

立法會 *Legislative Council*

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Paper for the Committee on Members' Interests' meeting on 19 April 2005

Review of the “Advisory Guidelines on Matters of Ethics in relation to the conduct of Members of the Legislative Council of the Hong Kong Special Administrative Region in their capacity as such”

Purpose

This paper sets out information which may assist the Committee on Members' Interests (“the Committee”) in deciding whether, and if so, how, the *Advisory Guidelines on Matters of Ethics in relation to the conduct of Members of the Legislative Council of the Hong Kong Special Administrative Region in their capacity as such* (“the Advisory Guidelines”) should be developed to provide specific guidelines to Members.

Background

The decision to examine the Advisory Guidelines

2. At the meeting held on 3 November 2004, the Committee agreed to examine the question of whether, and if so, how, the Advisory Guidelines should be developed. The Committee also agreed that in doing so, reference should be made to the Guide to Judicial Conduct published by the Judiciary of the Hong Kong Special Administrative Region in October 2004, the relevant codes and rules issued by legislatures in other territories, and the deliberations at the time when the Advisory Guidelines were drawn up.

Researches undertaken by the LegCo Secretariat

3. The Legislative Council (“LegCo”) Secretariat has undertaken research on the deliberations in connection with the drawing up of the Advisory Guidelines, compared the respective contents of the Advisory Guidelines and the Guide to Judicial Conduct, and sought further information on the arrangements in selected overseas legislatures for regulating their members' behaviour, including the codes and rules of conduct. The findings are set out below.

Past deliberations

4. The blueprint of the current Advisory Guidelines were drawn up in 1995. These Advisory Guidelines set out the general and specific conduct expected of LegCo Members in dealing with LegCo business.

5. At the time of devising these Advisory Guidelines in 1995, the Committee on Members' Interests recognised that the subject matter was complex and covered a very wide scope, and that it would be difficult, if not impossible, to devise a comprehensive set of guidelines to advise and guide LegCo Members as to what was and what was not proper behaviour in fulfilling their duties as LegCo Members. Having regard to the practice adopted by legislatures in other territories and bearing in mind the need to avoid invasion into LegCo Members' privacy, the Committee concluded that some general and specific standards of conduct should be drawn up to remind LegCo Members of the generally accepted and assumed standards of conduct of a member of a legislature and of their responsibilities in maintaining the public trust vested in them. After two consultation exercises involving Members and the public, the Committee finalized the Advisory Guidelines and issued them to Members in May 1996. These Advisory Guidelines were adapted, refined and improved in 1997, 2001 and 2002. The Advisory Guidelines were issued to LegCo Members for reference at the beginning of each term.

6. The original set of the Advisory Guidelines issued to LegCo Members in 1996 and the up-to-date version (amended in November 2002) are at **Appendices 1A** and **1B** respectively.

The Guide to Judicial Conduct

7. The Guide to Judicial Conduct was published in October 2004. It was the result of the work of a Working Party appointed by the Chief Justice. Its purpose is to provide practical assistance to judges in dealing with matters relating to judicial conduct and does not attempt to define judicial misconduct. It does not extend to matters arising from the conditions of service of a judge (for example, whether permission for outside work is required) or matters governed by law (for example, the Prevention of Bribery Ordinance, Cap. 201 and the Acceptance of Advantages (Chief Executive's Permission Notice 2004, G.N. 252).

8. The Guide contains a Preface and Parts A to F. Parts A and B outline the purpose of the guide and guiding principles. Parts C and D concern practical issues about the discharge of judicial duties and matters concerning disqualification. Parts E and F deal with professional activities outside court and non-judicial activities.

9. The Guide is made available to the public to increase transparency, and it is the intention of the Chief Justice to review it from time to time.

10. The LegCo Secretariat has prepared a comparison in **Appendix 2** of the contents of the Advisory Guidelines and the Guide to Judicial Conduct. Those guidelines in the Guide to Judicial Conduct which the Committee may consider adapting for inclusion in the Advisory Guidelines are highlighted in italic and bold.

Further information concerning selected overseas legislatures

11. The Research and Library Services Division has provided at **Appendix 3**, further information on the arrangements in selected overseas legislatures for regulation of their members' misbehaviour in the following aspects:

- (i) misbehaviour unrelated to declaration/conflict of interests which is subject to regulation;
- (ii) how misbehaviour is regulated, and whether the regulation is advisory or mandatory in nature;
- (iii) how independent officers/committees responsible for handling misbehaviour are selected or formed; and
- (iv) code and rules based on which the independent officers/committees handle members' misbehaviour.

12. The Research and Library Services Division has also provided at **Appendix 4** a table comparing the Advisory Guidelines issued by the Committee with the guides to members' conduct in selected overseas legislatures.

Advice sought

13. Members are invited to note the information in this paper and consider the way forward.

Legislative Council Secretariat
23 November 2004

**ADVISORY GUIDELINES ON MATTERS OF ETHICS IN
RELATION TO THE CONDUCT OF MEMBERS OF
LEGISLATIVE COUNCIL IN THEIR CAPACITY AS SUCH**

Appendix 1A

(Issued by the Committee on Members' Interests under
Legislative Council Standing Order No. 60B(1)(d))

I. General Standards

1. A Member should ensure that his conduct must not be such as to bring discredit upon the Legislative Council (Council). (see Footnote)
2. A Member should adhere to the spirit and the letter of any rules or regulations made by the Council, its committees or the President for the regulation of the practice and procedure of the Council and its committees or Members' behaviour in their conduct of the business of the Council.

II. Specific Standards

3. In accordance with Standing Order No. 65-
 - (a) In any debate or proceedings of the Council or any committee at which a Member is present he shall declare any direct pecuniary interests which he has in the matter.
 - (b) A Member shall not vote upon any question, whether in the Council or in any committee, in which he has a direct pecuniary interest.
 - (c) A Member shall not move any motion or amendment relating to a matter in which he has a pecuniary interest, whether direct or indirect, or speak on any such matter, whether in the Council or in any committee, without disclosing the nature of that interest.
4. In accordance with Standing Order No. 64A and guidance notes issued by the Committee on Members' Interests, a Member shall register particulars of registrable interests listed below:-
 - (a) remunerated directorships of companies, public or private;
 - (b) remunerated employments, offices, trades, professions or vocations;
 - (c) the names of clients when the interests referred to in (a) and (b) above include personal services by the Member which arise out of or are related in any manner to his membership of the Council;
 - (d) financial sponsorships-
 - i. as a candidate for election to the Council, where to the knowledge of the Member the sponsorship exceeds \$10,000 or 25% of his election expenses; or

- ii. as a Member of the Council, by any person or organization, stating whether any such sponsorships include any payment or any material benefit or advantage to the Member or his spouse, whether direct or indirect, where the total value from a single source in the course of one year exceeds 5% of the annual salary of a Member of the Council or where the value of any one-off sponsorship exceeds \$10,000;
 - (e) overseas visits made by the Member or his spouse relating to or arising out of membership of the Council where the cost of any such visit has not been wholly borne by the Member or public funds;
 - (f) any payments or any material benefits or advantages received by the Member or his spouse, which arise out of or are related in any manner to his membership of the Council, from or on behalf of foreign governments, organizations or persons;
 - (g) land and property;
 - (h) the names of companies or other bodies in which the Member has, to his knowledge, either himself or with or on behalf of his spouse or infant children, a beneficial interest in shareholdings of a nominal value greater than one-hundredth of the issued share capital.
5. A Member should not, in his capacity as such, seek to influence another person to further the Member's private interest.
 6.
 - (a) A Member should not knowingly take advantage of, or benefit from, information that is obtained in his capacity as a Member of the Council and which is not generally available to the public.
 - (b) A Member should ask for information only about matters of public interest and should not seek information for private or personal interest.
 7. A Member should not use any part of his Operating Expenses Reimbursement or District Office Allowance for purposes other than in connection with the business of the Council.

(Footnote: A Member should conduct himself in such a way as not to place himself in a position which may be contrary to the generally assumed standard of conduct expected of a Member of the Council. For example, the appearance of a Member in an advertisement to promote a commercial product or service may be regarded as not in keeping with the position or prestige of a Member of the Council. Members are therefore advised to exercise caution when deciding to engage in advertisement activities of a commercial nature as such engagement may run the risk of bringing discredit upon the Council.)

