

**Extracts of the Minutes of the 3rd to 8th meetings
of the Committee on Members' Interests**

Third meeting held on Monday 27 June 2005

Action

IV. Consideration of the recommendations of the Subcommittee to Consider a Mechanism for Handling Complaints and Allegations Concerning Members' Operating Expenses Reimbursement Claims
(LC Paper No: AS335/04-05)

13. The Deputy Chairman invited Ms Emily LAU, Chairman of the Subcommittee to Consider a Mechanism for Handling Complaints and Allegations Concerning Members' Operating Expenses Reimbursement Claims (Sub-committee), to brief members on the Sub-committee's recommendations, as set out in LC Paper No. AS335/04-05. Ms Emily LAU said that the Sub-committee recommended that:

- (a) a mechanism for handling complaints and allegations concerning Members' Operating Expenses Reimbursement (OER) claims should be established;
- (b) the scope of the mechanism should be confined to Members' OER claims; and
- (c) the existing terms of reference of the Committee should be expanded so that it may also handle complaints and allegations concerning Members' OER claims.

The Sub-committee had considered the option of forming select committees to handle such complaints as and when they were received. The conclusion was that efforts in setting up select committees would be wasted, if the complaints were subsequently found to be frivolous or unfounded. The Sub-committee considered that the Committee, which was a standing committee and composed of Members from various political groupings, was most suitable in handling complaints relating to OER claims.

14. Ms Emily LAU informed members that three other members of the Committee, namely, Hon Abraham SHEK, Hon LI Kwok-ying and Hon Alan LEONG, who were not present at the meeting and who were also members of the Sub-committee, had agreed that the Committee's terms of reference be expanded. Mr Albert CHENG said that he also agreed. The Deputy Chairman concluded that the meeting agreed in principle that the Committee should take up the additional duties of handling complaints concerning OER claims. Ms Emily LAU proposed that, on behalf of the Committee, the Deputy Chairman report its decision to House Committee at its meeting on 8 July. Members agreed and asked the clerk to inform the clerk to the House Committee accordingly.

15. Secretary General said that it would be straightforward to propose amendments to expand the Committee’s terms of reference under the Rules of Procedure. The Deputy Chairman requested the LegCo Secretariat to draft amendments to the Rules of Procedure for the Committee’s consideration at its next meeting. The Committee would also consider the basis on which such complaints and allegations might be dealt with, as well as the appropriate sanctions for substantiated complaints. Depending on the work of the Committee, he hoped that proposed resolution to amend the Rules of Procedure could be submitted to the Council for approval in late October 2005. ASG3 said that the LegCo Secretariat would start work on the procedure for handling complaints relating to OER claims during the Summer recess. Ms Emily LAU said that experience might be drawn from the handling of Hon James TO’ case and the Secretariat should set out various options, including possible sanctions, for members to consider. Mr Albert CHENG suggested that the imposition of fines could be one of the sanctions.

X X X X X X X

Fourth meeting held on Thursday 29 September 2005

III. Setting up of a Mechanism for Handling Complaints and Allegations Concerning Members’ Operating Expenses Reimbursement Claims
(LC Papers No. IN39/04-05 and LS114/04-05)

11. The Chairman said that at the last meeting, the Committee had agreed in principle to take up the additional duty of handling complaints concerning operating expenses reimbursement (OER) claims. She invited members to note the following rules in RoP, which enabled the Committee’s handling of complaints concerning registration and declaration of Members’ interests:

- (a) Rule 73(1)(c) – empowering the Committee to handle complaints made in relation to registration and declaration of Members’ interests;
- (b) Rules 83, 83A and 84 – stipulating that Members should register and declare certain interests; and
- (c) Rules 85 and 73(1)(e) – setting out the sanctions for Members found to have failed to register or declare their interests and empowering the Committee to make a report and recommend sanctions to the Council respectively.

She then invited members to consider LC Paper No. LS114/04-05, prepared by the Legal Service Division for the purpose of assisting members in considering how the expansion of duty should be set out in RoP. Its attachment contained some draft rules which were drafted along the lines of the above quoted rules.

12. Ms Emily LAU enquired whether the proposed rules would empower the Committee to deal with all complaints relating to OER claims. LA replied that the proposed rules were drawn up in accordance with the following recommendations of the Subcommittee to Consider a Mechanism for Handling Complaints and Allegations Concerning Members' Operating Expenses Reimbursement Claims, which had been endorsed by the House Committee on 17 June 2005:

- (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; and
- (c) the existing terms of reference of the Committee should be expanded so that it might also handle complaints and allegations concerning Members' OER claims.

13. LA then briefed members of the proposed rules. The proposed new Rule 83B would impose an obligation on Members to ensure that their OER claims were made in compliance with the provisions of the Guide for Reimbursement of Operating Expenses for Members of the Legislative Council (Guide). The proposed new Rule 73(1)(ca) would empower the Committee to consider and investigate any complaint alleging a Member's had breached the Guide. The proposed new Rule 85A would stipulate the available sanctions for Members who were found to have breached the obligations proposed under Rule 83B. The proposed revised Rule 73(1)(e) would empower the Committee to make relevant reports and recommendations on the sanction to the Council. This drafting approach had placed failure to comply with the provisions of the Guide as a basis for dealing with complaints about OER claims. He reminded members that there could be other drafting approaches.

14. Ms Emily LAU enquired about the legal status of the Guide and if the Committee could consider and investigate complaints relating to OER claims which Members had made before the establishment of the mechanism. LA replied that the Guide was drawn up by the Secretariat with the intention of assisting Members in making OER claims. Members had to follow the Guide in order to get reimbursed of operating expenses. The Guide was not drawn up under the authority of any legal provisions or RoP. Some of the provisions in the Guide might be considered mandatory while some were advisory in nature. In addition, Members had to sign declaration forms when lodging OER claims, which might carry legal consequences. SG said that the Subcommittee on Members' Remuneration and Operating Expenses Reimbursement chaired by Hon Patrick Lau Sau-shing had recently completed deliberation on the recommendations of the Independent Commission Against Corruption with respect to the provisions in the Guide, and accepted some of the recommendations. The revised Guide had been issued to Members on 26 September 2005.

15. On Ms Emily LAU's second question, LA said that according to the general principle of fairness, a mechanism for handling complaints should not be applied retrospectively to acts done before its establishment. Nevertheless, there was always the provision of Article 79(7) of the Basic Law, which provided for censure of Members for misbehaviours, and abusive OER claims could be regarded as misbehaviours.

16. Ms Emily LAU commented that it would be unacceptable if the Committee could not deal with a complaint against a Member only because the guideline he/she had breached was advisory in nature. SG responded that the allegations about OER claims received so far had been concerned with Members providing false information in their claims. The Deputy Chairman said that criminal proceedings might be brought against Members for making fraudulent claims. Ms Emily LAU responded that it required a very high threshold of evidence for the initiation of criminal proceedings. She considered that a mechanism within the Council for dealing with complaints would be necessary to deal with cases which did not meet the threshold.

