BAR COUNCIL'S COMMENTS ON THE JUDICIAL APPOINTMENTS COMMISSION BILL 2008

A. Overview

In considering the Government's proposals under the Judicial Appointments Commission Bill 2008 ("JAC Bill"), it is important to bear in mind the underlying purpose and principles behind the setting up of a Judicial Appointments Commission ("JAC"). They are as follows:

- To recognise and maintain the separation between the Judicial, Executive and Legislative branches of Government;
- To ensure transparency at all levels of the appointments process;
- To ensure representation of various stakeholders in the judicial system on the JAC;
- To ensure meaningful consultation with other concerned parties in the judicial appointments process;
- To ensure accountability of those involved in the process; and
- To clearly define criteria for the selection and promotion of judges.

These purposes have been culled from the lessons of our own history. Malaysia's experience from such events as the 1988 Judicial Crisis and the 2008 Royal Commission on the Video Clip, has taught us that part of what ails our current system stems from (i) Executive subjugation of the Judiciary; (ii) the pivotal role granted to the Executive in relation to judicial appointments (iii) the lack of transparency and accountability in the judicial appointments process and (iv) there being too much power and discretion being placed in the hands of too few.

The scope and operation of a judicial appointments commission must therefore be founded on the principles stated above.

Whether these principles have been adhered to in the Government's Bill can be assessed from such key factors as the powers of the Prime Minister, the composition and functions of the JAC, the appointing body for members of the JAC, how the selection process is conducted (including matters such as selection criteria and the JAC's quorum and voting requirements) and whether

the Prime Minister is ultimately bound to select from within the candidates shortlisted by the JAC or may independently select his own candidate.

The Malaysian Bar welcomes the move to set up a judicial appointments commission but the Bill as it presently stands does not promote the principles and purposes outlined above. The following are the concerns of the Malaysian Bar:

- Far from preserving the separation of powers between the executive and the judiciary, the JAC Bill in fact seeks to statutorily reinforce and validate the power of the executive in key aspects of the judicial appointments process. The non ex-officio members of the JAC are to be appointed at the sole discretion of the Prime Minister. As the Prime Minister appoints 5 members of the JAC, he controls the appointment of the majority of the JAC. The JAC Bill leaves open the possibility that the Prime Minister may appoint politicians and former members of the Executive or the public services. The Prime Minister also has sole power to allocate funds and determine allowances to the JAC. The Prime Minister has the sole power to remove any ex-officio member of the JAC without assigning reason. In addition, the Prime Minister can regulate the manner in which the judicial selection process is carried out as well as the criteria for selection.

- The Bill provides for legislative powers to be vested in the Prime Minister in that he may, albeit for the first two years, change the provisions of the JAC Bill.

- Further, it is arguable that the Prime Minister is not limited to choosing a candidate from among those shortlisted by the JAC but may in fact appoint someone who has not gone through the JAC's vetting and selection process. The Bill is vague and imprecise in this regard. Under the Bill, it is proposed that candidates be vetted by the JAC, which will then put forward either two or three names (depending on the type of vacancy) to the Prime Minister. For instance, clause 27 provides that the Prime Minister may call for two further names to be submitted to him. Thereafter, clause 28 does not explicitly state that the Prime Minister must recommend only those candidates proposed by the JAC to the Yang Di

Pertuan Agong. The Bill should make clear that the Prime Minister can only recommend such candidates as emerge from the JAC's deliberations.

- The JAC Bill in effect allows the Prime Minister to require to JAC to put forward four candidates for an appointment to an office bearer position, the Federal Court and Court of Appeal. In reality however, as these are senior positions in the judiciary, there are only likely to be a handful of qualified candidates. In respect of an appointment to the position of Chief Justice for example, there are only likely to be one or two suitably qualified candidates. In very rare cases, there may be three such candidates. Allowing the Prime Minister to call for up to four names for the position of Chief Justice, will render the JAC's function as a vetting and selection body redundant. In effect, all names being considered by the JAC will have to be submitted to the Prime Minister. The JAC may even have to put forward the name of a less qualified candidate or one that was not initially being considered in order to fulfil the Prime Minister's request.