**Advisory Guidelines on Matters of Ethics
in relation to the conduct of Members of
the Legislative Council of
the Hong Kong Special Administrative Region
in their capacity as such**

*(Issued by the Committee on Members' Interests under
Rule 73(1)(d) of the Rules of Procedure of the Legislative Council)*

I. General Standards

- (1) (a) A Member should ensure that his conduct must not be such as to bring discredit upon the Legislative Council ("the Council").
- (b) A Member should conduct himself in such a way as not to place himself in a position which may be contrary to the generally assumed standard of conduct expected of a Member of the Council. When deciding whether to engage in activities of a commercial nature such as advertisement activities, Members should accord due consideration as to whether the nature and contents of such activities might be regarded as not in keeping with the position or prestige of a Member of the Council and thereby bringing discredit upon the Council.
- (2) A Member should adhere to the spirit and the letter of any rules or regulations made by the Council, its committees or subcommittees, or the President for the regulation of the practice and procedure of the Council, its committees and subcommittees, or Members' behaviour in their conduct of the business of the Council.

II. Specific Standards

- (3) In accordance with Rules 83A, 84(1) and 84(1A) —
 - (a) In the Council or in any committee or subcommittee, a Member shall not move any motion or amendment relating to a matter in which he has

a pecuniary interest, whether direct or indirect, or speak on any such matter, except where he discloses the nature of that interest.

- (b) In the Council or in any committee or subcommittee, a Member shall not vote upon any question in which he has a direct pecuniary interest except where his interest is in common with the rest of the population of Hong Kong or a sector thereof or his vote is given on a matter of Government policy.
 - (c) In the Council or a committee of the whole Council, a Member shall withdraw when a vote is taken on a question in which he has a direct pecuniary interest except where his interest is in common with the rest of the population of Hong Kong or a sector thereof or his vote is given on a matter of Government policy.
- (4) In accordance with Rule 83 and guidance notes issued by the Committee on Members' Interests, a Member shall register particulars of registrable interests listed below:—
- (a) remunerated directorships of companies, public or private;
 - (b) remunerated employments, offices, trades, professions or vocations;
 - (c) the names of clients when the interests referred to above include personal services by the Member which arise out of or are related in any manner to his membership of the Council;
 - (d)
 - (i) all donations, as a candidate in the Legislative Council election in which the Member was elected as a Member of the Council, received by the Member or any person on his behalf for the purpose of meeting the Member's election expenses in the election; or
 - (ii) financial sponsorships, as a Member of the Council, by any person or organization, stating whether any such sponsorships include any payment or any material benefit or advantage to the Member or his spouse, whether direct or indirect;
 - (e) overseas visits made by the Member or his spouse relating to or arising

out of membership of the Council where the cost of any such visit has not been wholly borne by the Member or public funds;

- (f) any payments or any material benefits or advantages received by the Member or his spouse arising out of his membership of the Council from or on behalf of:
 - (i) any government or organization of a place outside Hong Kong; or
 - (ii) any person who is not a Hong Kong permanent resident;
 - (g) land and property;
 - (h) the names of companies or other bodies in which the Member has, to his knowledge, either himself or with or on behalf of his spouse or infant children, a beneficial interest in shareholdings of a nominal value greater than one-hundredth of the issued share capital.
- (5) A Member should not, in his capacity as such, seek to influence another person to further the Member's private interest.
- (6) (a) A Member should not take advantage of, or benefit from, information that is obtained in his capacity as a Member of the Council and which is not generally available to the public.
- (b) A Member should ask for information only about matters of public interest and should not seek information for private or personal interest.
- (7) A Member should not use any part of his Operating Expenses Reimbursement or District Office Allowance for purposes other than those in connection with the business of the Council.

Comparison between the “Advisory Guidelines on Matters of Ethics in relation to the conduct of Members of the Legislative Council of the HKSAR in their capacity as such”(“Advisory Guidelines”) and “the Guide to Judicial Conduct”

Notes: Members may wish to consider whether the sentences typed in bold and italic in the Guide to Judicial Conduct may be adapted for use in the Advisory Guidelines

Advisory Guidelines (Issued by the Committee on Members' Interests under Rule 73(1)(d) of the Rules of Procedure of the Legislative Council) November 2002 edition	Guide to Judicial Conduct (Issued by the Judiciary of Hong Kong Special Administrative Region) October 2004 edition
<u>I. General Standards</u> (1)(a) A Member should ensure that his conduct must not be such as to bring discredit upon the Legislative Council ("the Council"). (b) A Member should conduct himself in such a way as not to place himself in a position which may be contrary to the generally assumed standard of conduct expected of a Member of the Council. When deciding whether to engage in activities of a commercial nature such as advertisement activities, Members should accord due consideration as to whether the nature and contents of such activities might be regarded as not in keeping with the position or prestige of a Member of the Council and thereby bringing discredit upon the Council.	Part A: PURPOSE OF THE GUIDE 1. An independent Judiciary, upholding the rule of law and safeguarding the rights and freedoms of the individual, is a cornerstone of Hong Kong's society. Judges are entrusted by the community with the exercise of independent judicial power; and liberty, property and reputation are at stake in the decisions they make when adjudicating cases between citizens and between citizen and government. 2. In order to maintain public confidence in the Judiciary and the administration of justice, it is of fundamental importance that judges observe the highest standards of conduct. Judges must do their utmost to uphold the independence and impartiality of the Judiciary and to maintain the dignity and standing of the judicial office. The community has a right to have the highest expectations of the Judiciary and judges. 3. Judges are of course part of the community which they serve. Maintaining the highest standards of conduct does not mean that judges should be divorced from society, living a “monastic” life on its fringes. In the modern world, a perception that judges are remote and out of touch with their community would not inspire and may undermine public confidence in the Judiciary and the administration of justice.

4. The purpose of this Guide is to provide practical assistance to judges in dealing with matters relating to judicial conduct. Such matters may arise in many varied situations involving different circumstances requiring judges to decide on the proper course of action. This Guide obviously cannot be comprehensive. Its aim is to provide practical guidance for judges. It does not attempt to define judicial misconduct.
5. In situations of difficulty, different views might quite reasonably be taken as to the appropriate course of action. In such situations, judges may find it helpful to discuss the matter with colleagues. If in any doubt, it is recommended that judges should consult their Court Leaders and the Chief Justice, as Head of the Judiciary, may be consulted as appropriate. (Reference in this Guide to the Court Leader is to the Court Leader of the court where the judge concerned is sitting.)
6. ***Ultimately, the responsibility for deciding on the appropriate course of action in each case rests with the judge concerned. In matters concerning judicial conduct, it is important that judges exercise a high degree of alertness. Caution and commonsense are the surest guides. At the end of the day, the decision made must rest comfortably with the judicial conscience.***
7. Guides similar to the present are a common feature of a number of common law jurisdictions. Inevitably it may contain propositions as to proper judicial conduct that are self-evident and of course judges are and have been alive to them.
8. It should be noted that this Guide does not extend to matters arising from the conditions of service of a judge (for example, as to when permission for outside work is required) or matters governed by law (for example, the Prevention of Bribery Ordinance, Cap. 201 and the Acceptance of Advantages (Chief Executive's Permission Notice 2004, G. N. 252). This Guide does not affect the obligations of judges under their conditions of service or under the law.