17. ASG3 pointed out that the Guide was used as the central theme in the drafting of the proposed rules. He suggested that members might consider an alternative approach of using the Guide as a reference only when the Committee dealt with all complaints relating to OER claims. There might be cases which were not covered by the Guide. SG said that he would review the Guide. Ms Emily LAU stressed that the mechanism for handling complaints about OER claims should be as comprehensive as possible to cover all types of cases. Mr Alan LEONG said that the Guide provided guidance for Members to follow when making OER claims, and he had no objection to the current drafting approach. LA suggested that members might wish to examine the provisions in the Guide in detail at future meetings. Members agreed.

18. Mr Albert CHENG said that the Committee might not have jurisdiction to amend the Guide. Mr Alan LEONG said that the Committee might need to wait for a further revision of the Guide. Mr LI Kwok-ying said that the Committee should examine the Guide in detail before adopting it as a central theme for dealing with complaints relating to OER claims.

19. Ms Emily LAU proposed that the paper on the handling of previous complaints about OER claims, which had been prepared by the Secretariat for the Subcommittee to Consider a Mechanism for Handling Complaints and Allegations Concerning Members' Operating Expenses Reimbursement Claims, be made available to members for information. Members agreed.

Procedure for handling complaints relating to OER claims

20. Ms Emily LAU said that the Committee would need to decide whether a separate procedure should be drawn up for handling complaints

relating to OER claims. She asked if there was a need for that procedure to be provided in RoP. LA replied that the Committee had determined the procedure for handling complaints received in relation to the registration and declaration of Members' interests under Rule 73(7) of RoP, and that procedure might be used as a reference when determining the procedure for handling complaints relating to OER claims. Ms Emily LAU suggested that all Members should be consulted about the procedure before the Committee adopted it.

Sanctions for substantiated cases in selected overseas legislatures

21. The Chairman said that Mr Albert CHENG had suggested at the last meeting that the imposition of fines could be one of the sanctions. Head (Research and Library Services) then briefed members on his findings about such practice in selected overseas legislatures, as set out in LC Paper No. IN39/04-05. In UK, the House of Commons did not have the power to impose fines on Members who had breached the Code of Conduct for MPs. In 1999, there was a recommendation made by the Joint Committee on Parliamentary Privilege that the House of Commons should have the power to impose fines. However, no follow-up action had been taken so far. The House might impose the following sanctions: apology, withholding of salary, suspension and expulsion. Under the US Constitution, the House of Representatives had the power to impose fines on Members. The imposition of fines on Members was exercised infrequently - the last known case occurred in 1969. In Australia, the House of Representatives had the power to impose fines on Members, but such power only applied to substantiated cases involving breach of privilege or contempt, and not abusive claims of public funds. In Canada, the House of Commons had no power to impose fines on its Members. SG added that the Parliamentary Commissioner for Standards of the House of Commons in UK had told him that MPs might have their salaries withheld for a period of up to three months, and such a sanction amounted in effect to the imposition of a fine. The Committee noted the paper.

X X X X X X X

Fifth meeting held on Friday, 20 January 2006

III. Setting up of a Mechanism for Handling Complaints and Allegations Concerning Members' Operating Expenses Reimbursement Claims

(LC Papers No. CMI/9/05-06, CMI/10/05-06 and AS150/04-05)

Proposed amendments to RoP

13. SALA1 briefed members on the proposed amendments to RoP, which were set out in LC Paper No. CMI/9/05-06, and elaborated below:

- (a) New Rule 73(1)(ca) was proposed to expand the Committee's terms of reference so that it could handle complaints made in relation to the conduct of Members in respect of their claims for reimbursement of operating expenses (complaints relating to OER claims). The drafting of the subrule had been revised in the light of members' deliberations at the last meeting. Also, the phrase "if it thinks fit" was included in the subrule in order to specify beyond doubt that the Committee had the discretion to decide whether or not to proceed with investigation of a complaint after considering it. For the sake of consistency in drafting, the same phrase was proposed to be added to the existing Rule 73(1)(c).
- (b) An amendment was proposed to Rule 73(1)(e), which empowered the Committee to report to the Council and recommend a sanction under Rule 85 (Sanctions relating to Interests), to provide that the Committee might also make such a report and recommendation under the proposed Rule 85A (Sanctions relating to Claims for Reimbursement of Operating Expenses).
- (c) New Rule 73(1A) was proposed to provide that in considering or investigating a complaint relating to OER claims, the Committee should have regard to the provisions of the Guide for Reimbursement of Operating Expenses for Members of the Legislative Council (Guide). The rule would require the Committee to have regard to the provisions of the Guide in considering or investigating complaints relating to OER claims, but the Committee might also consider any other relevant matter.
- (d) New Rule 85A was proposed to provide for the sanctions which the Committee might recommend to be imposed on a Member pursuant to its investigation conducted under new Rule 73(1)(ca). The available sanctions were the same as those for failure to register or declare Members' interests.

14. Mr LI Kwok-ying said that the receipt of a relevant complaint was a prerequisite for the Committee to consider or investigate a complaint relating to OER claims. He enquired if the phrase "if it thinks fit" in Rule 73(1)(ca) would have the effect of removing such a prerequisite. SALA1 responded that the phrase was added to dispel the view that the Committee was obliged to proceed with investigation of a complaint. Mr LI Kwok-ying enquired if the phrase could be placed behind the word "investigate" to address his concern. SALA1 replied that if drafted in that way, the phrase would have the effect of qualifying both the words "consider" and "investigate".

15. Mr Alan LEONG said that the subrule as presently drafted was in order. He did not envisage that the Committee would disregard a complaint

without considering it first. Given the verb-object constructions of “consider...complaint” and “investigate...complaint”, the prerequisite of the presence of a complaint for action to be taken was obvious.

16. Ms Emily LAU enquired whether the phrase was added because problems had been encountered when subrule (c) was invoked in the past by the Committee in dealing with complaints relating to the registration and declaration of Members’ interests. SALA1 replied that this was not the case.

SALA1

17. The Chairman said that the phrase would assist readers in identifying the two stages, i.e. the consideration and investigation stages, for handling a complaint. Mr Albert CHENG suggested the words “after consideration” be added before “it thinks fit” to set out the two stages more clearly. SALA1 undertook to review the drafting of the subrule.

18. Ms Emily LAU asked if it was possible to impose a sanction of reprimand on a former Member. SALA1 replied that in theory a motion to that effect might be moved, but members might wish to note that Rule 85 and the proposed Rule 85A had been drafted in the context of imposing sanctions on present Members.

SG

19. Secretary General (SG) reported that he had reviewed the Guide jointly with Legal Adviser. Translation of the revised version was underway and the revised Guide would be issued to all Members in due course.

Procedure for handling complaints relating to OER claims

20. The clerk briefed members on the proposed amendments, as set out in LC Paper No. CMI/10/05-06, to The Procedure of the Committee on Members’ Interests for Handling Complaints received in relation to the Registration and Declaration of Members’ Interests (the Procedure) to expand its scope to cover the procedures for handling complaints relating to OER claims.

Title and paragraphs 1 and 2(a) of the Procedure

21. The clerk reported that the title of the Procedure and paragraphs 1 and 2(a) had been revised so that the Procedure would cover complaints relating to OER claims. Members did not raise objection to the proposal revisions.

Paragraph 2 of the Procedure

22. The clerk said that paragraph 2 had set out the reasons for which the Chairman might decide not to hold a meeting to consider a complaint. New subparagraph (d) was proposed to provide the following two reasons for not holding a meeting:

- (a) the complaint or related matter was being investigated by a law enforcement agency; and
- (b) the complaint or related matter related to a case pending in a court of law.

