the spirit of BL 82, inviting a HKNPJ or CLNPJ to sit on CFA should be on an ad hoc basis as the need arises, rather than a standing practice as set out in Cap. 484. Furthermore, the present composition of CFA required for hearing and determining an appeal has posed the risk that CFA will become inoperable if no NPJ is available.

17. Some members point out that some CLNPJs have voiced concerns over the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("the National Security Law"), while some CLNPJs are under political pressure within their own countries. In view of the changes in international situation, they suggest that

consideration should be given to changing the composition of CFA so that CJ and four PJs may form a quorate CFA for hearing and determining an appeal and it will be less reliant on the availability of NPJs.

18. Some members agree that inviting CLNPJs to sit on CFA has brought valuable judicial experience from other common law jurisdictions, especially soon after the establishment of HKSAR which had no prior experience as a place of final adjudication. As abundant knowledge and experience has been accumulated by CFA during the past twenty plus years since 1997, the Chairman considers that it may be timely to review the necessity of having a NPJ for a quorate CFA for hearing and determining an appeal, and she is of the view that instead of setting a rigid formula, CJ's decision shall be respected and CJ should be vested with the discretion to decide on the composition of CFA, including whether to select NPJs to sit on CFA and who to be selected having regard to the expertise required.

19. Members note that there are only three PJs on the establishment of CFA and enquire whether the number will be increased. In response, SJORC explains that with the existing number of HKNPJs and CLNPJs, together with the flexibility in their deployment, there should not be any undue difficulty in coping with the CFA caseload for the time being. Therefore, there is no imminent need for increasing the number of PJs.

20. Some members consider that the number of PJs to be appointed should be a constitutional matter having nothing to do with the present caseload of CFA. They suggest increasing the number of PJs to four or five so that there will be a sufficient number of PJs for forming the required composition of CFA for hearing and determining an appeal, as well as to replace an unavailable PJ by another PJ instead of a HKNPJ.

Appointing non-permanent judges from other common law jurisdictions

21. In response to members' enquiry, SJORC advises that at present, there are 17 NPJs comprising 4 HKNPJs and 13 CLNPJs. Of the 13 incumbent CLNPJs, nine are from the United Kingdom, three are from Australia and one is from Canada. Under section 10 of Cap. 484, the maximum number of NPJs is 30. She also advises that in deciding the CLNPJ to be selected to sit on CFA, the factors to be considered by CJ include the expertise required as well as CLNPJs' availability among their various professional, personal and family commitments.

22. Considering the changes in political outlook and international relations, some members consider that overreliance on certain common law jurisdictions for the appointment of CLNPs may be risky. The Chairman suggests that NPs from other common law jurisdictions should be appointed and, apart from the above, judges from other common law jurisdictions such as Singapore and Malaysia may also be considered as they also have sound knowledge and judicial experience.

23. In response, SJORC advises that the Judiciary has not encountered difficulties in nominating CLNPs to sit on CFA. In this regard, SJORC advises that arrangement is being made for five CLNPs to sit on CFA later this year and in early-2022. She also advises that the Judiciary will consider and recommend judges from other common law jurisdictions for appointment as CLNPs in accordance with established procedures, if suitable and eminent candidates are identified in such jurisdictions.

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

24. Members refer to some recent incidents in which some judges of other common law jurisdictions, when commenting on their appointments as CLNPs or declining the appointments, have taken the opportunities to besmirch Hong Kong. Some members also express concerns that certain politicians in those common law jurisdictions have exerted pressure on CLNPs already appointed or tried to interfere with individual judges' decisions on whether to accept appointment as CLNPs.

25. In view of the ever-changing political outlook, members are of the view that, when considering the suitability of candidates for senior judicial appointments, JORC should take into account whether the concerned candidate is politically neutral. While thorough background check may not be feasible, members consider that any negative views or bias towards Hong Kong ventilated by the candidate should be taken into consideration. Some members consider that whether a candidate has expressed views on socially or politically sensitive issues in high profile should also be taken into consideration since, once appointed, appointees may need to withdraw from adjudicating certain areas of cases if chances of conflict of interest may arise.

26. The Chairman stresses that in accordance with BL 92, judges and other members of the judiciary of HKSAR shall be chosen on the basis of their judicial and professional qualities no matter whether they are from within HKSAR or recruited from other common law jurisdictions.

Functions and powers of the Legislative Council under BL 73(7)

27. A member points out that the Basic Law has clearly provided the roles and authorities of JORC (under BL 88), CE (under BL 48(6) and BL 88), and LegCo (under BL 73(7)) in recommending, approving and endorsing the appointment and removal of the judges of CFA and CJHC respectively. With the function and powers of BL 73(7), LegCo has a duty to consider any proposed senior judicial appointments referred to it for endorsement from a political perspective and it should not shy away from performing this important function.

Application of information technology in the Judiciary

28. Noting that Mr Justice LAM is the Chairman of the Working Group on Court Record Management under the Committee on Information Technology in the Judiciary, members are concerned about the progress of application of IT in the Judiciary.

29. In response, SJORC advises that the Judiciary has been proactively taking forward incrementally a host of initiatives involving the use of information technology in court operations. As mentioned by CJ at the Ceremonial Opening of the Legal Year 2021, the Judiciary must remain a professional and efficient judiciary that moves with the times. For illustration, the Judiciary has gazetted several sets of subsidiary legislation for the implementation of the Court Proceedings (Electronic Technology) Ordinance enacted on 17 July 2020. Furthermore, a bill is being drafted to enable the conduct of remote court hearings.

Communication and exchange with Mainland

30. Members note that the incumbent CJ made a visit to Beijing recently and exchanged with the Supreme People's Court of the People's Republic of China ("PRC"). Some members support the strengthening of exchange between the Judiciary and Mainland courts, in particular on the understanding of the Constitution of PRC.

31. SJORC advises that the Judiciary will continue to arrange training for Judges and Judicial Officers ("JJOs") and facilitate exchanges between the Judiciary and other jurisdictions including the Mainland with a view to enhancing JJOs' knowledge and understanding of the developments of different judicial and legal systems in other jurisdictions.

Conclusion

32. The Chairman concludes that the Subcommittee supported the appointment of Mr Justice LAM unanimously and has completed deliberation on the proposed senior judicial appointment. The Subcommittee will report its deliberations to the House Committee at its meeting on 18 June 2021. 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 7 July 2021.

Advice sought

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

Council Business Division 4
Legislative Council Secretariat
17 June 2021

**Subcommittee on Proposed Senior Judicial Appointment
(Formed on 21 May 2021)**

Membership list

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

Members Hon Mrs Regina IP LAU Suk-yee, GBS, JP
Hon Paul TSE Wai-chun, JP
Hon Elizabeth QUAT, BBS, JP
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding

(Total : 6 members)

Clerk Mr Lemuel WOO

Legal adviser Ms Clara TAM