

# 立法會

## *Legislative Council*

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### **Paper for the House Committee Meeting on 17 June 2005**

### **Report of the Subcommittee to Consider a Mechanism for Handling Complaints and Allegations Concerning Members' Operating Expenses Reimbursement Claims**

#### **Purpose**

The purpose of this paper is to seek Members' advice on the recommendations of the Subcommittee to Consider a Mechanism for Handling Complaints and Allegations Concerning Members' Operating Expenses Reimbursement Claims (the Subcommittee).

#### **The Subcommittee**

2. At the House Committee meeting held on 15 October 2004, a Subcommittee was formed to consider the setting up of a mechanism to handle complaints and allegations concerning Members' Operating Expenses Reimbursement (OER) claims. The membership list of the Subcommittee is in **Appendix I**. Under the chairmanship of the Hon Emily Lau, the Subcommittee has held four meetings.

#### **Deliberations**

##### Study on mechanisms in overseas legislatures

3. The Subcommittee has studied the operation of mechanisms for handling complaints in relation to Members' misuse of allowances for personal interest in four overseas legislatures (namely, the United Kingdom (UK), Canada, the United States (US) and Australia). It is noted that the systems for handling complaints in these four countries dealt with complaints against Members' misbehaviour, including complaints and allegations concerning the use of public funds and failure to disclose relevant interests. Except for Australia, the other three

countries have codes of conduct or conflict of interest code, which provide yardsticks against which Members' behaviour can be measured. (Australia prepared a draft code in 1995, but it has not yet been approved.) In UK and Canada, a commissioner (namely Parliamentary Commissioner for Standards in UK and Ethics Commissioner in Canada) is appointed. The Commissioner in UK works on a part-time basis, while the one in Canada works on a full-time basis. The annual remuneration of both Commissioners is over HK\$1.5 million. The cost of the office supporting the Parliamentary Commissioner for Standards in UK in 2003-04 was about HK\$3,400,000. This does not cover most of the general office running cost, such as accommodation and information technology support, which is absorbed under the general administration of the Parliament. In US and Australia, a standing committee (namely Committee on Standards of Official Conduct in US and Committee on Members' Interests in Australia) is formed to receive complaints and allegations, consider the action to be taken and conduct inquiries. A summary of the major features of the mechanisms for handling complaints against Members' misconduct in the four countries is in **Appendix II**.

#### Need for a mechanism

4. The Subcommittee unanimously considers that, in order to uphold the reputation of the Legislative Council (LegCo) and its Members, it is necessary to put in place a mechanism to handle complaints and allegations concerning Members' OER claims. The proposed mechanism, if adopted, should be enshrined in the Rules of Procedure (RoP).

#### General principle

5. Deliberations on all complaints and allegations should be open, fair and above party politics.

#### Scope of the mechanism

6. The Subcommittee has considered whether the proposed mechanism should cover complaints and allegations concerning Members' OER claims only or concerning Members' misconduct as a whole. In the absence of a code of conduct for Members and in view of the envisaged difficulty and length of time taken to devise and adopt one, the Subcommittee concludes that, at this stage, the mechanism should **only** deal with complaints and allegations concerning Members' OER claims. The Subcommittee notes that the Independent Commission Against Corruption has reviewed the existing "Guide for Reimbursement of Operating Expenses Reimbursement for Members of the Legislative Council" and recommended some measures to enhance transparency of Members' OER claims, to reduce chances of conflict of interests and to increase Members' accountability for their claims. (This issue is being examined by the Subcommittee on Members' Remuneration and Operating Expenses Reimbursement.)

### Operation of the mechanism

7. The Subcommittee has considered whether a standing committee (as in US and Australia) or a commissioner (as in UK and Canada) should be appointed. Members of the Subcommittee prefer the former, because the number of complaints and allegations should not be frequent and many. It is not cost-effective to employ a commissioner with high remuneration.

### Additional role for the Committee on Members' Interests (CMI)

8. Having examined the pros and cons of various options, the Subcommittee arrives at the same recommendation as that of the Subcommittee on the same subject in the second LegCo term, i.e. that the terms of reference of CMI be expanded to include the monitoring and handling of complaints and allegations concerning Members' OER claims.

9. CMI already has a set of procedures to handle complaints in relation to the registration and declaration of Members' interests. It will be procedurally and operationally simple for it to also handle complaints and allegations concerning Members' OER claims, which should not be frequent and many. Moreover, a single case may involve allegations concerning registration of interests and abuse of Member's OER claims. From the experience in CMI's investigation into the recent cases of Hon James To's failure to register interests pursuant to Rule 83 of RoP, some members of the Subcommittee, who are also members of CMI, are of the view that, with some modifications, CMI's set of procedures is adequate to handle such complaints and allegations.