23. Ms Emily LAU said that since the subject of a criminal investigation would be very different from that conducted by the Committee, she doubted whether the first reason in subparagraph (d) for not holding a meeting was appropriate. SALA1 responded that criminal offences such as fraud or deception might be involved in a complaint received by the Committee. Ms Emily LAU enquired if there would be difficulties if the Committee and a law enforcement agency conducted their own investigations in parallel. SG said that the main consideration was whether the investigation conducted by the Committee would prejudice the criminal proceedings. SALA1 added that the paragraph had been drafted in the light of a case involving claims for reimbursement of rental allowance by a Member of the UK Parliament, which was set out in Appendix I to LC Paper No. IN39/04-05, issued for the fourth meeting of the Committee. In 2001, the UK Committee on Standards and Privileges (Committee on S&P) considered that the complaint against a Member of the Parliament had substance, but decided to put the matter on hold because the issues relating to the complaint were under police investigation. It was only after the police's announcement that it would not take any further action on the case that the Committee on S&P authorized the Parliamentary Commissioner for Standards (the Commissioner) to investigate the complaint. In June 2003, the Commissioner concluded that the Member had violated the relevant provisions.

24. Mr Albert CHENG said that he did not consider parallel investigations a problem. He referred to the case of the Sai Wan Ho Development, in which the Public Accounts Committee decided to proceed with consideration of the case after obtaining legal advice that it was empowered to do so, despite the fact that the Chief Executive had appointed a committee of inquiry to examine issues related to the case. There was also a related judicial review pending.

25. The Deputy Chairman said that in conducting investigations, the Committee was empowered under the Legislative Council (Powers and Privileges) Ordinance to summon any person to appear before the Committee and to give evidence in public hearings. Hence, in the case where a law enforcement agency and the Committee were dealing with broadly similar subjects, criminal proceedings conducted subsequent to the Committee's investigation might be prejudiced by the evidence given before the Committee. For this reason, he had reservations about the Committee investigating a complaint, the subject of which was being investigated by a law enforcement agency.

26. Mr Alan LEONG said that the Committee could decide whether it was appropriate to conduct parallel investigations on a case by case basis, having regard to all pertinent factors. Also, paragraph 2 only set out some of the reasons for which the Chairman might decide not to hold a meeting to consider a complaint, but he was not obliged to decide it that way.

27. Ms Emily LAU said that she would expect the Secretariat to provide information to assist members in deciding whether any criminal or judicial proceedings might be prejudiced if the Committee proceed with investigation of a particular complaint. Hence, she considered it unnecessary to include subparagraph (d) in the Procedure as it might hinder the work of the Committee unnecessarily.

28. As members had reservations about the subparagraph (d), SG proposed that it be deleted from the Procedure. Members agreed.

29. Mr Albert CHENG queried why it had been stipulated in paragraph 2 that it was the Chairman, not the Committee, who would decide whether or not to hold a meeting to consider a complaint. The Deputy Chairman and Mr Alan LEONG said that the final decision on whether or not to hold a meeting to consider a complaint should rest with the Committee. SG responded that paragraphs 4 and 5 of the Procedure had provided checks on the Chairman's decision not to hold a meeting. All members would be promptly notified of such a decision and it could be reviewed by members. Assistant Secretary General 3 (ASG3) added that the paragraph authorizing the Chairman to do the preliminary screening of complaints had been drafted for efficiency considerations, as some complaints might be frivolous. The Chairman said that as there was already a built-in check and balance mechanism, she anticipated that the incumbent Chairman would be prudent in making the decision not to hold a meeting, especially if the complaint was a marginal case. Ms Emily LAU concurred.

30. Mr Albert CHENG suggested that the word “決定”(decide), where it appeared for the second time in paragraph 2, be replaced by “考慮”(consider). SALA1 undertook to review the drafting of the paragraph.

SALA1,
clerk

31. The clerk sought members' view on new subparagraph (e), which provided that the Chairman might decide not to hold a meeting if the complaint involved substantially repeated allegations which had already been dealt by the Committee, save for fresh evidence produced. Members did not raise objection to the subparagraph.

32. The clerk sought members' view on new subparagraph 2(f), which provided that the Chairman might decide not to hold a meeting if the complaint was made against a former Member, or about a Member's act(s) or omission(s) which had allegedly taken place seven years or more prior to the date of the complaint. She said that the period of seven years was also adopted by the UK

Parliament. SALA1 added that it might be difficult for an accused person or witnesses to recollect events which happened many years ago and relevant documents might have been discarded or lost after a long time. Hence, in fairness to the accused person, the court might consider discontinuing a criminal trial on acts allegedly committed a long time ago.

X X X X X X X

Sixth meeting held on Friday, 17 February 2006

III. Setting up of a Mechanism for Handling Complaints and Allegations Concerning Members' Operating Expenses Reimbursement Claims

(LC Papers No. AS89/05-06 and CMI/20/05-06)

Proposed amendments to the RoP

5. Senior Assistant Legal Adviser (SALA1) said that the drafting of the proposed amendment to Rule 73(1)(c) and new Rule 73(1)(ca) of the RoP had been revised, as set out in LC Paper No. CMI/20/05-06, in the light of members' views expressed at the last meeting.

6. Referring to paragraph 5.1 of LC Paper No. CMI/23/05-06 issued for the next agenda item, Ms Emily LAU said that the powers and functions of the Select Committee on Members' Interests of Dáil Éireann (i.e. House of Representatives) of the Parliament of Ireland (Select Committee), were set out clearly, which included that the Select Committee:

- (a) might carry out an investigation on its own initiative;
- (b) if in the course of an investigation it was found that the member concerned did not contravene the section of the Ethics in Public Office Acts to which the complaint related, but might have contravened another, it might investigate the latter contravention;
- (c) should not carry out an investigation if the person concerned was no longer a member, unless requested by the person under complaint to carry out or continue with the investigation; and
- (d) might discontinue an investigation at its own discretion if it considered that the complaint was frivolous or vexatious.

She enquired if the Committee had ever discussed the issues of carrying out an investigation on its own initiative and the handling of anonymous complaints.

7. The clerk replied that it could be read from Rule 73(1) of the RoP that the Committee had to act upon a complaint and this had been the case since the Committee was first established. Also, it was provided in The Procedure of

the Committee on Members' Interests for Handling Complaints received in relation to the Registration and Declaration of Members' Interests (the Procedure) that anonymous complaints would not be handled. Assistant Secretary General 3 (ASG3) said that the Committee in a previous term had consciously decided that it should only act upon a complaint, which might also be lodged by a Member. The Chairman said that the provision that the Committee should act only upon a complaint was consistent with the view that Members were also subject to scrutiny by members of the public. The Deputy Chairman added that one of the considerations of the Committee was that where the Committee was dominated by a political party, the Committee would less likely be used, or seen to be used, as a platform to persecute opponents if it only acted upon a complaint. Mr LI Kwok-ying said that if the Committee carried out an investigation on its own initiative, the member proposing an investigation should not be allowed to take part in the investigation as he might have already taken a view on the case. On balance, he considered that the Committee should not carry out an investigation on its own initiative.

