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Paper for the House Committee meeting on 24 February 2023

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 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 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). BL 92 stipulates that judges and other members of the judiciary of HKSAR shall be chosen on the basis of their judicial and professional qualities and may be recruited from other common law jurisdictions.

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”) 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. Such

procedure is also stipulated in section 7A of the Court of Final Appeal Ordinance (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 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 non-permanent judges from another common law jurisdictions 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 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”). Sections 7(1), 8(2) and 9(2) of Cap. 484 respectively provide for the appointment of PJs, NPJs and CLNPJs on CFA by CE acting in accordance with the recommendation of JORC. Section 10 of Cap. 484 sets a ceiling of 30 on the total number of persons holding office as NPJs at any one time. At present, there are 14 NPJs, comprising four HKNPJs and 10 CLNPJs.

6. According to section 16 of Cap. 484, 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.

The current appointment

8. The Director of Administration wrote to the Chairman of the House Committee on 13 January 2023 advising that CE had accepted the recommendation of JORC on the appointment of the Honourable Mr Patrick Anthony KEANE, AC, KC (“Mr Patrick KEANE”) as a CLNPJ (“the proposed senior judicial appointment”). Subject to LegCo’s endorsement, CE will make the appointment under BL 88.

9. According to the information provided by the Administration, in making the above recommendation to CE, JORC noted that CFA had been functioning satisfactorily and that it had been CFA’s established practice since 1 July 1997 to draw from the list of CLNPJs to hear substantive appeals. JORC also took into account the fact that the availability of the existing 10 CLNPJs to come to Hong Kong for four weeks to sit on CFA was somewhat limited owing to their extensive professional commitments including arbitration, mediation and/or lecturing work for which they were in huge demand. As a result, a number of them could not manage a four-week period once a year. There were also other logistical considerations affecting the availability of CLNPJs to sit on CFA. For instance, the relevant judge might simply be unavailable to sit on CFA during the timeslot in which he was asked to sit. In addition, most of the judges had particular expertise in certain areas. When a judge with an expertise in a particular area of law was not available to sit on CFA, the listing of the case might have to be delayed.

10. JORC indicated that it was important that substantive appeals were heard within a reasonable time and agreed that the number of CLNPJs should be increased to give greater flexibility in handling CFA caseload and ensure the effective operation of CFA.

The Subcommittee

11. 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 3 February 2023, 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 13 February 2023 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 Patrick Anthony KEANE, AC, KC

13. Members consider that Mr Patrick KEANE has profound judicial experience and a high reputation. They hold a positive view of Mr Patrick KEANE and express full support for the proposed senior judicial appointment.

14. Some members consider that Mr Patrick KEANE's acceptance of the appointment is respectable and commendable considering the changes in political outlook and international relations in recent years, which have brought political pressure to some CLNPs in their own countries. Mr Patrick KEANE's acceptance of the appointment has also shown that, upon a clear and objective understanding of the actual situation of Hong Kong, judges from other common law jurisdictions will continue to accept appointments as CLNPs in exercising their own independent professional judgments.

The need for appointing non-permanent judges from other common law jurisdictions to sit on the Court of Final Appeal

15. Members hold different views as to whether it is necessary to appoint CLNPs to participate in hearing and determining appeals at CFA. Some members note from BL82 that CFA may invite judges from other common law jurisdictions to sit on CFA *as required*, and query why it has been a longstanding practice.

16. SJORC advises that section 16 of Cap. 484 requires that CFA is constituted by five judges when hearing and determining appeals, and that the

fifth judge (apart from CJ and three PJs) should be one HKNPJ or one CLNPJ selected by CJ and invited by CFA. Since the establishment of HKSAR in 1997, it has been a practice for CLNPJs to be invited to participate in hearing and determining appeals at CFA in accordance with BL 82 and section 16 of Cap. 484. As the appeals heard and determined by CFA cover a wide range of laws such as contract law, commercial law, criminal law, civil practice and procedure, administrative law, arbitration, court's jurisdiction etc., given their eminent standing and outstanding judicial experience, CLNPJs have proved to be invaluable assets to CFA. Some members also agree that CLNPJs, with their knowledge and expertise, will help enrich the legal profession of Hong Kong.