10. The Subcommittee further recommends that the detailed procedures for handling complaints and allegations concerning Members' OER claims should be formulated by CMI.

### Retrospective application of the proposed mechanism

11. The Subcommittee has also considered whether there should be retrospective application of the proposed mechanism. The view of the Legal Service Division is that in the rules of statutory interpretation, there is a presumption against retrospective application. Unless the contrary intention appears, a rule is presumed not to be intended to have retrospective operation. The rationale is that, as a matter of fairness, a rule by which conduct is to be regulated should deal with future acts, and it should not change the character of transactions carried out before its introduction upon the faith of the then existing rule. The proposed mechanism introduces both a new procedure, and a new penalty which did not exist when the act was done or the omission was made. If the proposed mechanism is applied to cases which have occurred before its introduction, such application may be regarded as not consistent with the principle which underpins the presumption against retrospective application, because a penalty which is not provided for at the time when the act occurred is applied to the act. For that reason, such application may

be considered unfair to the person concerned. The conclusion is that while the rule of statutory interpretation could serve as a reference, whether the proposed mechanism should be applied retrospectively would be a matter for the Subcommittee to consider from a policy point of view. The Subcommittee decides not to pursue this issue in the light of the legal advice.

### Timing

12. The Subcommittee recommends that the proposed mechanism for handling complaints and allegations concerning Members' OER claims, if adopted, should be implemented as soon as possible.

### **Consultation**

13. On 28 April 2005 the draft report to the House Committee was issued to Members of the Subcommittee and CMI for comments. To facilitate consultation and discussion among Members, the draft report was circulated to all Members.

14. The draft report was endorsed by Members of the Subcommittee. Due to the unavailability of members, CMI is not able to discuss the draft report until 27 June 2005. It should be noted that four out of seven members of CMI are members of the Subcommittee.

### **Recommendations**

15. The Subcommittee recommends that:

- (a) a mechanism for handling complaints and allegations concerning Members' OER claims should be established;
- (b) the scope of the mechanism should be confined to Members' OER claims;
- (c) the existing terms of reference of CMI provided in Rule 73 of RoP should be expanded so that it may also handle complaints and allegations concerning Members' OER claims. The Committee on Rules of Procedure may have to consider moving a motion to amend the rule. CMI would draw up procedures for handling such complaints.

**Advice sought**

16. Members' advice is sought on the Subcommittee's recommendations in paragraph 15 above.

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Legislative Council Secretariat  
14 June 2005

**Membership List of  
Subcommittee to Consider  
a Mechanism for Handling Complaints and Allegations  
Concerning Members' Operating Expenses Reimbursement Claims**

Hon Emily Lau Wai-hing, JP (Chairman)

Dr Hon Lui Ming-wah, JP

Hon Mrs Selina Chow Liang Shuk-yee, GBS, JP

Hon Howard Young, SBS, JP

Hon Abraham Shek Lai-him, JP

Hon Lee Wing-tat

Hon Li Kwok-ying, MH

Hon Alan Leong Kah-kit, SC

Hon Kwong Chi-kin

Hon Tam Heung-man

(Total : 10 members)

Major features of Mechanisms for Handling Complaints concerning Members' Operating Expenses Reimbursement Claims in Selected Legislatures

	The House of Commons in the UK	The House of Commons in Canada	The House of Representatives in the US	The House of Representatives in Australia
Responsible authority	Parliamentary Commissioner for Standards.	Ethics Commissioner.	Committee on Standards of Official Conduct.	Committee on Members' Interests.
Scope of main duties	Considering complaints relating to breach of the Code of Conduct for Members of Parliament, including Members' improper use of allowances or failure to disclose relevant interests.	Considering complaints relating to breach of the Conflict of Interest Code for Members of the House of Commons, including Members' failure to disclose relevant interests or improper use of public resources for private interest.	Investigating Members' alleged violations of the Code of Official Conduct of the House, including improper use of official resources.	Considering complaints relating to Members' failure to disclose relevant interests; and inquiring into and reporting on the arrangements made for the compilation, maintenance and accessibility of the Register of Members' Interests.
Eligibility requirements	No formal requirement. Unofficial requirements include knowledge of the parliamentary system, political impartiality, intellectual rigour, independence and integrity.	No formal requirement. After the appointment, the Commissioner is prohibited from holding any other government office or engaging in any other employment for reward.	Not applicable.	Not applicable.
Appointment /formation	Nominated by the House of Commons Commission, and approved by resolution of the House.	Nominated by the Prime Minister after consultation with parties in the House, approved by resolution of the House, and appointed by the Governor in Council.	Comprising 10 members divided evenly by party, with five from the majority party and five from the minority party.	Comprising seven members, with four from the Government Party and three from non-government parties or independents.
Nature of appointment	Part-time.	Full-time.	Not applicable.	Not applicable.
Annual remuneration	£111,500 (HK\$1,628,000).	Ranging from CN\$239,700 (HK\$1,520,000) to CN\$282,000 (HK\$1,800,000).	Not applicable.	Not applicable.
Cost of supporting office	2003-04 £230,000 (HK\$3,400,000) (excluding most general office running cost, such as accommodation and information technology support)	Not available.	Not applicable.	Not applicable.