8. Ms Emily LAU said that given that the Select Committee of the Irish Parliament was empowered to carry out an investigation on its own initiative, there might be merits in such an arrangement. Mr Alan LEONG said that the Ethics in Public Office Acts provided the legal basis for initiating investigations by the Select Committee, which was not the case for the Committee. Also, as members of the Dáil Éireann were returned by the general elections, the persecution of minority members was less likely to occur as all members were subject to public scrutiny. Moreover, where a Member lodged a complaint against another Member, it was his duty to come up with some basis for lodging the complaint. If the Committee were to carry out an investigation on its own initiative, a separate mechanism might need to be put in place to frame a complaint as there was no complainant. SG said that if the Committee were to carry out an investigation on its own initiative, it might be performing both the roles of prosecutor and adjudicator, which might be unfair to the Member under investigation.

9. Mr Albert CHENG said that there were few obstacles impeding members of the public to lodge a complaint with the Committee. If a Member considered that a case was worth pursuing, he might lodge the complaint, either in his own name or ask any member of the public to do so. Hence, he considered that there was no need to provide for the Committee with the power to carry out an investigation on its own initiative. Ms Emily LAU said that after considering other members' views, she would not pursue the matter for the time being.

A Guide for Reimbursement of Operating Expenses for Members of the Legislative Council

10. SG said that the revised version of A Guide for Reimbursement of Operating Expenses for Members of the Legislative Council (the Guide) had been issued to all Members by the Principal Council Secretary (Administration) on 27 January 2006 under LC Paper No. AS89/05-06. The revisions, which

were sidelined in the paper, aimed at removing any ambiguities about the nature (i.e. mandatory or advisory) of the provisions.

11. Ms Emily LAU asked if Members had been consulted before the revised Guide was issued. SG replied that Members had been consulted on the underlining policy but not on the drafting of the Guide. Ms Emily LAU said that the drafting was no less important than the policy. SG responded that two rounds of briefings with Members' assistants had been conducted. SALA1 added that the Guide had been drawn up in accordance with the principles for reimbursement of Members' operating expenses (OER) laid down by the Independent Commission on Remuneration for the Members of the Executive Council and the Legislature of the Hong Kong Special Administrative Region (Independent Commission on Remuneration) appointed by the Government. Its primary purpose was to provide practical guidance for Members in making OER claims. The Subcommittee on Members' Remuneration and Operating Expenses Reimbursement, chaired by Hon Patrick Lau Sau-shing, had taken on board some of the recommendations of the Independent Commission Against Corruption with respect to the provisions in the Guide. The Subcommittee's recommendations as contained in its third report submitted to the House Committee were endorsed by the latter at its meeting on 8 July 2005. The latest revisions to the Guide were technical in nature and were made in the light of the proposed new Rule 73(1A), which provided that in considering or investigating a complaint relating to OER claims, the Committee should have regard to the provisions of the Guide. SG said that he always welcomed Members' views and suggestions to fine-tune the Guide, so long as it did not deviate from the principles laid down by the Independent Commission on Remuneration.

12. Mr Albert CHENG said that as the Accounts Office of the Secretariat had been scrutinizing Members' OER claims closely, he was not too worried that Members would inadvertently breach the provisions in the Guide. However, every Member was ultimately responsible for the OER claims he made. Both the Deputy Chairman and Ms Emily LAU expressed appreciation of the work of the Accounts Office.

13. The Chairman suggested, and members agreed, that the proposed amendments to the RoP as set out in LC Paper No. CMI/20/05-06 be endorsed by the Committee. Members also agreed that all Members be consulted on the amendments, together with the revised Procedure to be finalized later.

clerk

Procedure for handling complaints relating to OER claims

Paragraph 2 of the Procedure

14. The clerk recapped that it was decided at the last meeting that:

- (a) subparagraph (d) be deleted from paragraph 2;

- (b) subparagraph (f) be accepted in the way it was drafted; and
- (c) the word “決定”(decide), where it appeared for the second time in paragraph 2 be replaced, by “考慮”(consider).

Proposed new paragraph 8 of the Procedure

15. The clerk reported that the new paragraph 8 provided that the Committee should, in addition to any other matter that the Committee might consider relevant, have regard to the provisions of the Guide. Members did not raise any objection to the proposed paragraph.

Paragraph 9 (original no.:8) of the Procedure

16. The clerk reported that paragraph 9 was amended to add a new provision that:

- (a) the Member under complaint might be accompanied and advised by his legal adviser, but he had to give explanations and provide information himself, and not through the legal adviser; and
- (b) the legal adviser might not address the Committee.

17. Ms Emily LAU enquired about the precedents in which a Member under complaint was accompanied by a legal adviser. The clerk replied that there had been cases in which witnesses summoned by select committees were accompanied by their legal advisers. Ms Emily LAU asked if the Member under complaint might be accompanied by another Member who was a lawyer by profession. SALA1 replied that this was not allowed if the accompanying Member was attending the hearing in the capacity as a legal practitioner, as it had been provided in Rule 82 of the RoP that no Member should appear before the Council or any committee or subcommittee in a professional capacity for or on behalf of a party. Ms Emily LAU said that since the accompanying person would give advice in private to the Member under complaint, it would be difficult to prevent the accompanying Member, who was a lawyer by profession but attending the hearing in another capacity, from offering legal advice to the Member under complaint.

18. Mr Albert CHENG raised for discussion the question of whether the Member under complaint should be allowed to bring a person other than a legal practitioner. The Deputy Chairman said that the Member under complaint should be allowed to bring any person(s) but a limit might be imposed on the number of accompanying persons. Since many Members had delegated their work on making OER claims to their assistants, they might need to be

accompanied by their assistants to help them with the details of OER claims. SALA1 said that such assistants might also appear before the Committee as witnesses. Mr Albert CHENG said that a personal adviser should be allowed to accompany the Member under complaint to a hearing. SG said that in the practice of disciplinary proceedings in the civil service, the accused officer was allowed to invite a friend or colleague to assist him in a disciplinary inquiry hearing. Mr Albert CHENG said that reference might be drawn from the practice of disciplinary proceedings in the civil service.

19. SG said that it appeared from the information provided in LC Paper No. CMI/23/05-06 that for the Irish Parliament, a member under complaint might even be allowed to have a representative to present his case on his behalf. The Deputy Chairman said that reference should be drawn from the practices of overseas legislatures before making a decision on the point. Ms Emily LAU cautioned that care should be taken in drawing reference from overseas legislatures, which might have vastly different political settings. SALA1 drew members' attention to Appendix II to LC Paper No. AS335/04-05, issued for the third meeting. In the House of Commons in Canada and the House of Representatives in the United States, legal representation was allowed. In the House of Commons in the United Kingdom and the House of Representatives in Australia, legal representation was not allowed but the Member under complaint might be accompanied by, and confer with, counsel. Mr Albert CHENG added that as far as he knew, in the case of Canada, the legal adviser might be a law professor who was not a practising lawyer. The clerk undertook to provide more information on the practices of overseas legislatures for members' reference at the next meeting.

clerk

Paragraph 10 (original no.: 9) of the Procedure

20. The clerk said that paragraph 10 had been revised to provide that the Committee might decide not to proceed with an investigation on the ground that there was no prima facie case or on such other grounds that the Committee thought fit. The amendment aimed at providing more flexibility for the Committee to decide whether or not to proceed with an investigation. The Deputy Chairman said that this would give the Committee too much discretion, which might be criticized by some members of the public. Ms Emily LAU said that the practice of the Irish Parliament might be followed, in which a written decision of the Select Committee would be sent to the Member under complaint and the complainant. The clerk stated that this had already been provided for in paragraph 18 (original no.: 16) of the Procedure. Mr Albert CHENG said that if the Committee decided not to proceed with an investigation because it was unsubstantiated, it would have to come up justifications for that decision. Hence he suggested, and other members agreed, that the original wording of the paragraph be kept.

