

立法會
Legislative Council

LC Paper No. LS25/04-05

**Legal Service Division Paper for the
Subcommittee to consider a mechanism for the handling of complaints and
allegations concerning Members' Operating Expenses Reimbursement claims**

Retrospective Application of the Proposed Mechanism

The Legal Service Division has been asked to advise whether the proposed mechanism for handling complaints and allegations concerning Members' Operating Expenses Reimbursement ("OER") claims could be applied retrospectively to cases occurred before its introduction.

Background

2. Members may recall that, a subcommittee was formed under the House Committee last term ("the former Subcommittee") to consider a mechanism for the handling of complaints and allegations concerning Members' OER claims. The recommendations of the former Subcommittee are contained in its report to the House Committee (LC Paper No. AS 298/03-04). In summary, the former Subcommittee considered it necessary to put in place a mechanism to handle complaints and allegations concerning Members' OER claims, which should be enshrined in the Rules of Procedure. In relation to the details of the said mechanism, the former Subcommittee recommended that:-

- (a) the terms of reference of the Committee on Members' Interests ("CMI") be expanded to include the handling of complaints and allegations concerning OER claims;
- (b) with some adaptation, the procedure of the CMI for handling complaints concerning registration and declaration of Members' interests be applied to investigate complaints and allegations concerning OER claims; and
- (c) sanctions similar to those stipulated under Rule 85 of the Rules of Procedure, where a Member may be admonished, reprimanded or suspended by the Council on a motion to that effect, be adopted for abuse in OER claims.

In essence, the mechanism would consist of a new set of procedures to investigate alleged abuse of OER claims, and new sanctions for substantiated cases of abuse.

Present situation

3. The practice of the Secretariat in the handling of complaints and allegations against OER claims is contained in another paper LC Paper No. AS 150/04-05 issued by the Secretariat separately. In essence, the Secretariat would ask the Member concerned to clarify, and to refund if necessary. No sanction is involved. The only possible sanction for an abuse of OER claim would be under Article 79(7) of the Basic Law, where a Member may be censured for misbehaviour by a vote of two-thirds of the Members present. The Basic Law does not specify what amounts to misbehaviour under Article 79(7), and it would be for Members to decide when passing the motion. Thus, in a case of abuse of OER claim, where the behaviour involved is regarded by Members to be so serious as to disqualify the Member concerned from his office, the abuse could be dealt with under Article 79(7).

4. Members may note that despite the recommendation of the former Subcommittee that an abuse of OER claim should be dealt with by admonition, reprimand or suspension, the ultimate sanction of disqualification under Article 79(7) of the Basic Law may still apply in appropriate cases.

Considerations from the legal point of view

5. As a rule 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 behind this presumption 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. For non-criminal acts, a statute may displace the presumption against retrospective application should public interest so demands. Pure procedural rules may apply to pending as well as future proceedings, other than proceedings of a criminal nature. The basis for this principle applicable to procedural rules is that it is presumed that the object of all procedural rules is to enable justice to be done. They are beneficial and not inflicting detriment on anyone. Whether a rule is presumed to have retrospective effect therefore depends on whether its nature is substantive (in the sense that it may bring about changes to existing rights or liabilities) or procedural.

6. For acts that are made criminal after they are carried out, article 15(1) of the International Covenant on Civil and Political Rights provides that “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed”. This provision expresses in clear terms the principle that fairness requires that rules which make an act or omission criminal and imposes a sanction to them should not have retrospective application.

7. The former Subcommittee recommended that with some adaptation, the procedure of the CMI in the handling of complaints in relation to the registration and declaration of Members' interests be used to investigate complaints and allegations concerning OER claims. The former Subcommittee also recommended that the same sanctions as those relating to declaration of interests be adopted. Should the recommendations be adopted, the proposed mechanism would consist of the procedure for the investigation of alleged abuse of OER claims and the sanctions to be imposed when the case is substantiated. The proposed mechanism therefore 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 occurred before its introduction, such application might be regarded as not consistent with the principle which underpins the presumption against retrospective application as the mechanism involves a penalty which was not provided for at the time when the case occurred and, for that reason, as not fair to the person concerned.

Conclusion

8. It seems that whether the proposed mechanism could be applied retrospectively would be a matter for this Subcommittee to consider from a policy point of view, having regard to the considerations set out above. On a related issue, members may note that no matter what the present Subcommittee decides on retrospective application, the considerations set out above would suggest that the procedure and sanctions in the proposed mechanism could be applied to persons who are Members after the introduction of the proposed mechanism but are no longer in office, if the act or omission concerned takes place after the introduction. There would, of course, have to be adaptations made to the sanctions to be imposed under the proposed mechanism since a former Member who is not holding office as a Member could not be suspended.

Prepared by

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