**Appendix II (cont'd)**

**Major features of Mechanisms for Handling Complaints concerning Members' Operating Expenses Reimbursement Claims in Selected Legislatures**

	<b>The House of Commons in the UK</b>	<b>The House of Commons in Canada</b>	<b>The House of Representatives in the US</b>	<b>The House of Representatives in Australia</b>
Subject matters of complaints handled by independent officers/committees	Failure to register and declare interests; improper use of allowance; improper use of the position as Member; and conduct bringing discredit on the House.	Improper use of the position as Member.	Violation of gift rule; impropriety bringing disrepute to the House; improper use of official resources for political purposes; improper campaign loans; improper use of campaign funds; improper financial disclosure; conspiracy to violate federal bribery and gratuity statutes; receipt of illegal gratuity; obstruction of justice; defrauding the government; racketeering; tax evasion; improper use of corporate political contributions; and receipt of campaign contributions in return for legislative assistance.	Failure to register interests.
Number of cases handled in recent years	During 2002-03 and 2003-04, of the 148 specific complaints against named Members received by the Commissioner, 21 required full investigation.	The Commissioner has received one complaint so far.	The Committee investigated eight complaints during the past five years.	The Committee has received one complaint so far.
Whether complaints about events that occurred in previous terms of parliament can be considered	Normally the Commissioner does not consider complaints which are against former Members or go back more than seven years.	Such situation has not arisen and no rules have been provided on this issue.	Normally it does not accept a complaint of any alleged violation which occurred before the third previous Congress.	Such situation has not arisen and no rules have been provided on this issue.
Whether complaints that have criminal elements can be considered	Normally the Commissioner does not investigate complaints which involve allegations of criminal misconduct.	The Commissioner is required to suspend investigating a complaint which involves violation of law or is being investigated by other authorities.	The Committee is required to defer action on a complaint which alleges conduct that is being, or more appropriate to be investigated by other law enforcement agencies.	Such situation has not arisen, and no rules prohibit the Committee from investigating complaints which involve allegations of criminal misconduct.



Appendix II (cont'd)

Major features of Mechanisms for Handling Complaints concerning Members' Operating Expenses Reimbursement Claims in Selected Legislatures

	The House of Commons in the UK	The House of Commons in Canada	The House of Representatives in the US	The House of Representatives in Australia
Whether witnesses and documents can be called for	No, but the Committee on Standards and Privileges can do so in support of the Commissioner.	Yes.	Yes.	Yes.
Whether an investigation can be initiated by the responsible authority	No.	Yes.	Yes.	No.
Whether an investigation is conducted in private	In private.	In private.	In private.	Can be in private or in public.
Whether the Member under complaint can have legal representation	No, but the Member under complaint can be accompanied by, and confer with, counsel.	Yes.	Yes.	No, but the Member under complaint can be accompanied by, and confer with, counsel.
Whether the Member under complaint has the right of silence	There is no specific rule on the right of silence. By convention, the Member under complaint is required to co-operate with any investigation at all stages.	Such situation has not arisen. The Member under complaint is required by the Conflict of Interest Code to co-operate with respect to any investigation.	There is no specific rule on the right of silence.	There is no specific rule on the right of silence. By convention, witnesses are bound to answer all questions which the Committee sees fit to put to them.
Safeguards against partisanship	The Commissioner is an appointee, not an employee, of the House. The Committee on Standards and Privileges does not allow any one party to have a majority of its membership, and most of its members are senior backbenchers who are respected in the House.	The Commissioner cannot be a sitting Member and cannot actively participate in partisan politics. Members are required to respect the investigation process and permit it to take place without commenting on the matter.	Committee staff must be professional and non-partisan. The Member under complaint is ineligible to participate in any Committee or subcommittee proceedings.	The Committee's government members on their own cannot force an investigation to proceed. The Member under complaint is ineligible to participate in any Committee proceedings.