	<p>9. This Guide will first discuss the Guiding Principles (Part B). It will then deal with various areas of judicial conduct: Discharge of judicial duties (Part C); Matters concerning disqualification (Part D); Professional activities outside court (Part E); and Non-judicial activities (Part F).</p> <p>10. It may be appropriate to revise or supplement this Guide from time to time.</p>
<p>(2) A Member should adhere to the spirit and the letter of any rules or regulations made by the Council, its committees or subcommittees, or the President for the regulation of the practice and procedure of the Council, its committees and subcommittees, or Members' behaviour in their conduct of the business of the Council.</p>	<p>Part B: GUIDING PRINCIPLES</p> <p>11. Three guiding principles are relevant to any consideration of judicial conduct. First, a judge must be independent. Secondly, a judge must be impartial. Thirdly, a judge must display integrity and propriety in all matters of conduct, both in and out of court.</p> <p><u>Independence</u></p> <p>12. Judicial independence is constitutionally guaranteed by the Basic Law which contains safeguards for its protection. Article 85 provides that the courts of Hong Kong shall exercise judicial power independently, free from any interference, and that judges shall be immune from legal action in the performance of their judicial functions.</p> <p>13. Judicial independence is of course not conferred as a privilege enjoyed by judges. It imposes a responsibility on judges and is essential to enable them to perform their constitutional duty of adjudicating disputes impartially without fear or favour. Judicial independence is a fundamental guarantee of a fair trial and a fundamental safeguard of the rights and freedoms of Hong Kong residents. It is a prerequisite to the rule of law. Judges must ensure that their conduct, both in and out of court, does not undermine judicial independence or give the appearance of doing so.</p> <p>14. The Judiciary must be and must be seen to be independent of the executive and legislative branches of government. The relationship between the Judiciary and the executive and legislative arms of government should be one of mutual respect, each recognizing and respecting the proper role of the others. The responsibility for dealing with the other branches of government on behalf of the Judiciary rests with the Chief Justice.</p>

15. Judges must be aware that threats to their judicial independence may take the form of subtle attempts to influence how they should approach certain cases or to curry favour with them in some way. Judges must reject any extraneous attempt, direct or indirect, to influence them, by any means. If appropriate, any such attempt should be reported to the Court Leader who can consider any necessary action. In reaching their decisions, judges should be influenced solely by the matters properly before them in the case.
16. Cases will arise that have excited public controversy with extensive media publicity. Sometimes the weight of the publicity may tend considerably towards one desired result. However, in the exercise of the judicial function, the judge must be immune from the effects of such publicity. Judicial independence encompasses independence from all forms of outside influence. Judges should act fearlessly, irrespective of popular acclaim or criticism.
17. Judicial independence involves not only the independence of the Judiciary as an institution from the other branches of government. It also involves judges being independent from each other. A judge may sometimes find it helpful to “pick the brain” of colleagues. But it must be remembered that judicial decision-making is the responsibility of the individual judge, including each judge sitting in a collegiate appellate court.

Impartiality

18. Impartiality is the fundamental quality required of a judge. Judges should conduct themselves in and out of court in a way that maintains confidence in their impartiality and that of the Judiciary.
19. Justice must be done and must be seen to be done. Impartiality must exist both as a matter of fact and as a matter of reasonable perception. If partiality is reasonably perceived, that perception is likely to leave a sense of grievance and of injustice having been done, which is destructive of confidence in judicial decisions.
20. The perception of impartiality is measured by the standard of a reasonable, fair-minded and well-informed person, as discussed more fully in relation to questions of apparent bias.

21. A perception that a judge is not impartial may arise in a number of ways, for instance, by a perceived conflict of interest, by the judge's behaviour on the bench or by the judge's out-of-court associations and activities.

Integrity and Propriety

22. The conduct of judges is subject to public scrutiny. Judges should conduct themselves, both in and out of court, in a way that maintains the standing and dignity of the judicial office.
23. Judges enjoy the rights and freedoms of citizens generally. However, it must be recognized and accepted that there are proper constraints on a judge's activities imposed by the judicial office.
24. A judge must attempt to strike the right balance. *The guide is for the judge to consider whether in the eyes of a reasonable, fair-minded and well-informed member of the community, the proposed conduct would be likely to call his or her integrity into question or to diminish respect for him or her as a judge. If so, the proposed course of conduct should be avoided.*
25. *It goes without saying that judges must have scrupulous respect for the law and its observance. What in others may be seen as a relatively minor transgression may well attract publicity, bringing the judge into disrepute, and raising questions regarding the integrity of the judge and the Judiciary.*

II. Specific Standards

PART C: THE DISCHARGE OF JUDICIAL DUTIES

Diligence

26. Judges should be diligent in the performance of their judicial duties. They should endeavour to be punctual and to perform their judicial duties with reasonable promptness.

Behaviour in court

27. Judges should conduct themselves with courtesy to all and require similar courtesy from those who appear before them. Unjustified reprimands of counsel, offensive remarks about litigants or witnesses and intemperate behaviour by a judge may undermine the perception of impartiality.

28. All who appear in court, legal practitioners, litigants and witnesses, are entitled to be dealt with in a way that respects their dignity. Judges must ensure that all who appear in court are protected from any display of prejudice based on racial, gender, religious or other discriminatory grounds.
29. Judges should at the same time be firm in maintaining the proper conduct of the proceedings and preventing unnecessary wastage of court time. A judge may have to intervene but should ensure that impartiality and the perception of impartiality are not adversely affected by the manner of intervention.

Communications concerning a case

30. There should be no communication concerning a case between the judge and any of the parties in the absence of the others unless the consent of those absent has been obtained. The principle of impartiality generally prohibits private communications between the judge and any of the parties, their legal representatives, witnesses or jurors. If the court receives such a private communication, it is important for it to ensure that the other parties concerned are fully and promptly informed.

Correction of oral judgments and jury summations

31. A judge may not alter the substance of reasons for a decision given orally. The correction of slips, poor expression, grammar or syntax and the inclusion of citations omitted at the time of delivery of oral judgments are acceptable.
32. The transcript of a summing up to a jury is, like a transcript of evidence, a true record of what was said in court. The transcript of a summing up should not be altered in any way unless it does not correctly record what the judge actually said.

Reserved Judgments

33. A judge should deliver reserved judgments within a reasonable time, taking into account the complexity of the matter and other work commitments. If a judge is in difficulty in completing a reserved judgment within a reasonable time, it is the responsibility of the judge to raise the matter with the Court Leader so that arrangements for making time available to complete the judgment can be considered.

Communication with appellate courts

34. A judge should not communicate privately with an appellate court or appellate judge in respect of any pending appeal from that judge's determination.

Letters of complaint

35. From time to time, after the conclusion of a case, judges may receive letters or other forms of communication from disappointed litigants and others, criticising their decisions or decisions made by their colleagues. A judge should not enter into contentious correspondence with the authors of such communications. If in doubt whether a response is required, or if their receipt becomes oppressive, or if they are of a threatening nature, the matter should be reported to the Court Leader who may take such steps as are appropriate.

Media criticism

36. There may be media criticism of a decision or criticism mounted by interested members of the public. A judge should refrain from answering such criticism, for example, by writing to the press or making incidental comments about such criticism when sitting on the bench. Judges should speak only through their judgments in dealing with the case being decided. It is generally inappropriate for judges to defend their judgments publicly.
37. If there is media misreporting of court proceedings or a judgment and a judge considers that the error should be corrected, the judge should consult the Court Leader and the Judiciary may issue a press release to state the factual position or take steps for an appropriate correction to be made.