- The various stakeholders are not represented on the JAC. The JAC Bill proposes that the JAC be comprised two groups: judges and "eminent persons". The appointment of eminent persons is in the hands of the Prime Minister although there is a consultation process with various stakeholders, which we welcome. However, the Prime Minister is given the absolute power to remove any of the eminent persons without assigning a reason. Apart from affecting the independence of the eminent persons, this places far too much power in the hands of the Prime Minister.

- Although the stakeholders are consulted on the appointments of eminent persons, there is a glaring absence of any obligation on the JAC thereafter to consult with them in conducting the selection process for judicial vacancies. The Bill ought to impose such an obligation.

- The Prime Minister is not obliged to make his reasons for the rejection of a candidate known to the JAC. The Prime Minister is in effect empowered to reject the initial recommendations of the JAC and require that the JAC submit two further names to him.

- The Prime Minister is given unfettered power to amend the provisions of the Act by Gazette notification in the first two years after its coming into force.

- One of the key revelations of the Lingam enquiry was that manoeuvring for judicial appointments was facilitated by the placement of too much power in the hands of too few. The JAC Bill repeats the mistake, making the system once again overly dependent on the integrity of one person, that is, the Prime Minister. We recommend instead that the following powers given to the Prime Minister under the JAC Bill, be given to a parliamentary committee established for this purpose:

  (i) Appointment of 'eminent persons' to the JAC.
  (ii) Determination of allowances for the JAC.
  (iii) Removal / dismissal of JAC members

The totality of the issues set out above must be addressed so that the proposed JAC will meet the principles reflected in clause 2 of the JAC Bill namely to defend the independence of the judiciary and to ensure that public interest is properly represented in matters relating to the judiciary. In the final analysis, the Government's proposal must not be seen to be legalising and reinforcing the control of the Executive over the judicial appointments process.

Constitutional Amendments Required

To be completely effective, the JAC Bill requires a Constitutional amendment. The following points must be noted.

The Constitution states, in Article 122B that before tendering his advice for an appointment to the positions of President of the Court of Appeal, Chief Judges of the High Court, judges of the Federal Court, judges of the Court of Appeal and judges of the High Court, the Prime Minister must consult the Chief Justice. Before advising on the appointment of Chief Judge of the High Court, the Prime Minister must consult the Chief Judge of each of the High Courts and if the appointment is in respect of the High Court of Sabah and Sarawak, the Prime Minister must consult the Chief Minister of each of those states. For non-office bearer positions in the Federal

Court, Court of Appeal and High Court, the Prime Minister must consult with the respective head of that particular Court (i.e. the Chief Justice of the Federal Court, President of the Court of Appeal and the Chief Judge of High Court respectively).

The JAC is now a parallel process to the constitutional consultation process since it is envisaged that the JAC will vet and select candidates to be recommended to the Prime Minister, and bearing in mind that the respective office bearers of the judiciary are constituent members of the JAC.

The Constitutional process will always override any legislative process.

A further incongruity arises where for example, the Chief Justice in deliberations as a member of the JAC has disagreed with the JAC's choice for appointment to a judicial vacancy. Under the Constitution, the Prime Minister must still consult the Chief Justice who thus effectively has a 'second bite at the cherry'. In other words, the Chief Justice has the opportunity to express his personal view (contrary to the JAC's position), thus undermining the decision of the JAC.

For this reason, Constitutional amendments are required and it is best that such amendment be made prior to the passage of this Bill.

A further reason for a Constitutional amendment is that the consultation process envisioned under the JAC Bill as well as the Bar Council's alternative proposals (set out under Part B, paragraph 16 below) will effect a change in the Prime Minister's prerogative. The current Constitutional provisions allow the Prime Minister to freely explore any number of candidates for each judicial vacancy. He must consult with certain office bearers of the judiciary, but he need not accept their views on the candidates. This unfettered prerogative of the Prime Minister will be checked once a JAC is introduced, with a Constitutional amendment.

Conclusion

The purpose of these comments is to give a broad overview of what the Malaysian Bar views as significant issues that must be addressed in the JAC Bill. It does not mean that the Malaysian Bar does not support the setting up of a JAC. We support the positive aspects of the Bill for example

provisions which spell out criteria for the appointments. However, if there was truthful recognition of the crisis that the nation has endured and genuine effort to address the problem, there is no reason why amendments cannot be made to the Bill so as to make it effective. We strongly urge that the Bill be referred to a select committee of Parliament so that more views are canvassed, including views from the judiciary, before this important Bill is passed.