Paragraph 12 (original no.11) of the Procedure

21. The clerk reported that textual amendments had been proposed to paragraph 12 to make the Chinese version tally with the English version. She proposed the phrase “在該類聆訊上” in the Chinese version be further amended to “在該研訊中”. Members agreed.

Paragraph 13 (original no.:12) of the Procedure

22. Noting that the amendments were similar to those set out in paragraph 9 of the Procedure, which had been discussed earlier, members agreed that a decision on the paragraph be deferred to the next meeting.

New paragraph 14 of the Procedure

23. The clerk reported that the purpose of the proposed paragraph was to provide that if, during the preliminary consideration or the investigation stages, the Committee had come to the knowledge that the complaint or related matters was/were being investigated by a law enforcement agency, or was/were relating to a case pending in a court of law, the Committee might suspend its investigation until the conclusion of the such investigation or legal proceedings. Mr Albert CHENG proposed that the phrase “may suspend” be replaced by “may consider suspending” so as to set out more clearly that the Committee was not obliged to suspend its investigation in those circumstances. SALA1 said that the Committee would have already taken due consideration before it came up with the decision to suspend its work. Members agreed to use the original wording of the proposed paragraph.

Paragraph 15 (original: 13) of the Procedure

24. The clerk said that the amendments to paragraph 15 provided for an additional ground for deciding that a complaint was substantiated, which was that the Member under complaint had fallen short of the standard expected of a Member in handling OER claims. Ms Emily LAU said that the Committee’s previous report on Hon James TO’s case had adopted such a line of thinking. As there were rules in the RoP stipulating that Members should register or declare registrable interests, which provided for the basis of the grounds on which complaints were substantiated, she enquired if the standard of conduct should also be set out in the RoP.

25. Mr Albert CHENG said that different people might have different expectations on Members and a Member should not be sanctioned only for not meeting the expectations of a particular group of people. SALA1 said that there might be cases in which there were insufficient evidence to substantiate a case, yet the conduct of a person might be judged by his peers to be unacceptable. The standard of conduct therefore provided a benchmark against which the conduct of a Member might be judged. The Deputy Chairman said

that the standard of conduct might be set out in the Guide. He also suggested that the wording of the paragraph should follow that of the proposed Rule 73(1A) of RoP as closely as possible. The Chairman said that the principles laid down for OER claims might be set out in the paragraph. SALA1 undertook to review the drafting of the paragraph.

SALA1

Paragraph 16 (original: 14) of the Procedure

26. SALA1 explained that the purpose of the proposed amendment was to limit the information which the Member under complaint might submit during a review of his case, to those which could not have been obtained by him with reasonable diligence. This limitation was also imposed in criminal proceedings, so as to discourage the accused from withholding certain information during the initial trial. The Deputy Chairman said that he supported the proposed amendment in principle, but he suggested that the drafting of the Chinese version should be improved.

SALA1

Paragraphs 17 and 19 (original nos. 15 and 17) of the Procedure.

27. Members agreed to the technical amendments proposed to paragraphs 17 and 19.

X X X X X X X

Seventh meeting held on Tuesday, 4 April 2006

II. Setting up of a Mechanism for Handling Complaints and Allegations Concerning Members' Operating Expenses Reimbursement Claims
(LC Papers No. CMI/33/05-06, LS53/05-06 and FS08/05-06)

2. The Chairman said that the Committee had yet to deliberate paragraphs 9, 13, 15 and 16 of the proposed revisions to The Procedure of the Committee on Members' Interests for Handling Complaints received in relation to the Registration and Declaration of Members' Interests (the Procedure). She invited members to consider LC Paper No. CMI/33/05-06.

Paragraphs 9 and 13 (original nos. 8 and 12 respectively) of the Procedure

3. The Chairman said that at the last meeting, members had considered the proposed additions to paragraphs 9 and 13 to provide that:

- (a) the Member under complaint might be accompanied and advised by his legal adviser, but he had to give explanations

and provide information to the Committee himself, and not through the legal adviser; and

- (b) the legal adviser might not address the Committee.

Members had different views on whether the Member under complaint should be allowed to be accompanied by a person other than a legal adviser. In this connection, the Research and Library Services Division of the Legislative Council (LegCo) Secretariat had set out, in LC Paper No. FS08/05-06, the practices in selected overseas legislatures for members' reference.

4. Referring to paragraphs 2.1 to 2.4 of LC Paper No. FS08/05-06, Ms Emily LAU noted that different practices were adopted by the selected overseas legislatures. In the House of Commons of the United Kingdom (UK) and the House of Representatives of the Parliament of Australia, a Member under complaint might be accompanied by persons other than lawyers to attend inquiries, but only he himself was allowed to respond to enquiries. In the Canadian Parliament, a Member under complaint might be represented by counsel or by any other representative and, in the House of Representatives of the United States Congress, by counsel.

Legal representation in the Committee's inquiries

5. Ms Emily LAU said that a Member under complaint should not be allowed to be represented by counsel, especially during the preliminary consideration stage. Mr Alan LEONG said that legal representation should not be allowed as the inquiries conducted by the Committee were inquisitorial in nature, not adversarial as in a court a law. Secretary General (SG) said that at the last meeting, although members had different views on whether a Member under complaint might be accompanied by a person other than a legal adviser, they were of the unanimous view that such a person should not be allowed to address the Committee.

Allowing a Member under complaint to be accompanied by a legal adviser

6. The Deputy Chairman said that the practice of the UK Parliament should be followed.

7. Mr LI Kwok-ying said that he also considered that the inquiries of the Committee were inquisitorial in nature and he expected a Member under complaint would co-operate with the Committee. The role of an accompanying legal adviser would include advising the Member under complaint whether his answers to questions might incriminate himself. The presence of a legal adviser might place members of the Committee, who generally had no legal training, in a disadvantaged position, especially in framing questions to be put to the Member

under complaint. He raised for discussion the impact on the Committee's work of allowing the Member under complaint to be accompanied by a legal adviser.

8. Ms Emily LAU pointed out that, in all the four selected overseas legislatures, legal practitioners were allowed to accompany the Member under complaint, and in two of the legislatures, the legal practitioner might even represent the Member under complaint. She enquired if the interests of the Member under complaint would be fully protected if he was not allowed to be accompanied by a legal adviser. Senior Assistant Legal Adviser 1 (SALA1) said that the purpose of allowing a Member under investigation to be accompanied by a legal adviser was to ensure fairness to him in the inquiry. The benefit of the presence of a legal adviser to the Member would depend on the nature of the inquiries, the experience and background of the Member under complaint as well as the role of the accompanying legal adviser. He envisaged that the role of the legal adviser would be to advise the Member the implications of his answers to the Committee.