<p>(3) In accordance with Rules 83A, 84(1) and 84(1A) —</p> <p>(a) In the Council or in any committee or subcommittee, a Member shall not move any motion or amendment relating to a matter in which he has a pecuniary interest, whether direct or indirect, or speak on any such matter, except where he discloses the nature of that interest.</p> <p>(b) In the Council or in any committee or subcommittee, a Member shall not vote upon any question in which he has a direct pecuniary interest except where his interest is in common with the rest of the population of Hong Kong or a sector thereof or his vote is given on a matter of Government policy.</p> <p>(c) In the Council or a committee of the whole Council, a Member shall withdraw when a vote is taken on a question in which he has a direct pecuniary interest except where his interest is in common with the rest of the population of Hong Kong or a sector thereof or his vote is given on a matter of Government policy.</p>	<p>PART D: MATTERS CONCERNING DISQUALIFICATION</p> <p>38. The duty of judges is to hear and determine cases listed before them. However, occasions may arise when the fundamental principle requiring the court to be, and to be seen to be, impartial may operate to disqualify a judge from sitting.</p> <p>39. Three classes of cases calling for disqualification have been dealt with in the case-law:</p> <ul style="list-style-type: none"> (a) where there is actual bias; (b) where bias is presumed and disqualification is automatic; and, (c) where the circumstances give rise to apparent bias. <p>40. This continues to be a developing area of the law. Accordingly, while this Part seeks to distil the applicable principles, judges should be alert to possible developments.</p> <p><u>Actual bias</u></p> <p>41. Where a judge is affected by actual bias, disqualification must follow. Cases of actual bias are very rare.</p> <p><u>Presumed bias: automatic disqualification</u></p> <p>42. The Australian position differs from that in England and Wales in this context. The Australian High Court has held that there is no rule of automatic disqualification and subsumes all relevant cases under the general rule concerning apparent bias discussed below. The House of Lords has, on the other hand, not only confirmed the rule's existence, but extended it, as indicated below. The Court of Final Appeal has not yet had occasion to rule on the approach to be adopted in Hong Kong. Until it does, it would be prudent to assume that the stricter automatic disqualification approach is applicable in our jurisdiction. What follows in this section is therefore a distillation of the English rule.</p> <p>43. Bias is presumed and the judge is automatically disqualified where the judge has a pecuniary or proprietary interest in the outcome of the case.</p>
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| <p>(d) (i) all donations, as a candidate in the Legislative Council election in which the Member was elected as a Member of the Council, received by the Member or any person on his behalf for the purpose of meeting the Member's election expenses in the election; or</p> <p>(ii) financial sponsorships, as a Member of the Council, by any person or organization, stating whether any such sponsorships include any payment or any material benefit or advantage to the Member or his spouse, whether direct or indirect;</p> <p>(e) overseas visits made by the Member or his spouse relating to or arising out of membership of the Council where the cost of any such visit has not been wholly borne by the Member or public funds;</p> <p>(f) any payments or any material benefits or advantages received by the Member or his spouse arising out of his membership of the Council from or on behalf of:</p> | <p>(a) This may be so, for example, where the judge has a substantial shareholding in one of the parties and the outcome of the case might be such as could realistically affect the judge's interest.</p> <p>(b) Where a publicly listed company is a party and the judge holds a relatively small part of its total shareholding, the automatic disqualification rule would usually not apply since the outcome of the case would usually not affect the judge's interest. But it may be different where the litigation involves the viability and survival of the company itself in which case, depending on the circumstances, the outcome may be regarded as realistically affecting the judge's interest.</p> <p>44. The automatic disqualification rule has been extended by the House of Lords to cover a limited class of non-financial interests, namely, where the judge's decision would lead to the promotion of a cause in which he is involved in promoting together with one of the parties. So a judge was held to be automatically disqualified where he was a director of a company which, although not a party in the case, was controlled by a party and carrying on associated work in promoting the same causes.</p> <p>45. The automatic disqualification rule is limited in scope. It has been observed that any extension is undesirable unless regarded as plainly required.</p> <p><u>Apparent bias</u></p> <p>46. In practice, questions of disqualification are most likely to arise in relation to suggestions of apparent bias.</p> <p>47. The apparent bias test may be stated as follows:
A particular judge is disqualified from sitting if the circumstances are such as would lead a reasonable, fair-minded and well-informed observer to conclude that there is a real possibility that the judge would be biased.</p> |
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<p>(i) any government or organization of a place outside Hong Kong; or</p> <p>(ii) any person who is not a Hong Kong permanent resident;</p> <p>(g) land and property;</p> <p>(h) the names of companies or other bodies in which the Member has, to his knowledge, either himself or with or on behalf of his spouse or infant children, a beneficial interest in shareholdings of a nominal value greater than one-hundredth of the issued share capital.</p> <p>(5) A Member should not, in his capacity as such, seek to influence another person to further the Member's private interest.</p> <p>(6)(a) A Member should not take advantage of, or benefit from, information that is obtained in his capacity as a Member of the Council and which is not generally available to the public.</p>	<p>48. While this test has sometimes been formulated with slightly different wording so that, for instance, in some of the frequently cited passages in the leading English cases, the word “reasonable” has sometimes been left out, it is clear on analysis that the test set out above is the operative test. It is the test for apparent bias adopted in Scotland, Australia, South Africa and in the European Court of Human Rights. It is also applied in New Zealand and Canada. After the English courts had made what was described as “a modest adjustment of the test” previously adopted, it is now also in substance the test applied in England and Wales. It has effectively been adopted in Hong Kong by the Appeal Committee of the Court of Final Appeal.</p> <p><u>Applying the test</u></p> <p>49. Consideration only needs to be given to the question of disqualification if the circumstances present a real possibility that the apparent bias rule may apply. Judges should not yield to tenuous, trivial or frivolous grounds and should not accede too readily to suggestions of apparent bias. If they do, this would place a burden on a judge’s colleagues and may encourage parties to believe that by seeking disqualification, they may be able to have their case transferred from a judge whom for one reason or another they may wish to avoid.</p> <p>50. Where the circumstances do raise a question of apparent bias, a judge may wish to consult colleagues and the Court Leader for their views, and should do so when in doubt. However, it is the ultimate responsibility of the judge to decide for himself or herself whether disqualification is required. That decision is made applying the apparent bias test. The judge must consider the position objectively from the viewpoint of the reasonable, fair-minded and well-informed individual and ask whether such individual would conclude that there is a real possibility that the judge would be biased if he or she were to proceed to hear the case.</p>
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Disclosure to the parties prior to commencement of the hearing

51. Three situations may arise:

- (a) Where, having taken into account all known material circumstances and applied the apparent bias test, the judge is satisfied that disqualification is not required, no disclosure to the parties is required. The judge should proceed to hear the case. If, however, someone objects, that objection should obviously be heard and resolved with an open mind.
- (b) Conversely, where, having applied the apparent bias test, the judge is satisfied that disqualification is necessary, steps should immediately be taken to inform the Court Leader so as to have the case re-assigned to a different judge. Again, no disclosure is required and the case will simply proceed before the replacement judge.
- (c) Where a judge wishes to have the assistance of submissions from the parties, whether on the facts or the law, before deciding whether disqualification is required, disclosure of the relevant circumstances should be made to the parties, inviting them to make any submissions desired in the light of such circumstances. Having heard such submissions, the judge should decide whether to proceed applying the apparent bias test.

52. Such questions should be dealt with at as early a stage as possible before the hearing to obviate the inconvenience of an adjournment.

- (b) A Member should ask for information only about matters of public interest and should not seek information for private or personal interest.

Disclosure after commencement of the hearing

53. There are times when a question of apparent bias may arise for the first time after the hearing has begun. For instance, a witness with whom the judge has a potentially relevant relationship may be unexpectedly called; or the judge may discover that someone relevant owns a company which is a named party to the litigation, and so forth.

54. Where this occurs, the abovementioned approach to pre-hearing apparent bias questions should equally be adopted in the first and third situations discussed: where satisfied that the test does not require disqualification, no disclosure is required; and where assistance of the parties' submissions is desired, disclosure should be made for that purpose.
55. The approach to the second situation discussed is different. If, applying the test, disqualification is considered necessary (a conclusion that should not lightly be reached given its implications in terms of expense and disruption), the judge must inform the parties of his decision, disclosing its basis. In this context, questions of waiver may require consideration, but, as discussed below, care must be taken to avoid any impression of pressurising the parties to consent to the judge hearing the matter.

Some practical illustrations

56. Questions of apparent bias may arise in an infinite variety of situations. In each case, the judge must resolve them applying the apparent bias test, taking all material facts into account. Some practical illustrations are considered below.

Relationships

57. Litigant or witness : Applying the test, it would appear inevitable that a judge should disqualify himself or herself where the relationship between the judge and the litigant or a material witness is one of: (i) spouse (or domestic partner) or (ii) close relative, which in this context refers to a parent, brother or sister, child or son-in-law or daughter-in-law.
58. Counsel or solicitor-advocate in the case: Similarly, the test would appear to necessitate disqualification where a judge has one of the abovementioned relationships with counsel or a solicitor appearing as advocate in the case.