Certainly, more time is required and we are positive that with further consideration, Parliament will be able to establish a JAC that upholds the purposes and principles reflected in Clause 2 of the JAC Bill.

B. Comments on Specific Provisions of the JAC Bill

Clause 5:

1. We cannot see a rationale for the inclusion of a judge of the federal court on the JAC, and no reason is proffered in the Explanatory Statement. The federal court judge may not be wholly independent and fearless because such a judge is subordinate to the office bearers of the judiciary. He may also have aspirations for higher office and this if of course a matter within the purview of the JAC. It is possible that he may, whether consciously or otherwise, subordinate his views to that of the office bearers of the judiciary sitting on the JAC. We therefore disagree with the inclusion of a federal court judge as a member of the JAC. As an alternative, the JAC Bill could instead increase the number of eminent persons on the JAC to 5.

2. The selection of "eminent persons" leaves open the possibility that former members of the executive and public service, members of parliament and state assemblies and other politicians may sit on the JAC. It is our position that these former members ought to be expressly excluded.

3. In respect of the Prime Minister's role in the appointment of non ex-officio members of the JAC, the purpose of a JAC is to make the judicial appointments process independent of the Executive and to balance the role of the Prime Minister in the process. It would defeat this purpose if the Prime Minister had nominees on the JAC. The fact that the appointments of the non ex-officio members is in the hands of the Prime Minister is therefore wholly repugnant to the principle of separation of powers. This rationale should also apply in respect of powers to remove a member of the JAC, to determine the allowances of members of the JAC and to make regulations in respect of the JAC's procedure.

4. An alternative that may be explored, and which we recommend, is the setting up a parliamentary committee to oversee the appointment and removal of the non ex-officio members. Another alternative is to have the appointment of the first 5 non ex-officio members be undertaken by an alternative body, and subsequent appointments to be undertaken by the JAC itself.

5. It is appropriate to remember that the 1988 judicial crisis was precipitated by power vested in the office of the Prime Minister. The findings of the Royal Commission of Inquiry on the Videoclip show that significant problems arose from the overemphasis on Executive power in the appointments process. Therefore, having nominees of the Prime Minister on the JAC fails to redress these problems. We do not agree that the appointment and removal of eminent persons be left to the Prime Minister. Rather, this should be placed in the hands of a parliamentary committee.

Clause 7

6. The power to determine the allowances of the JAC should not be in the Prime Minister's hands, for the reasons set out paragraph 3 above. We propose that all matters relating to funding for the JAC be approved and determined by Parliament. In this respect, Parliament could be aided by the recommendations of the parliamentary committee proposed in paragraph 4 above.

Clause 9

7. For the reasons set out in paragraph 3 above, the Prime Minister should not have control over the dismissal of members of the JAC. Again, this should be undertaken by a parliamentary committee.

Clause 10

8. We believe that sub-clause 1b(iii) needs to be amended to refer only to a situation where the person charged was in fact sentenced to a jail term of more than two years. Otherwise, it would seem that this clause imposes far too onerous a restriction on the members of the JAC.

9. In addition, sub-clause (1) should include a provision that ex-officio members of the JAC vacate their post on the JAC automatically upon vacating their judicial office.

10. On the Prime Minister's power to appoint under sub-clause (2), we repeat our concerns stated in paragraph 3 above. This power to appoint should be given to a parliamentary select committee.

Clause 11

11. We would propose that under the definition of "connected" in sub-clause (2), the category of connected persons should not be closed or limited to the instances set out therein, as various other relationships may fall under this category, for example, employer-employee relationships. The definition should be inclusive rather than exclusive.

Clause 13

12. It appears from sub-clause (3) that a meeting of the JAC cannot be held in the event none of the judicial members are present.

Clause 14

13. Sub-clause (2) has the effect of validating an improper and invalid meeting by the mere device of having minutes taken of the invalid meeting. This is extremely unusual, and would make nonsense of the other legal requirements of the Act, for example, clauses 11, 13(4), 13(5), and 24. This sub-clause would engender a lackadaisical attitude towards compliance or a disregard for the provisions of the Act. Sub-clause (2) should be deleted.