17. Some members point out that Hong Kong is the sole common law jurisdiction in the People's Republic of China ("PRC") under the principle of "One Country, Two Systems". As such, appointing and selecting CLNPJs to sit on CFA will reinforce HKSAR's standing in that respect. They consider that being an international trade and commercial centre, Hong Kong will need to keep in step with the developments in law and legal practices of its trading or commercial partners, many of which are common law jurisdictions, and the appointment of CLNPJs will help boost their confidence in the legal system of Hong Kong.

18. There is also a view that by accepting appointments as CLNPJs at the present juncture, it will signify a recognition of the independence and high standing of the judiciary of HKSAR and the judicial system in Hong Kong. When serving as CLNPJs, these judges will have first-hand experience as to how the legal system of Hong Kong, the Constitution of the People's Republic of China ("the Constitution"), the Basic Law and the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region ("the Hong Kong National Security Law") have been operating smoothly in Hong Kong. It is hoped that with these experiences rather than hearsay, CLNPJs will help tell the good stories of Hong Kong to the world.

Composition of the Court of Final Appeal and number of judges appointed

19. Referring to the resignations of two CLNPJs from the United Kingdom ("UK") in 2022 and considering it as resulting from political pressure, some members consider that overreliance on CLNPJs may be politically risky. There is a view that the number of PJs on the judicial establishment of CFA should be increased to cope with CFA workload, and the ceiling on the total number of persons holding office as NPJs should be lifted, with a view to including more talents in the pool, either HKNPJs or CLNPJs.

20. SJORC advises that as the workload of CFA has been quite stable over the past few years at around 20 substantive appeal cases each year, there is no imminent need for increasing the number of PJs as there has been a sufficient number of NPJs and flexibility in their deployment. She explains that, in accordance with section 16 of Cap. 484, CFA is constituted by five judges when hearing and determining appeals and the fifth judge should be one HKNPJ or one CLNPJ. Section 10 of Cap. 484 sets a ceiling of 30 on the total number of persons holding office as NPJs at any one time. At present, there are 10 CLNPJs (not counting Mr Patrick KEANE) and four HKNPJs. CJ will continue to closely monitor the manpower situation and review the judicial establishment of CFA as and when needed.

Appointing non-permanent judges from other common law jurisdictions to sit on the Court of Final Appeal

21. Members agree that more new blood should be introduced to the pool of NPJs and more judges from common law jurisdictions other than UK, Australia and Canada should be appointed. This will avoid overreliance on CLNPJs from these countries, as well as open new horizons of cooperation with other common law jurisdictions. There is a suggestion that JORC should consider judges from other common law jurisdictions such as Singapore, Malaysia, Brunei, India, South Africa, and Commonwealth countries in the Caribbean region.

22. SJORC advises that among the ten CLNPJs in office, six are from UK, three are from Australia and the remaining one is from Canada. The valuable contribution of these CLNPJs with their eminent standing and reputation sitting on CFA for the past twenty-five years speaks for itself. SJORC supplements 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, the legal system of Hong Kong 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 common law jurisdictions such as Singapore and Malaysia have relatively greater differences from that of Hong Kong. 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.

23. Some members are of the view that whilst appointing more judges from common law jurisdictions other than the UK, Australia, New Zealand and

Canada may be desirable, it is difficult in practice as substantiated by the fact that most of court cases quoted by Hong Kong lawyers are mainly from UK, to a lesser extent from Australia and Canada and an even lesser extent from the United States. It is considered that, as the appointment of CLNPIs is one of the attractions of Hong Kong being an international trade and commercial centre and the only common law jurisdiction in PRC, appointing judges from other common law jurisdictions should be considered prudently and thoroughly.

Knowledge and understanding about the constitutional order and cultural backgrounds of Hong Kong

24. Since the CLNPIs may participate in hearing and determining appeals relating to cases concerning constitutional order or national security of HKSAR, there is a concern whether CLNPIs possess adequate knowledge and proper understanding of the Constitution, the Basic Law, the “One Country, Two Systems” principle and the Hong Kong National Security Law to carry out their duties.

