The Law Society's Comments on the Consultation Paper on Process of Appointment of Judges

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1. Independence of The Judicial Officers Recommendation Commission ("JORC")

Article 88 of the Basic Law provides that judges of the Courts of the Hong Kong Special Administrative Region shall be appointed by the Chief Executive on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors.

The JORC exercises the functions of the independent commission referred to in the Basic Law. The Law Society emphasizes that, as provided in the Basic Law, the independent character of the JORC must be maintained.

2. Endorsement of Judicial Appointments by LegCo

Article 73(7) of the Basic Law provides that one of the powers and functions of LegCo is to endorse the appointment and removal of the judges of the Courts of Final Appeal and the Chief Judge of the High Court.

Article 90 of the Basic Law provides that the Chief Executive shall obtain the endorsement of LegCo to the appointment or removal of judges of the Court of Final Appeal and the Chief Judge of the High Court.

The LegCo Panel has observed that for the purposes of the endorsement the information provided to LegCo by the Administration has been sketchy and inadequate. The Law Society considers that this issue should be addressed because without proper information, LegCo would not be in a position to properly exercise its function of endorsement.

3. Endorsement Procedure

In relation to endorsement the LegCo Panel has proposed three

options for consideration. The first two substantially follow the existing procedure. The last of these options is entitled "Special Procedure" and envisages an adoption in modified form of certain features of the US system, such as the holding of open hearings by the Senate Judiciary Committee to question judicial candidates.

The LegCo Panel observed that the strength of the US system was its transparency and accountability, but also noted that the system was highly intrusive and political, and that the system was controversial in the US.

The Law Society considers an adoption of the US system to be inappropriate for Hong Kong for the following reasons:-

1. the judicial qualities of a candidate are the prime concern and the necessary investigations are best done by the JORC on a confidential basis, with LegCo exercising a supervisory role by way of its power of endorsement;

2. the process of judicial appointment must not become politicized;

3. any public intrusion into the private life of a candidate must be strictly controlled;

4. a system which might cause unnecessary embarrassment to candidates is objectionable; and

5. suitable candidates might be deterred from applying.

4. Information on Judicial Candidates

The Law Society supports the LegCo Panel suggestion that more information on a judicial candidate should be made available to LegCo.

The Law Society does not agree that LegCo should be explicitly exempted from the application of section 11(1) of the JORC Ordinance

prohibiting the disclosure of information relating to specific appointments to any unauthorized person without the permission of the Chief Executive. The Law Society would also note that under section 11(1) of that Ordinance disclosure "in the course of duty" is in fact permissible. The Law Society does not consider any amendment to section 11(1) is necessary.

5. Appointment of Judges

The LegCo Panel also went into the question of appointment of judges generally. They referred to "the secrecy of the present system of appointment of judges" and called for greater transparency and accountability.

The Law Society recognizes the need for transparency and accountability. However, it must also be recognized that much of the work of the JORC could only be effectively done on a confidential basis, for example consultations on the suitability of a candidate.

The Law Society supports a requirement that all candidates for judicial appointment should be required to complete a detailed application form which would include a detailed description of their legal experience and expertise.

6. Composition of JORC

The Law Society considers that the Secretary for Justice as principal legal adviser to the Chief Executive, should no longer be a member of JORC. The appropriate role for the Secretary for Justice is to advise the Chief Executive on the recommendations of the JORC. The Chief Executive does not take part in the deliberations of JORC. Neither should his principal legal adviser.

The Law Society considers that both branches of the legal profession should have a greater presence in the JORC. Under the existing law, one barrister and one solicitor are to be appointed by the Chief Executive in consultation with the Bar Association and the Law Society. The Law Society considers there should be two members from each branch of the profession.

The reason is that practising lawyers are best placed to assess the quality of judicial candidates and to offer assistance to other members of JORC in their assessment. However to ensure that fresh and unbiased perspectives may continually be offered to JORC, appointments should be for a term of two years only.

The Law Society does not consider it appropriate that any person who has specific political affiliations or appointments should become a member of JORC. In the same spirit currently no member of LegCo may be a member of JORC.

7. Open recruitment

The Law Society supports the suggestion that there should be open recruitment for judicial vacancies at the High Court level and above.

8. Complaints against Judges

The Law Society considers it appropriate that a system be established to address instances of poor or inappropriate judicial performance. However, the Law Society considers that the matter should be more fully debated before specific proposals are put forward.

9. Law Society Working Party

The above issues have also been considered by the Law Society's Working Party on Civil Justice Reform and its full report will be released in April 2002.

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