59. Apart from the solicitor-advocate, the position in relation to solicitors is less clear-cut. Solicitors may play large or small roles in relation to a piece of litigation, ranging from a small, temporary, behind-the-scenes involvement to a primary role as instructing solicitor, as the main correspondent in letters to the other parties or as the main adviser to the client in the litigation. Applying the test, disqualification may well be necessary where a solicitor having a relevant relationship with the judge, is or has been playing a major role in the proceedings. Conversely, the test may permit a minor, transient or unimportant role in the litigation to be safely ignored.
60. Friendships, including a close friendship or a past professional association with counsel or solicitor in the case, such as former pupils, members of the same chambers or partners in the same firm, usually would not require disqualification.
61. It is in each case a question of conscientiously applying the test to the particular facts. For example, the fiancée of a judge, may well be regarded as in a position similar to that of a judge's spouse; as may also be the case regarding individuals having an intimate personal relationship of a less formal nature with the judge. On the other hand, different considerations are likely to apply, for example, to a distant relative.

Financial interests

62. The automatic disqualification rule has already been discussed. It requires disqualification of a judge having a pecuniary or proprietary interest in the outcome of the case or who is involved in a shared cause with one of the parties. Situations may however arise where the automatic disqualification rule is not engaged but where deciding the case heard may nevertheless be seen to have financial implications for the judge in question. In such cases, the apparent bias test must be employed to decide whether the judge should sit.

63. A few examples of this latter situation may assist.

- (a) A judge owns a mortgaged flat and, with falling interest rates, has made an application to the mortgagee bank to refinance the loan at a lower interest rate. If, while the application is pending, the same bank were to come before the judge seeking, say, to recover a loan made to some other customer, there is no question of the automatic disqualification rule applying since the judge is not interested in the outcome of the bank's action against that other customer. Nonetheless, because of the judge's pending application to the plaintiff bank regarding his mortgage interest rate, the apparent bias test would have to be applied.
- (b) To vary the above example, the bank's action against the other customer comes before the judge when his son or daughter has just applied for employment by that bank. Again, automatic disqualification is not required but the apparent bias test would have to be applied.
- (c) A judge has a pending claim against an insurance company arising out of say, theft of the judge's car. If that insurance company is a party in a case listed before the judge, automatic disqualification is similarly not required but the apparent bias test would have to be applied.

64. These examples illustrate the point that the apparent bias test may be applicable in a case with possible financial implications for the judge where the automatic disqualification rule is not engaged. Whether the judge applying the test would rule in favour of disqualification in the examples just given would depend on all the circumstances.

65. One would generally expect the apparent bias rule not to require disqualification where a judge is merely involved as a customer, dealing in the ordinary course of business with a bank, insurance company, credit card company, mutual fund or unit trust, or the like, which happens to be a party in a case, without there being pending any dispute or special transaction involving the judge.

66. In cases involving financial implications which are highly contingent and remote at the time of the decision, one would expect application of the test generally not to result in disqualification.

Other situations

67. Where a judge has, before appointment, acted as a lawyer for or against a person, one would expect that this, by itself, would usually not result in disqualification. But everything depends on the particular circumstances.
68. Similarly, where a judge in a previous case has held against a person, whether as a witness or a litigant, this by itself would usually not be expected to result in disqualification. But the circumstances may be such that the question of disqualification has to be considered. For example, this may arise if the credibility of that person is in issue and the judge had in a previous case rejected his or her evidence in such strong terms as to throw doubt on the judge's ability to approach such person's evidence in the current case impartially.

Waiver in presumed bias and apparent bias situations

69. In a situation where bias is presumed and the automatic disqualification rule applies and in a situation where there may be apparent bias, a party may waive his right to object. Any waiver must be clear and unequivocal and made with full knowledge of all relevant facts. However, although a party may waive his right to object, it would be undesirable for a judge to give any impression of exerting any pressure on the parties to consent to the judge hearing the matter as this would put the parties in an invidious position. Further, even if there is a waiver, it is ultimately for the judge to decide whether to sit.

Necessity

70. The law recognizes a doctrine of necessity in this area. In other words, the situation could arise where, notwithstanding the judge's conclusion in favour of disqualification, whether because of presumed bias and the application of the automatic disqualification rule or because of apparent bias, the judge should nevertheless sit. However, such cases would only rarely arise and the scope of that doctrine is debateable.

	<p>PART E: PROFESSIONAL ACTIVITIES OUTSIDE COURT</p> <p>71. The contents of this Part do not affect judges' obligations to seek permission for outside work as required by their conditions of service or under the Acceptance of Advantages (Chief Executive's Permission) Notice 2004, given under section 3 of the Prevention of Bribery Ordinance, Cap. 201.</p> <p>72. There is no objection to judges contributing to legal and professional education such as by delivering lectures, teaching, participating in conferences and seminars, judging moots and acting as honorary examiners. Nor is there any objection to judges contributing to legal texts as authors, writers of forewords, editors and the like. On the contrary, such professional activities by judges are in the public interest and are to be encouraged.</p> <p>73. Judges should of course ensure that such professional activities do not affect the discharge of their judicial duties.</p> <p>74. A judge should avoid expressing views on controversial legal issues which are likely to come before the courts in a way which may impair the judge's ability to sit.</p>
	<p>PART F: NON-JUDICIAL ACTIVITIES</p> <p>75. In the area of non-judicial activities, the appropriate guide for judges is to consider whether a reasonable, fair-minded and well-informed member of the community would consider that the conduct in question would be likely to undermine judicial independence or impartiality or to affect the dignity and standing of the judicial office. If so, the conduct should be avoided. The following are some of the more common situations. They are of course not exhaustive.</p> <p><u>Political organizations or activities</u></p> <p>76. Judges should refrain from membership in or association with political organizations or activities. For example, a judge should refrain from attendance at political gatherings or demonstrations. But a judge is of course free to exercise his or her electoral rights.</p>

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| <p>(7) A Member should not use any part of his Operating Expenses Reimbursement or District Office Allowance for purposes other than those in connection with the business of the Council.</p> | <p>77. Where a close member of a judge's family is politically active, the judge should bear in mind that in some cases, the question of disqualification may arise for consideration as concerns may exist as to the perception of the judge's impartiality.</p> <p><u>Use of judicial office</u></p> <p>78. <i>Judges should not use the judicial office for personal advantage or for the benefit of family and friends or so conduct themselves that their actions might reasonably be so perceived.</i></p> <p>79. <i>Judges should not use the fact of holding judicial office in any attempt or what may reasonably be seen to be an attempt to extricate themselves from legal or bureaucratic difficulties. For example, if stopped for an alleged traffic offence, a judge should not volunteer his or her judicial status to the law enforcement officer.</i></p> <p>80. However, in private dealings, judges need not conceal the fact of holding judicial office. <i>But a judge should take care to avoid giving any impression that the status of judge is being used in order to obtain some form of preferential treatment.</i></p> <p><u>Use of judicial stationery</u></p> <p>81. <i>In general, judicial stationery is intended for use when a judge wishes to write in an official capacity. Care should be taken in the use of judicial stationery when writing in a private capacity. For example, it would not be objectionable to send a thank you note after a social occasion using such stationery. On the other hand, it would not be appropriate to use judicial stationery where there may be a reasonable perception that the judge is seeking to draw attention to the fact of his or her being a judge in order to influence the recipient of the letter, for example, generally when writing to complain or regarding, for instance, a disputed claim on an insurance policy.</i></p> |
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Letters of reference

82. *Although there is no objection to a judge providing a letter of reference, caution should be exercised. A person seeking such a letter may do so not because he or she is well known to the judge but solely to benefit from the judge's status. In relation to letters of reference, judicial stationery should generally only be used when the judge's personal knowledge of the individual has arisen in the course of judicial work; for example, when writing for a judicial clerk or a judge's marshal. In other cases, for example, when writing for a domestic helper, a private letterhead should be used.*

Giving character evidence

83. A judge should not volunteer to give character evidence in court. If requested, a judge, after consultation with the Court Leader, should only agree to do so when to refuse would be manifestly unfair to the person seeking that character evidence.

Giving legal advice

84. A judge should not give legal advice. However, in the case of close family members or close friends, he or she may offer personal advice on a friendly, informal basis, without remuneration, even on a matter having legal implications, but making it clear that he or she must not be treated as giving legal advice and that any legal advice needed should be professionally sought.

Participation in organizations

85. Judges are free to participate in community non-profit-making organizations of various types by becoming members of the organization and their governing bodies. Examples include, charitable organizations, university and school councils, church councils, hospital boards, social clubs, sporting organizations, and organizations promoting cultural or artistic interests.
86. However, in relation to such participation, the following matters should be borne in mind:
- (a) It would not be appropriate for a judge to participate in an organization if its objects are political or if its activities are likely to expose the judge to public controversy or if the organization is likely to be regularly or frequently involved in litigation.