25. There is also a concern whether CLNPIs possess sufficient knowledge and proper understanding of the culture, language, constitutional, political order, and values of the people of HKSAR when hearing and determining appeals concerning those aspects. Some members consider that the selection of NPIs to sit on CFA to hear and determine these appeals should be proceeded with great prudence.

26. Some members opine that for appeals arising from judicial review where moral values, political system, constitutional order and national security of HKSAR are at stake, or where the use of Chinese language may pose a barrier difficult to overcome, these appeals should more appropriately be heard and determined by judges with knowledge about the cultural backgrounds, language, the Basic Law and the Hong Kong National Security Law.

27. On the other hand, as CLNPIs have proved to be providing outstanding contribution to CFA in hearing and determining appeals concerning areas such as commercial law, admiralty law and company law, they should continue to be invited to sit on CFA so long as cultural differences are not the issues. However, some members raise that the language interpretation in courts may also distort the original meaning of the testimonies given by plaintiffs, defendants or appellants in courts, which is another issue of cultural difference to be addressed.

28. There is an enquiry as to whether CLNPs will need to take the Judicial Oath. In response, SJORC advises that under BL 104, when assuming office, judges of the courts at all levels in the HKSAR must, in accordance with the law, swear to uphold the Basic Law and swear allegiance to the HKSAR. CLNPs shall also take the Judicial Oath as set out in Schedule 2 - Part V of the Oaths and Declarations Ordinance (Cap. 11), whereby CLNPs are required to uphold the Basic Law, bear allegiance to HKSAR, serve the HKSAR conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit. SJORC further advises that in accordance with section 16 of Cap. 484, CFA is constituted by five judges when hearing and determining appeals, including CJ, three PJs and one HKNPJ or one CLNPJ. In addition, CLNPs have been hearing and determining appeal cases in accordance with the Laws of Hong Kong. Given that all of them 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 Constitution, the Basic Law, the “One Country, Two Systems” principle and the Hong Kong National Security Law.

Other concerns

29. Referring to an enquiry about the remuneration of CLNPs, SJORC replies that a CLNPJ is normally invited to sit in CFA for a stint of about four weeks. CLNPs are currently remunerated for the stint they sit. Their remuneration is pegged to the monthly salary of a PJ and is calculated on a pro-rata basis. They are eligible for a return air passage to and from Hong Kong, local hotel accommodation, use of official transport and medical coverage for their stint. The total expenditure for NPJs (including both HKNPJs and CLNPJs) in 2021-2022 is about HK\$6 million, which includes salaries and other expenses such as return air passage and hotel accommodation etc.

30. In response to an enquiry about how the candidates for consideration of appointment as CLNPs come about, SJORC replies that the candidates are recommended by CJ after careful consideration of the candidates’ judicial and professional qualities. After deliberation, JORC will then make a recommendation to CE. Subsequent to CE’s acceptance of the recommendation of JORC, the proposed appointment will be submitted to LegCo for endorsement. Some members consider that JORC should research into the candidates’ political stance towards China and political background when formulating its recommendations to CE.

Conclusion

31. The Chairman concludes that the Subcommittee has completed deliberation and supports the proposed senior judicial appointment unanimously. The Subcommittee will report its deliberation to the House Committee at its meeting on 24 February 2023. The Administration has advised that, subject to members' deliberation at the House Committee, it intends to move a resolution to seek the Council's endorsement of the proposed senior judicial appointment in accordance with BL 73(7) at the Council meeting of 15 March 2023.

Advice sought

32. Members are invited to note the deliberation of the Subcommittee.

Council Business Division 4
Legislative Council Secretariat
23 February 2023

Subcommittee on Proposed Senior Judicial Appointment

Membership list

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

Members Hon Paul TSE Wai-chun, JP
Dr Hon Junius HO Kwan-yiu, JP
Hon Holden CHOW Ho-ding
Hon YUNG Hoi-yan, JP
Hon LAM San-keung, JP
Hon Dennis LEUNG Tsz-wing, MH
Hon TANG Fei, MH

(Total : 8 members)

Clerk Mr Lemuel WOO

Legal adviser Miss Joyce CHAN