Clause 15

14. This clause gives the JAC near absolute immunity from any breach of the other provisions of the proposed Act, and is against principles of transparency and accountability. It particularly enables the Commissioners to disregard with impunity their obligations under Clause 11. If the concern of the framers of the JAC Bill is that an appointment of a judge may be rendered defective by reason of any of the grounds set out in sub-clauses 15(a) – (c) and consequently that the judicial acts of that appointee may be rendered null and void, then such concern imay be specifically addressed by including a provision in the Bill to save such judicial acts

irrespective of any defects in the appointment. The Bill should not seek to validate the appointment itself.

Clause 18

15. Sub-clause 18(4) is inconsistent with Clause 16 and the independence of the JAC. The JAC should determine its own regulations and that of its committees. In this respect, we also recommend that clause 30 be amended to state the JAC may make its own regulations. This is to ensure the independence of the JAC from the Executive.

Clause 22

16. The Bill specifies that the JAC shall select not less than 3 candidates for each vacancy in the High Court, and not less than 2 candidates for each vacancy in the superior courts other than the High Court. No rationale has been proffered for this minimum number of candidates that must be proposed by the JAC to the Prime Minister. In effect, the Prime Minister is asking for multiple choices. The JAC is charged with vetting and selecting the best candidate(s) according to select criteria. It would be a mockery of this process if the JAC is obliged to propose multiple candidates (i.e. more than the best candidate) especially if there may not be a sufficient number of candidates who have met the selection criteria. It may in any event not be practically feasible. This problem is further exacerbated by Clause 27 whereby the Prime Minister may require the JAC to propose a further 2 candidates for appointment to an office bearer position, the Federal Court and the Court of Appeal.

In effect, the Prime Minister is entitled to call for 4 candidates for each vacancy in an office bearer position, the Court of Appeal and Federal Court. This defeats the purpose of the JAC as a vetting and selection body.

Bar Council's Proposal

In respect of all appointments, whether to the High Court, Court of Appeal, Federal Court or an office bearer position, we recommend that the JAC shall initially select 1 candidate. The Prime Minister then has a choice of accepting the candidate, rejecting the candidate or asking the JAC

to reconsider its recommendation. This is Stage 1. The Prime Minister may only exercise the options of rejection or reconsideration once each in any given vacancy.

If the Prime Minister rejects the selection or requires reconsideration, the process moves to Stage 2. At this stage, the JAC again submits a name to the Prime Minister who has the following options: he may accept the selection; he may reject the selection (but only if he has not already used that power at Stage 1); or he may require reconsideration (but only if he has not already used that power at Stage 1). If asked to reconsider, the JAC may, after reconsideration, submit the same name to the Prime Minister.

Thereafter, if the Prime Minister rejects the selection (but only if he has not already used that power at Stage 2) or requires reconsideration (but only if he has not already used that power at Stage 2) the process moves on to Stage 3. At this stage, the panel again puts a name to the Prime Minister. This time he must accept the selection of the JAC's candidate, or of the candidate selected in Stage 1 or Stage 2 who the panel was asked to reconsider. The Prime Minister cannot at this stage, select the person who has been earlier rejected.

Whenever the Prime Minister rejects a candidate or requires the JAC to reconsider a candidate, the Prime Minister must give his reasons for doing so in writing.

Alternative Proposal

As an alternative, we propose that the JAC be required to initially proffer up to two names to the Prime Minister for each vacancy. The JAC should not be required to produce two names initially since it is unlikely, especially in relation to office bearer positions, that there would be more than a few potential candidates. After the JAC's vetting process, one candidate may be considered the better choice and it is this candidate's name that should be put forward to the Prime Minister. After receiving the initial one or two names, the Prime Minister may require another name to be submitted but in that case, it is imperative that he must first give his reasons in writing.

We believe that one of these proposals ought to be adopted. The current proposal (in particular the fact that the Prime Minister is not required to give reasons for requiring further candidates) is wholly contrary to the need for accountability and transparency in the appointments process.