- (b) A judge should ensure that it does not make excessive demands on his or her time.
- (c) A judge should not serve as legal adviser. This does not prevent a judge from expressing a view, purely as a member of the body in question, on a matter which may have legal implications; but it should be made clear that such views must not be treated as legal advice. It should be made clear that in so far as legal advice is required by the body in question, this should be professionally sought.
- (d) Organizations such as charitable organizations may appeal to the public for funds. But a judge should not personally become involved in or lend his or her name to any fund raising activities.

Commercial activities

- 87. Judges should not hold directorships in commercial companies; that is, companies whose objects are profit-related. This applies to both public and private companies, whether the directorship is executive or non-executive and whether it is remunerated or not. Accordingly, upon appointment, judges should resign from all such directorships.
- 88. Judges, however, can hold directorships in “family companies”; that is, companies owned and controlled by a judge and his or her family. It is common for matrimonial homes or other family assets such as investment properties to be owned and controlled by family companies. However, the directorship of such a company should not require the judge to devote excessive time to the company’s affairs and its activities should not involve commercial trading or expose the judge to public controversy.

Owners' Corporations

89. Where a judge owns or occupies premises in a building which has an Owners' Corporation, then he or she may serve on its management committee but should not give legal advice. However, this does not prevent a judge from expressing a view, purely as a member of the body in question, on a matter which may have legal implications; but it should be made clear that such views must not be treated as legal advice. It should be made clear that in so far as legal advice is required by the body in question, this should be professionally sought.

Management of personal investments

90. Judges are entitled to manage their own investments and those of their immediate families, including acting as trustees of family trusts and the like. However, the caution necessary in relation to acting as a director of a family company similarly applies.

Judges acting as executors

91. There is no objection to judges acting as executors or trustees of the estates of family members or close friends provided they do so without remuneration (whether or not they are beneficiaries of the estate).

Personal litigation

92. Judges have the right to act in the protection of their rights and interests, including by litigating in the courts. However, judges should be circumspect about becoming involved in personal litigation. If contemplating legal action, the judge should consult the Court Leader. A judge, as a litigant, runs the risk of appearing to take advantage of his or her office and, conversely, of having his or her credibility adversely judged by judicial colleagues.

Acceptance of legal services

93. A judge should not accept free legal services and should pay at a proper rate for legal services except for services provided by a spouse or close relative, referring, in this context, to a parent, brother or sister, child or son-in-law or daughter-in-law.

Social contact with the legal profession

94. Social contact between members of the Judiciary and members of the legal profession is a long-standing tradition and is proper. However, as a matter of common sense, judges should exercise caution.

- (a) Care should be taken to avoid direct social contact with members of the profession who are currently appearing or are in cases due imminently to be heard before them. For example, it would generally not be appropriate for a judge to attend a dinner party for say, 12 persons including counsel then appearing before the judge. However, it would be unobjectionable for a judge to attend a large cocktail party given, for example, by newly appointed Senior Counsel to celebrate their appointment. At such a function, although counsel appearing before the judge are likely to be present, direct social contact can readily be avoided.
- (b) If such contact does take place, talk of the case should be avoided and the other parties to the hearing should be informed of the contact at the earliest opportunity.
- (c) Care should be taken in assessing the appropriate degree to which social visits to their old chambers or firm should be made. For example, it would be appropriate for a judge to visit his or her old chambers or firm to attend a function, such as a Christmas party or an anniversary party or a party to celebrate the appointment of a member of chambers as Senior Counsel or his or her elevation to the Bench. However, excessively frequent visits by a judge to his or her old chambers in order to socialize with former colleagues would not be appropriate.

**Using clubs and social facilities
for certain organizations**

95. Judges should exercise care in relation to using clubs and other social facilities run by or for members of organizations such as the Police, the ICAC and Customs and Excise Department, which are, or whose members are, likely to appear frequently before the courts. Thus, while there is no objection to a judge occasionally accepting an invitation say, to dine at a police mess, it would be undesirable for him or her to frequent or become a member of such clubs or to be a regular user of such facilities.

Visiting bars, karaoke lounges and the like

96. *There is no prohibition against judges visiting pubs, bars, karaoke lounges or similar venues. But discretion should be exercised. Judges should consider how such visits are likely to be perceived by reasonable, fair-minded and well-informed members of the community in the light, for example, of the reputation of the place visited, the persons likely to frequent it and any concern that may exist as to the place not being operated in accordance with law.*

Membership of syndicates

97. Whether it is appropriate for judges to join a syndicate engaged in a leisure activity such as owning a racehorse or a leisure boat depends on the circumstances. These include considerations such as the syndicate's object, the nature of a member's involvement, the extent of dealings (particularly financial dealings) between members, the identity of the other members, whether they are likely to appear regularly before the judge so that questions of apparent bias might often arise.

Gambling

98. *There is no prohibition against judges engaging in occasional gambling as a leisure activity. But discretion should be exercised, bearing in mind the perception of a reasonable, fair-minded and well-informed member of the community. It is one thing to have a flutter at the horse races or at soccer betting or to pay an occasional visit to a casino outside Hong Kong for fun during a holiday or to play cards or mahjong with friends and family. It is quite another for a judge to be extensively involved in gambling activities or to play for high stakes or to attend establishments which have a questionable reputation.*

INFORMATION NOTE

Supplementary Note on Mechanisms for Regulating and Dealing with Members' Misbehaviour

1. Background

1.1 The Committee on Members' Interests, at its meeting on 3 November 2004, requested the Research and Library Services Division to provide supplementary information on the following items, which were touched upon in the information note entitled "Mechanisms in Selected Legislatures for Regulating and Dealing with Members' Misbehaviour Unconnected with Parliamentary Proceedings":

- (a) the misbehaviour unrelated to declaration/conflict of interests which is subject to regulation;
- (b) how the misbehaviour is regulated, and whether the regulation is advisory or mandatory in nature;
- (c) how the independent officers/committees responsible for handling misbehaviour are selected or formed; and
- (d) the codes and rules based on which the independent officers/committees handle Members' misbehaviour.

2. Misbehaviour unrelated to declaration/conflict of interests which is subject to regulation

The United Kingdom

2.1 In the United Kingdom (UK), under the Code of Conduct for Members of Parliament, Members' misbehaviour unrelated to declaration/conflict of interests which is subject to regulation can be classified as follows:

- (a) failure to conduct at all times in a manner which will tend to maintain and strengthen the public's trust and confidence in the integrity of Parliament;
- (b) undertaking any action which would bring the House, or its Members generally, into disrepute; and
- (c) information that Members receive in confidence in the course of their parliamentary duties being used under circumstances which are not connected with those duties.

The United States

2.2 In the United States (US), under the House of Representatives' Code of Official Conduct, Members' misbehaviour unrelated to declaration/conflict of interests which is subject to regulation can be classified as follows:

- (a) failure to conduct at all times in a manner that reflects creditably on the House;
- (b) retaining an employee who does not perform duties commensurate with the compensation the employee receives;
- (c) discharging or refusing to hire an individual, or discriminating against an individual with respect to compensation, terms, conditions or privileges of employment, because of the race, colour, religion, sex (including marital or parental status), disability, age or national origin of such individual;
- (d) allowing an individual, group or organization not under the direction and control of the House to use the words "Congress of the United States", "House of Representatives", "Official Business", or any combination of such words, on any letterhead or envelope; and
- (e) disclosing any classified information received in the course of service with the House, without the authorization by the House or in accordance with its Rules.

Canada and Australia

2.3 Both Australia and Canada do not have any parliamentary documents specifying the types of misbehaviour unrelated to declaration/conflict of interests, since such misbehaviour is not subject to regulation, unless it amounts to a matter of privilege.

3. How the misbehaviour is regulated and whether the regulation is advisory or mandatory in nature

3.1 In the UK's House of Commons, Members' misbehaviour unrelated to declaration/conflict of interests is regulated by the Code of Conduct for Members of Parliament, which was prepared pursuant to the Resolution of the House of 19th July 1995. The Code is binding on Members.