9. The Chairman said that law enforcement agencies might be conducting concurrent investigations into the same subject matter, or related matters, of the complaint against the Member concerned. The legal rights of the Member under complaint who had received no legal training might be jeopardized if he was not allowed to be accompanied by a legal adviser.

10. Mr Alan LEONG said that there was a gap between reality and presumption regarding people's knowledge in laws. Allowing a Member under complaint to be accompanied by a legal practitioner would help bridge the gap. Also, the Member who was accompanied by a legal adviser would have no excuse for avoiding answering questions by claiming that he had to first seek legal advice.

11. Ms Emily LAU said that safeguards might need to be put in place to prevent the efficiency of the Committee's inquiries from being seriously hampered by the Member under complaint taking too much time in conferring with his legal adviser. The Deputy Chairman said that he was not too worried about this, and he considered it acceptable that the inquiries would take a longer time for the sake of protecting the legal rights of the accused. SALA1 added that it was not uncommon for a court of law to adjourn upon application by the legal representative of the accused to seek instructions from his client, such as when a new issue was raised.

Right of Silence in the Committee's inquiries

12. Ms Emily LAU asked if there were provisions to deal with the situation in which the Member under complaint refused to answer any questions. SG considered that a Member under complaint should enjoy the right of silence. The clerk said that in the UK Parliament, if a Member under complaint chose to remain silent at a disciplinary hearing, the authorities concerned might take this

into account when compiling their report. SALAI added that there was a provision in the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) that any person summoned under it by the Council or a committee would commit an offence if he refused to answer any lawful and relevant question put to him during the course of any examination, unless such refusal was allowable under that Ordinance.

13. The Deputy Chairman said that the basic right of the Member under complaint to remain silent should be respected. Mr Alan LEONG said that the Member under complaint should not be compelled to speak as he enjoyed the right of silence. However, there had been recent developments in the criminal procedures in the UK whereby the fact that the accused chose to remain silent could draw an adverse inference against him. Should the Committee adopt such an approach, there might be a need to consider whether this should be stated in the Procedure so that the Member under complaint would be aware of the consequence of remaining silent. Ms Emily LAU and Mr LI Kwok-ying concurred with Mr Alan LEONG.

SALAI

Allowing the Member under complaint to be accompanied by persons other than a legal adviser

14. The Deputy Chairman said that as the Member under complaint should be accountable for his claims for reimbursement of Members' operating expenses (OER), he should personally answer the Committee's questions. Yet, he might still need to consult his assistants before he could give correct answers to the Committee.

15. The Chairman said that as the Member under complaint was expected to be fully prepared before attending the inquiries, she doubted the need for his assistants to attend inquiries to give on-the-spot assistance. Also, Members' assistants might attend inquiries of the Committee in the capacity as witnesses. Ms Emily LAU responded that while she also expected the Member under complaint to be prepared, he might not be conversant with every single detail of the OER claims. The accompanying assistants would assist him in answering questions, although they should not be allowed to address the Committee. On the other hand, Members' assistants attending inquiries as witnesses would be answering questions put by the Committee. Mr LI Kwok-ying said that as OER claims were in practice handled by Members' assistants, allowing them to accompany the Member under complaint would facilitate the Committee's work as the Member under complaint would then be able to give more precise answers.

16. Referring to the practice of the UK Parliament, Assistant Secretary General 3 (ASG3) pointed out that it was possible for members to consider also stipulating that the Member under complaint might be accompanied by any person who, in the opinion of the Committee, would help advance the consideration of the complaint.

17. Mr Alan LEONG said that that the Member under complaint should be allowed to decide whether a legal adviser or a person of another profession should accompany him. The main function of an accompanying person other than a legal adviser was to assist him in sorting out the details of the OER claims. The number of accompanying persons should be kept to a minimum in order not to adversely affect the efficiency of the inquiries. Therefore he considered that the Member under complaint should be allowed to be accompanied, as of right, by a legal adviser and, subject to the agreement of the Committee, by any other accompanying persons.

18. Mr LI Kwok-ying said that the Member under complaint should be allowed, as of right, to be accompanied by a legal adviser and an assistant. Ms Emily LAU said that it might suffice to limit the total number of accompanying persons to three, and the Member under complaint should be allowed to decide whether or not to include a legal adviser. She said that she did not favour any approach which would necessitate the Committee holding extra meetings to decide if a particular person nominated by the Member under complaint to accompany him would help advance the consideration of the complaint.

19. The Deputy Chairman said that the Member under complaint should be allowed to choose the person who, in his opinion, would be most helpful to him for presenting his case to the Committee. Also, it would be wasteful of the time of the Committee if it had to involve itself in deciding whether a particular person should be allowed to accompany the Member under complaint. He therefore favoured the approach suggested by Mr LI Kwok-ying. However, he considered that the number of persons other than the legal adviser should be limited to two. Mr LI Kwok-ying concurred.

20. The Chairman proposed, and members agreed, that before the Committee decided on the way forward at the next meeting, the Secretariat should set out the different options on the accompanying persons below, together with their pros and cons, be set out in a paper to the Committee so that members might consult the Members of their respective groupings:

- (a) a maximum of three persons may accompany the Member under complaint to appear before the Committee;
- (b) a legal adviser, plus any other persons as agreed by the Committee, may accompany the Member under complaint to appear before the Committee; and
- (c) a legal adviser, plus a maximum of two any other persons, may accompany the Member under complaint to appear before the Committee.

Confidentiality requirements for accompanying persons

21. The Chairman raised for discussion the question of how to guard against premature release by the accompanying persons of evidence taken before the inquiries. Ms Emily LAU said that the accompanying persons should be bound by the same confidentiality requirements imposed on Members and LegCo Secretariat staff. SALA1 said that Rule 81 of the Rules of Procedure (RoP) provided that the evidence taken before a committee under Rule 80 and documents presented to the committee should not, except in the case of meetings of the committee held in public, be published by a member of the committee or by any other person before the committee had presented the report to the Council. Any member of the committee who failed to comply with the rule might be admonished or reprimanded by the Council on a motion to that effect. ASG3 advised that the aforesaid sanctions were applicable to Members only. Ms Emily LAU said that the rule might be amended to extend the sanctions to any person other than a Member.

SALA1

Paragraph 15 (original no. 13) of the Procedure and new proposed rules of RoP

22. The Chairman recapped that when the Committee considered paragraph 15 of the Procedure at the last meeting, Ms Emily LAU had enquired if the standard of conduct expected of a Member in handling OER claims should be set out in the RoP for Members to follow. In this connection, the Legal Service Division had proposed revised amendments to the RoP, as set out in LC Paper No. LS53/05-06.

23. SALA1 said that the proposed new Rule 83AA was to provide that, when making OER claims or applying for advance of operating funds, “a Member shall:

- (a) ensure that any information, declaration or certification provided or made is true, accurate and complete; and
- (b) act according to any undertaking that he has given.”

The proposed rule also covered acts relating to applications for advance of operating funds.