17. We would also note here that a constitutional amendment will be required to put in this new consultation and selection mechanism. Under the present Constitutional provisions, the Prime Minister may theoretically consider any number of candidates. While he will need to consult with certain office bearers of the judiciary, he need not accept their views. It is his prerogative to do so. However, under the JAC Bill and the alternative proposals of the Bar Council, such prerogative is to be limited. A Constitutional amendment is required to enable this.

Clause 23

18. The phrase "knowledge of the judiciary" in sub-clause (4) is ambiguous and has not been defined nor explained in the Explanatory Statement. We would in any event propose that the phrase be removed as it does not appear to be material to the selection of judges. We would also recommend that the said sub-clause be expanded to include diversity that reflects Malaysia's social and racial make-up.

Clause 24

19. We cannot see a reason for the disqualification of the Chief Justice as Chairman under sub-clause (1), and no explanation is proffered in the Explanatory Statement.

20. As has been pointed out by former Chief Justice Tun Abdul Hamid Mohamed (see *The New Straits Times*, 12.12.2008), there may be difficulty in reaching the quorum requirement of seven in respect of appointments to the position of Chief Justice and President of the Court of Appeal. This is the case for example since in respect of selection for the position of Chief Justice, at least 4 other members (i.e. the President of the Court of Appeal, Chief Justice of Malaya, Chief Justice of Sabah and Sarawak and the Federal Court judge) are potential candidates and hence disqualified from sitting. We are of the view that this difficulty may be resolved by increasing the number of "eminent persons" on the JAC.

21. As an alternative, we propose that a special selection panel be formed in respect of selection of office bearer positions in the judiciary. The panel should comprise the following:

(i) the Chief Justice

(ii) the two most senior members of the superior courts who are not candidates for the position

(iii) all the eminent persons on the JAC

22. In respect of the proposed voting by simple majority (sub-clause (5)), we propose that voting be by two-thirds majority of those present (with a minimum quorum of 7 members), in order to ensure that every recommendation or decision of the JAC will in effect receive the approval of the majority of the JAC's members irrespective of the quorum present, for instance, where there are only 7 members present, a vote of 5 members is required to approve a candidate, and in effect the 5 also represents the majority of 9.

Clause 27

23. We cannot see a rationale for this Clause, bearing in mind that the JAC would have proffered the best candidate(s) available at first instance. The Clause effectively allows the Prime Minister to disregard the considered decision of the JAC, bearing in mind that the Prime Minister is not required to give any reasons for his request of two additional names. As pointed out at paragraph 16, this effectively means that the Prime Minister is entitled to call for 4 candidates for each vacancy in an office bearer position, the Court of Appeal and Federal Court. This is so even when the JAC itself considers that only one or two candidates are suitable, which is likely in respect of office bearer positions in the Judiciary. For example, the JAC may be considering four candidates for the position of Chief Justice, as there is likely to be only a small pool of candidates available for this highest office. The present position effectively means that all such applicants for the position would have to be put forward by the JAC to the Prime Minister if he invokes Clause 27. Thus, Clause 27 renders the JAC redundant and gives the false impression that all the candidates are endorsed by the JAC. We reiterate our proposals set out at paragraph 16 above.

Clause 28

24. It is noted that the Bill presently remains silent on the requirement that the Prime Minister may only select a candidate who has been put forward by the JAC. It is arguable that this is implied. However given that this is one of the core principles of the Bill, it is imperative that it be expressly and unequivocally stated. This Clause should be amended to make clear that the Prime Minister can only recommend names which are proposed by the JAC.

Clause 29

25. Our view is that the position of Judicial Commissioners ought to be abolished. However, if maintained, then they ought not to be required to put in an application to become High Court judges. Rather, Judicial Commissioners should automatically be considered by the JAC for appointment to the High Court and should undergo the same vetting process as all other candidates.

Clause 30

26. Once again, we cannot see the rationale for this Clause. The Prime Minister should not have control over the JAC's procedures, and we refer to our comments in paragraphs 3 and 15 above.

Clause 37

27. Clause 37 must be removed. It usurps the functions of Parliament and allows the Prime Minister to legislate by ministerial edict. This would, in our view, be unconstitutional. The explanation given in the Explanatory Statement that the purpose is to remove "*any difficulties that may arise in connection with the implementation of the proposed Act"* is wholly unconvincing.

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