3.2 In the US's House of Representatives, such misbehaviour is regulated by the Code of Official Conduct, which was established in 1968 as Rule XXIII of the House Rules. The Code is binding on Members.

3.3 Both Canada and Australia do not have any codes of conduct or rules regulating Members' misbehaviour unrelated to declaration/conflict of interests.

4. How the independent officers/committees responsible for handling misbehaviour are selected or formed

The United Kingdom

4.1 In the UK's House of Commons, the Parliamentary Commissioner for Standards is responsible for handling Members' misbehaviour. The House's Standing Order 150 only states that the Commissioner is "*appointed by the House*". It does not have an established process through which the nomination of the Commissioner to the House is made.

4.2 Appointed by Resolution of the House in 2002, the current Commissioner was formally nominated by the House of Commons Commission, which is responsible for managing the personnel in the House. The Commission consists of the Speaker of the House as the Chairman, the Leader of the House, a Member of the House nominated by the Leader of the Opposition, and three other Members appointed by the House, none of whom is a Minister.¹

4.3 According to the Commissioner, the nomination process in 2002 involved interviews of candidates. During the final interview, the Chairman of the Committee on Standards and Privileges, who by convention had been drawn from the opposition parties², was invited to join the Commission to decide on the nomination of the Commissioner to the House. Meanwhile, the nomination process was invigilated by an independent assessor recommended by the Commissioner for Public Appointments.

¹ Erskine May (2004), pp. 236-237.

² This arrangement was explicitly agreed by the government in June 2003. In addition, by convention, no single party should have a majority on the Committee. See Erskine May (2004), p. 783.

The United States

4.4 In the US's House of Representatives, the Committee on Standards of Official Conduct is responsible for handling Members' misbehaviour. The Committee is the only standing committee of the House whose membership is divided evenly by party. The Committee is composed of 10 members, five from the majority party and five from the minority party.

Canada

4.5 In Canada, the Ethics Commissioner and the Senate Ethics Officer are responsible for handling Members' misbehaviour related only to conflict of interests in the House of Commons and the Senate respectively. They are new posts established on 31 March 2004 under An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence. The two officers are given the rank of a deputy head of a government department in Canada³. There is no significance associated with the terminological difference between "Commissioner" and "Officer"⁴ as both are appointed through a similar process which statutorily entails:⁵

- (a) consultation with the leader of every recognized party in either House of Parliament;
- (b) approval of the appointment of either officer by resolution of each House he or she serves; and
- (c) the Governor in Council making the appointment of either officer. The Governor in Council represents the Governor General⁶ who acts by and with the advice and consent of those members of the Privy Council⁷ who make up the Cabinet led by the Prime Minister.⁸

³ Sections 72.04 (1) and 20.4 (1), An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence, available from: <http://www.canlii.org/ca/as/2004/c7/sec2.html>.

⁴ There are, however, some differences in their functions. The Ethics Commissioner is responsible for administering not only the Conflict of Interest Code for Members of the House of Commons but also the Prime Minister's Conflict of Interest and Post-employment Code for Public Office Holders which applies to cabinet ministers, parliamentary secretaries and thousands of Federal Order in Council appointees. On the other hand, the Senate Ethics Officer is responsible only for administering the Senate's code of conduct which is still under consideration.

⁵ Sections 72.01 and 20.1, An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence.

⁶ The Governor General is the representative of the UK's sovereign in Canada to exercise all of the Crown's powers, and is appointed on the advice of the Prime Minister normally for a five-year term.

⁷ The Privy Council is a formal advisory body to the executive branch of the government appointed by the Governor General on the advice of the Prime Minister.

⁸ The Prime Minister is the leader of the government, who is ordinarily the leader of the party having the greatest number of seats in the House of Commons.

4.6 Nevertheless, the Act does not establish a process through which potential candidates for either the Ethics Commissioner or the Senate Ethics Officer are solicited or brought forward. The current Ethics Commissioner was nominated by the Prime Minister. The nomination for the Senate Ethics Officer has not been made.

Australia

4.7 In Australia, the House of Representatives has two standing committees handling Members' misbehaviour. The Committee of Members' Interests, which can consider any specific complaints made in relation to the registration or declaration of interests, is appointed at the commencement of each Parliament in accordance with the House's Standing Order 329. The Committee has seven members: four nominated by the government party and three nominated by the opposition parties. The Committee of Privilege, which is responsible for inquiring into complaints of breach of privilege or contempt referred to it by the House or the Speaker, is established under Standing Order 325. The Committee consists of the Leader of the House or his or her nominee, the Deputy Leader of the Opposition or his or her nominee, and nine other Members.

5. Codes or rules based on which the independent officers/committees handle Members' misbehaviour

The United Kingdom

5.1 In the UK, the Parliamentary Commissioner for Standards performs his or her duties in accordance with the House's Standing Order 150, which empowers the Commissioner to receive and investigate specific complaints from Members or members of the public in respect of the registration or declaration of interest or other aspects of the propriety of a Member's conduct. The Office of the Parliamentary Commissioner for Standards has also issued guidance notes by which the Commissioner can follow when handling complaints or conducting investigations.

The United States

5.2 In the US, the powers of the Committee on Standards of Official Conduct to handle Members misbehaviour are authorized by clause 3 of House Rule XI. Such powers include investigating alleged violations of the Code of Official Conduct, and rendering advisory opinions regarding the propriety of any current or proposed conduct of a Member. Investigations conducted by the Committee are also made in accordance with Committee Rules adopted by the Committee under the authority of clause 2(a)(1) of House Rule XI of the current Congress. Committee Rules can be modified, amended or repealed by a vote of a majority of the Committee.

Canada

5.3 In Canada, it is An Act to amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence which empowers the Ethics Commissioner and the Senate Ethics Officer to perform their duties assigned by the House of Commons and the Senate respectively regarding the conduct of Members. In addition, the Ethics Commissioner performs his or her duties under the authority of the Conflict of Interest Code for Members of the House of Commons, which provides for not only rules of conduct but also procedures of conducting inquiries. Similar arrangement will apply to the Senate, which will also issue a code of conduct under which the Senate Ethics Officer performs his or her duties.⁹

Australia

5.4 In Australia, the Committee of Members' Interests handles complaints relating to Members' misbehaviour under the House's Standing Order 329, while the operation of the Committee of Privilege is authorized by Standing Order 325.

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⁹ Reply from the Parliamentary Information and Research Service of the Library of Parliament in Canada, 9 November 2004.

INFORMATION NOTE

Comparison between the Advisory Guidelines on Matters of Ethics in relation to the Conduct of Members adopted by the Legislative Council of the Hong Kong Special Administrative Region and Codes of Conduct adopted by Selected Overseas Legislatures

1.1 This information note presents a comparison table summarizing the key contents of the Advisory Guidelines on Matters of Ethics in relation to the Conduct of Members of the Legislative Council (LegCo) of the Hong Kong Special Administrative Region in their capacity as such issued by the Committee on Members' Interests of LegCo and the codes of conduct adopted by selected overseas legislatures, namely the Code of Conduct for Members of Parliament issued by the House of Commons of the United Kingdom (UK) Parliament, the Code of Official Conduct issued by the House of Representatives of Congress of the United States (US), and the Conflict of Interest Code for Members of the House of Commons issued by the Parliament of Canada.

1.2 The comparison is made in the following aspects:

- (a) purpose, scope and effect;
- (b) guiding principles/general standards;
- (c) registration of interests and acceptance of bribes, gifts or other benefits;
- (d) ways to handle pecuniary interest in parliamentary proceedings and use of information relating to parliamentary duties; and
- (e) use of the status of a Member, use of stationery relating to legislature, and use of allowances.