24. Noting that Rule 83AA(a) provided that any information provided should be “詳盡”(complete), the Deputy Chairman stated that it was always arguable whether a Member had complied with the rule as he would never know if he had provided enough details. For example, a Member might be accused of breaching the rule because of his failure to provide detailed breakdowns on the sundry expenses of an event for which he had made OER claims. SG said that it was possible that even though a Member had completed every part of the relevant forms for OER claims, he might not have provided all the relevant facts. For example, in making OER claims for an event, a Member might not disclose the

facts that the event was held in collaboration with other parties, and that he was only making OER claims in respect of a portion of the expenses of the whole event. The Deputy Chairman suggested that the word “完備” might be more precise than “詳盡”, as it did not carry the meaning of “full details”. SALA1 responded that the Chinese text of the word “complete” was “詳盡” in various ordinances. Also, the meaning of the words “true, accurate and complete” in Rule 83AA(a) should be interpreted in the context of what was required to enable the approving officer to consider the claim concerned. Mr Albert CHENG and Mr Alan LEONG considered that there was no need to change the wording. SALA1 said that in view of members’ concern, he would review if the Chinese rendition of the word “complete” could be replaced by “完整” or “完備”.

SALA1

25. Ms Emily LAU asked if the LegCo Secretariat would provide guidelines to Members for complying with the Rule. SG replied that guidelines on making OER claims together with actual examples had been issued to Members.

26. On the drafting of Rule 83AA, Mr Alan LEONG asked why a “/” had been used between the words “申報” and “聲明” in the Chinese version of paragraph (a). He also proposed that

- (a) paragraph (a) be rewritten to read “ensure that any information provided or any declaration or certification made is true, accurate and complete.”, and
- (b) the word “根據” in the Chinese version of paragraph (b) be replaced with “依照”, as the former had been used in the preamble of the rule.

SALA1 replied that the “/” was used in the Chinese version because both of the words “申報” and “聲明” were used in the Chinese version of A Guide for Reimbursement of Operating Expenses for Members of the Legislative Council and the claim forms therein, in respect of the words “declaration” or “declare”. Members agreed to the textual amendments proposed by Mr Alan LEONG.

27. SALA1 said that after review, the Legal Service Division suggested that the proposed Rule 85A be incorporated into the existing Rule 85. Members agreed to the suggestion. The clerk proposed a consequential amendment to delete the reference to Rule 85A in paragraph 17 of the Procedure. Members agreed.

28. The clerk said that paragraph 15 had been simplified by deleting the basis on which a complaint might be found substantiated. Members agreed to the new drafting.

Paragraph 16 (original no. 14) of the Procedure

29. Ms Emily LAU noted that an amendment was proposed to the paragraph to stipulate that in seeking a review of the Committee’s decision that the complaint was substantiated, the Member under complaint was allowed to submit only such supplementary information which could not have been obtained by him with reasonable diligence. She enquired about the rationale for restricting the information which might be submitted. SALA1 replied that the amendment was proposed on the basis of a similar limitation in appeal proceedings in courts, which disallowed the parties to introduce new evidence in appeals unless on good grounds. Ms Emily LAU said that the amendment might create additional work for the Committee as it would have to deliberate the admissibility of the information submitted by the Member under complaint. Mr Albert CHENG said that there was no need for the amendment as a time limit of seven working days had already been imposed and Members’ behaviours were under the scrutiny of the public. The Chairman enquired if words similar to the proposed amendment had been used in the letters accompanying the draft reports sent to the witnesses who attended hearings of select committees. SG replied in the negative and suggested that the proposed amendment be dropped. The clerk added that when the Committee’s draft report on a case of failure to register interests was sent last year to the Member under complaint for comment, the Member was also invited to note that he might submit information which was unavailable at earlier inquiries, pursuant to the original paragraph of the Procedure. Ms Emily LAU proposed, and members agreed, that the original paragraph be kept.

Consultation with Members

30. The Chairman recapped that it had been agreed at the last meeting that upon finalization of the Procedure, all Members would be consulted on the proposed amendments to the RoP and the revised Procedure. Ms Emily LAU said that the Committee might also invite all Members to express their views.

X X X X X X X

Minutes of the eighth meeting held on Tuesday, 2 May 2006

III. Setting up of a Mechanism for Handling Complaints and Allegations Concerning Members’ Operating Expenses Reimbursement Claims

(LC Papers No. CMI/33/05-06, CMI/36/05-06 and CMI/39/05-06)

Persons allowed to accompany a Member under complaint to appear before the Committee

4. The presiding member recapped that at the last meeting, the Committee had considered the proposed additions to paragraphs 9 and 13 of the

Procedure of the Committee on Members' Interests for Handling Complaints received in relation to the Registration or Declaration of Members' Interests or Members' Claims for Reimbursement of Operating Expenses (the Procedure), which concerned the persons to be allowed to accompany a Member under complaint to appear before the Committee, and had decided that members should consult the LegCo Members of their respective groupings regarding their preference on the three different options detailed below:

- (a) Option 1: A Member under complaint may be accompanied by a maximum of three persons, whose attendance need not be subject to the Committee's prior permission;
- (b) Option 2: A Member under complaint may be accompanied by a maximum of one legal adviser and two other persons, whose attendance need not be subject to the Committee's prior permission; and
- (c) Option 3: A Member under complaint may be accompanied by a maximum of one legal adviser, whose attendance need not be subject to the Committee's prior permission and, with the Committee's prior permission, any number of other persons.

5. The presiding member invited members to note members' returns which were summarized in LC Paper No. CMI/39/05-06, and also her own which was tabled at the meeting. In gist, members' views were as follows:

- (a) Option 1 was favoured by Ms Emily LAU, and she had consulted nine independent LegCo Members from the pan-democratic camp;
- (b) Option 2 was favoured by Mr SIN Chung-kai, Mr Abraham SHEK and Mr LI Kwok-ying, and they had consulted those LegCo Members who respectively belonged to the Democratic Party, the Alliance, and the Democratic Alliance for the Betterment and Progress of Hong Kong (DAB); and
- (b) Option 3 was favoured by Mrs Sophie LEUNG and Mr Alan LEONG, and they had consulted those LegCo Members who respectively belonged to the Liberal Party and Civil Party.

6. The presiding member said that none of the options had won the clear majority support of Members.

7. Mr LI Kwok-ying said that after tendering his return, he had also consulted Members who belonged to the Hong Kong Federation of Trade Unions (HKFTU). They favoured option 1, and suggested stipulating in the Procedure

that a Member under complaint could not claim that he was unfairly treated on grounds that he had not been accompanied by a legal adviser, if he had chosen not to be so accompanied. He said that Members belonging to the DAB would also favour option 1 if this approach was adopted.

8. Mr Albert CHENG said that he favoured option 1 and supported HKFTU's suggestion. He pointed out that option 2, which specified that one of the three accompanying persons had to be a legal adviser, might be considered as discriminating against other professions. He also considered this unfair to a Member under complaint who did not have the resources to hire a legal adviser, since he would then be allowed to be accompanied by a maximum of two persons only.

(The Chairman arrived at 2:48 pm, and took over the chair)

9. Mr Albert CHENG said that disputes might arise between the Committee and a Member under complaint on whether or not a particular person accompanying him might be regarded as a "legal adviser". Senior Assistant Legal Adviser 1 (SALA1) responded that if the Committee's intention was to have a qualified lawyer to advise the Member under complaint, then the drafting of the relevant rules could clearly specify this. A Member under complaint should be reminded of the right to be accompanied by a legal adviser at the time when he was invited to appear before the Committee so that he was clear about his right from the beginning. The Chairman said that law enforcement agencies might be conducting concurrent investigations into the same subject matter, or related matters, of the complaint against the Member concerned. The role of the legal adviser would be to protect the legal position of the Member under complaint.