Table 1 – Purpose, scope and effect

Codes/Guidelines	Purpose	Scope	Effect
LegCo's Advisory Guidelines	The Guidelines do not have a provision on this subject.	The Guidelines apply to matters of ethics in relation to the conduct of Members in their capacity as such.	The Guidelines are advisory in nature.
The UK's Code of Conduct	The Code aims to assist Members in discharging their obligations to the House, their constituents and the public at large.	The Code applies to Members in all aspects of their public life, but does not seek to regulate what Members do in their purely private and personal lives.	The Code is binding on Members.
The US's Code of Official Conduct	The Code does not have a provision on this subject.	The Code applies not only to Members but also to Delegate, Resident Commissioners, officers and employees of the House.	The Code is binding on Members, Delegates, Resident Commissioners, officers and employees of the House.
Canada's Conflict of Interest Code	<p>The Code aims to:</p> <ul style="list-style-type: none"> (a) maintain and enhance public confidence and trust in the integrity of Members; (b) demonstrate to the public that Members are held to standards that place public interest ahead of their private interests; (c) provide for greater certainty and guidance for Members in how to reconcile their private interests with their public duties and functions; and (d) foster consensus among Members by establishing common standards and providing the means by which questions relating to proper conduct may be answered by an independent, non-partisan adviser. 	The Code only applies to conflicts of interests of Members when carrying out the duties and functions of their office as Members, including Members who are ministers or parliamentary secretaries.	The Code is binding on Members.

Table 2 – Guiding principles/General standards

Codes/Guidelines	Guiding principles/General standards
LegCo's Advisory Guidelines	<p>A Member should:</p> <ul style="list-style-type: none"> (a) ensure that his conduct must not be such as to bring discredit upon LegCo; (b) conduct himself in such a way as not to place himself in a position which may be contrary to the generally assumed standard of conduct expected of a Member; and (c) adhere to the spirit and letter of any rules or regulations made by LegCo, its committees or subcommittees, or the President for the regulation of the practice and procedure of LegCo, its committees and subcommittees, or Members' behaviour in their conduct of the business of LegCo.
The UK's Code of Conduct	<p>A Member:</p> <ul style="list-style-type: none"> (a) has a duty to be faithful and bear true allegiance to the Queen, her heirs and successors; (b) has a duty to uphold the law and to act on all occasions in accordance with the public trust placed in him; (c) has a general duty to act in the interests of the nation as a whole; and a special duty to his constituents; and (d) observe the general principles of conduct, namely integrity, objectivity, accountability, openness, honesty and leadership.
The US's Code of Official Conduct	<p>A Member, Delegate, Resident Commissioner, officer or employee of the House shall:</p> <ul style="list-style-type: none"> (a) conduct himself at all times in a manner that reflects creditably on the House; and (b) adhere to the spirit and letter of House Rules and to the rules of committees of the House.
Canada's Conflict of Interest Code	<p>Members are expected to:</p> <ul style="list-style-type: none"> (a) serve public interest and represent constituents to the best of their abilities; (b) fulfil their public duties with honesty and uphold the highest standards so as to avoid real or apparent conflicts of interests; (c) perform their official duties and functions, and arrange their private affairs in a manner that bears the closest public scrutiny; (d) arrange their private affairs so that foreseeable real or apparent conflicts of interest may be prevented from arising; and (e) refuse to accept any gift or benefit connected with their position that might reasonably be seen to compromise their personal judgement or integrity.

Table 3 – Registration of interests and acceptance of bribes, gifts or other benefits

Codes/Guidelines	Registration of interests	Acceptance of bribes, gifts or other benefits
LegCo's Advisory Guidelines	The Guidelines require Members to register particulars of registrable interests.	A Member shall register any payments or any material benefits or advantages received by the Member or his spouse arising out of his membership of LegCo from or on behalf of any government or organization of a place outside Hong Kong; or any person who is not a Hong Kong permanent resident.
The UK's Code of Conduct	The Code requires Members to fulfil conscientiously the requirements of the House in respect of the registration of interests in the Register of Members' Interests.	The acceptance by a Member of a bribe to influence his conduct as a Member, including any fee, compensation or reward in connection with the promotion of, or opposition to, any Bill, Motion, or other matter submitted, or intended to be submitted to the House or to any Committee of the House, is contrary to the law of Parliament.
The US's Code of Official of Conduct	This subject is covered by House Ethics Rules, not the Code.	A Member, Delegate, Resident Commissioner, officer or employee of the House should not accept gifts or an honorarium for a speech, a writing for publication or other similar activity, unless he fulfils some requirements.
Canada's Conflict of Interest Code	The Code does not set up a Register of Members' Interests, but requires Members to file disclosure statements with the Ethics Commissioner.	Neither a Member nor any member of his family should accept, directly or indirectly, any gift or other benefit, except compensation authorized by law, that is related to the Member's position. However, a Member or a member of his family may accept gifts or other benefits received as a normal expression of courtesy or protocol, or within the customary standards of hospitality that normally accompany the Member's position.

Table 4 – Ways to handle pecuniary interest in parliamentary proceedings and use of information relating to parliamentary duties

Codes/Guidelines	Ways to handle pecuniary interest in parliamentary proceedings	Use of information relating to parliamentary duties
LegCo's Advisory Guidelines	<p>(a) A Member shall not move any motion or amendment relating to a matter in which he has a pecuniary interest or speak on any such matter, except where he discloses the nature of that interest; and</p> <p>(b) A Member shall not vote upon any question, or shall withdraw when a vote is taken on a question, in which he has a direct pecuniary interest, unless his interest is in common with the rest of the population of Hong Kong or its sector, or his vote is given on a matter of government policy.</p>	<p>(a) A Member should not take advantage of, or benefit from, information that is obtained in his capacity as a Member and which is not generally available to the public; and</p> <p>(b) A Member should ask for information only about matters of public interest, and should not seek information for private or personal interest.</p>
The UK's Code of Conduct	Members should always draw attention to any relevant interest in any proceeding of the House or its committees; and no Member should act as a paid advocate in any proceeding of the House.	Information which Members receive in confidence in the course of their parliamentary duties should be used only in connection with those duties; and such information must never be used for the purpose of financial gain.
The US's Code of Official Conduct	A Member, Delegate, Resident Commissioner, officer or employee of the House who has been convicted by a court of record for the commission of a crime for which a sentence of two or more years' imprisonment may be imposed should refrain from participation in the business of each committee of which he is a member.	A Member, Delegate, Resident Commissioner, officer or employee of the House should not disclose any classified information received in the course of his service with the House, except as authorized by the House or in accordance with its Rules.
Canada's Conflict of Interest Code	<p>(a) A Member, who has reasonable grounds to believe that he or his family member has a private interest that might be affected by a matter that is before the House or a committee of which the Member is a member, should disclose the general nature of the private interest at the first opportunity; and</p> <p>(b) A Member should not participate in debate on or vote on a question in which he has a private interest.</p>	<p>(a) A Member should not use information obtained in his position as a Member that is not generally available to the public to further his private interest or to improperly further another person's private interest; and</p> <p>(b) A Member should not communicate such information to another person if he knows that such information may be used to further his private interest or to improperly further another person's private interest.</p>

Table 5 – Use of the status of a Member, use of stationery relating to legislature, and use of allowances

Codes/Guidelines	Use of the status of a Member	Use of stationery relating to legislature	Use of allowances
LegCo's Advisory Guidelines	A Member should not, in his capacity as such, seek to influence another person to further the Member's private interest.	The Guidelines do not cover this subject.	A Member should not use any part of his Operating Expenses Reimbursement or District Office Allowance for purposes other than those in connection with the business of LegCo.
The UK's Code of Conduct	The Code does not cover this subject.	The Code does not cover this subject.	No improper use shall be made of any payment or allowance made to Members for public purposes, and the administrative rules which apply to such payments and allowances must be strictly observed.
The US's Code of Official Conduct	A Member, Delegate, Resident Commissioner, officer or employee of the House should not receive compensation or permit compensation to accrue to his beneficial interest from any source, the receipt of which would occur by virtue of influence improperly exerted from his position in Congress.	A Member, Delegate or Resident Commissioner should not allow an individual, group or organization not under the direction and control of the House to use the words "Congress of the United States", "House of Representatives" or "Official Business", or any combination of such words, on any letterhead or envelope.	A Member, Delegate, Resident Commissioner, officer of the House should not retain an employee who does not perform duties commensurate with the compensation the employee receives.
Canada's Conflict of Interest Code	A Member should not use his position as a Member to influence a decision of another person so as to further the Member's private interests or to improperly further another person's private interests.	The Code does not cover this subject.	The Code does not cover this subject.

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