10. Mr LI Kwok-ying said that one of the functions of an accompanying legal adviser would be to advise a Member under complaint whether his statements might incriminate himself. The Member should be allowed to choose any person who, in his opinion, could protect his legal rights.

11. Mr Alan LEONG said that he would expect that a Member under complaint to be fully prepared before appearing before the Committee, and the main role of an accompanying person other than a legal adviser would be to provide assistance to the Member on the details of the claims which he had made under Members' operating expenses reimbursement (OER) scheme. He considered that the number of such accompanying persons should be kept to a minimum, and therefore their attendance be subject to the prior permission of the Committee. Otherwise, a Member under complaint might, in the extreme case, choose to be accompanied by a reporter.

12. Secretary General (SG) said that the more restrictive the rules on the accompanying persons, the more likely that a Member under complaint might seek a judicial review to challenge them. Ms Emily LAU said that the Members whom she had consulted favoured option 1 because it allowed a Member under

complaint to choose, having regard to his own best interests, the persons to accompany him. Therefore, a person of whatever profession should be allowed, even if he was a reporter. Also, if a Member under complaint did not opt, under paragraph 18 of the Procedure, for the inquiry to be held in public, he and any accompanying persons should be bound by confidentiality requirements.

13. Mr Albert CHENG said that a person should not be disallowed to accompany a Member under complaint just because he was a reporter by profession, as he would be attending in another capacity, such as an assistant to the Member under complaint. Generally speaking, he considered the Committee's allowing a reporter to attend its inquiry held in camera would not pose a greater risk of its proceedings being divulged than persons of other professions.

14. SG proposed for the Committee's consideration that option 1 be amended to read "a Member under complaint might be accompanied by a maximum of three persons, including legal adviser(s)".

15. The Deputy Chairman said that he agreed to such an amendment, and he would support option 1 as amended by SG's proposal. He suggested that the Procedure be thus amended and all Members' agreement be sought for its adoption together with the related amendments to the Rules of Procedure (RoP). Other members agreed. The clerk said that under Rule 73(7) of RoP, the procedure of the Committee was to be decided by the Committee. Assistant Secretary General 3 (ASG3) said that a resolution had to be passed at a Council meeting to amend the relevant rules of the RoP to empower the Committee to deal with complaints relating to OER claims. Ms Emily LAU said that the Committee should consult all Members before it determined the Procedure and proposed amendments to RoP.

Confidentiality requirements to be imposed on accompanying persons

16. The Chairman sought members' views on how to guard against the Committee's confidential proceedings being divulged by the accompanying persons who were not subject to Rule 81 of the RoP which governed Members only. The Deputy Chairman said that he was not too concerned about this as a Member under complaint could always request that the inquiry be conducted in public. Ms Emily LAU said that all participants in inquiry held in camera should be bound by confidentiality requirements. She considered that Members divulging the Committee's proceedings constituted misbehaviour and should be censured under Article 79(7) of the Basic Law, and other persons divulging such information should be reprimanded by the Council on a motion to that effect.

17. Mr Albert CHENG said that the Public Accounts Committee (PAC) had deliberated at length the problem of confidential information being divulged, and all PAC Members had signed a confidentiality undertaking. ASG3 said that the scope of Rule 81(1) of the RoP was restrictive in that it related only to

premature publication of evidence taken before a committee and documents presented to the committee. PAC members were also concerned about the proceedings of PAC meetings being divulged, and this was now a broader issue to be examined by the Committee on Rules of Procedure (CRoP).

18. Ms Emily LAU said that an independent competent body should be set up to investigate any leakage of confidential information. Mr Albert CHENG said that the sensitive issue of political persecution would arise if an outside body was brought in to undertake the investigation, and LegCo Members were accountable mainly to electors. Ms Emily LAU said that the House Committee should be requested to appoint an investigation committee, whose membership and supporting staff were independent of the committee from which confidential information had been divulged.

19. SG said that it would take some time before CRoP completed the related study. He suggested the Committee consider adding in the Procedure provisions about the requirement to keep confidential information. The clerk proposed that provisions might be added under the Confidentiality Requirement section of the Procedure to require any persons attending inquiry of the Committee held in camera to sign a confidentiality undertaking, with the consequence that, if they were found to have breached the undertaking, they might be reprimanded by the Council on a motion to that effect. Members agreed.

The situation in which a Member under complaint remained silent when appearing before the Committee

20. The Chairman sought members' views on how to deal with the situation in which a Member under complaint remained silent when appearing before the Committee.

21. Referring to paragraph 13 of the minutes of the last meeting, the clerk said that Mr Alan LEONG had told the meeting that there had been recent developments in the criminal procedures in the United Kingdom (UK) whereby the fact that the accused chose to remain silent could draw an adverse inference against him. He had also said that should the Committee adopt such an approach, there might be a need to consider whether this should be stated in the Procedure so that the Member under complaint would be aware of the consequence of remaining silent.

22. Mr Alan LEONG added that in UK, when summing up the case, the prosecution might draw the attention of the jury to the fact that the accused had chosen to remain silent. SALA1 explained that under common law, where there was established a prima facie case in which the accused was reasonably expected to give explanations but he did not, the fact that he remained silent might be taken by the adjudicating authority as a factor reinforcing the case. However,

silence in itself was not evidence of the alleged conduct and would not relieve the prosecution of the burden of proof.

23. Mr LI Kwok-ying disagreed that it should be mentioned in the Procedure that an adverse inference could be drawn against a Member under complaint if he remained silent, as this would give the public the impression that the Committee was not handling the case in an impartial manner. Ms Emily LAU said that where a Member under complaint was reasonably expected to give explanations of his case but he did not, it was reasonable for the Committee, when deliberating the case, to take this into account. Thus, it could only be fair to the Member under complaint to be forewarned of the possible consequence of remaining silent.

24. The Deputy Chairman enquired if a Member under complaint would breach any rules if he chose to remain silent. SALA1 responded that if a Member under complaint was only invited to appear before the Committee, he would not be breaching any rules by remaining silent. However, if he was summoned under the Legislative Council (Powers and Privileges) Ordinance (Cap.382) to appear before the Committee, it would be an offence for him to refuse to be examined or to answer any lawful and relevant questions put by the Committee. The offender would be liable to a fine of \$10,000 and imprisonment for 12 months, but the consent of the Secretary for Justice was required for initiating prosecution. Nevertheless, this was a separate issue and the Committee could carry on its own investigation and draw its conclusion on the case.

25. Mr Alan LEONG said that according to the Procedure, during the preliminary consideration stage, a Member under complaint would be invited, but not summoned under the Legislative Council (Powers and Privileges) Ordinance, to appear before the Committee. Hence, if a Member under complaint remained silent, it would be up to the Committee to decide whether or not to proceed to the investigation stage. Mr Albert CHENG said that at the investigation stage, a person summoned to appear before the Committee would be obliged to answer its questions.

26. Mr Alan LEONG said that as it had been provided in paragraph 15 of the Procedure that a complaint would be regarded as substantiated only if the Committee was satisfied that there was sufficient evidence for that, it would suffice to set out in the Preliminary Consideration section of the Procedure that the Committee might proceed to investigation if a Member under complaint remained silent. Members agreed.

the clerk

X X X X X X X