

立法會

Legislative Council

LC Paper No. CB(3) 46/09-10

Ref: CB(3)/HS/1

Paper for the House Committee meeting on 16 October 2009

Mechanism for the censure of a Member for misbehaviour under Article 79(7) of the Basic Law

Purpose

This paper describes the mechanism for the censure of a Member for misbehaviour under Article 79(7) of the Basic Law ("BL 79(7)") which will lead to his disqualification from the office of a Member of the Legislative Council ("LegCo"). The paper also provides the background on the principles and procedural steps considered by the Committee on Rules of Procedure ("CRoP") and endorsed by the House Committee when a resolution was passed by the Council on 28 April 1999 for putting in place a mechanism in the Rules of Procedure of the Legislative Council ("RoP") for the implementation of BL 79(7).

Background

2. Since July 1998, CRoP of the First LegCo had proposed changes to the RoP for the implementation of specific articles of the Basic Law. In November 1998, CRoP of the First LegCo commenced its study on the implementation of BL 79(7). BL 79(7) provides:

"香港特別行政區立法會議員如有下列情況之一，由立法會主席宣告其喪失立法會議員的資格……

(七) 行為不檢或違反誓言而經立法會出席會議的議員三分之二通過譴責。"

(English translation)

"The President of the Legislative Council of the Hong Kong Special Administrative Region shall declare that a member of the Council is no longer qualified for the office

(7) When he or she is censured for misbehaviour or breach of oath by a vote of two-thirds of the members of the Legislative Council present."

3. In its study, CRoP focused on what behaviours should be regarded as those falling within the meaning of "misbehaviour" serious enough to disqualify a Member from office and what mechanism should be established to deal with allegations of such misbehaviour. In view of the serious and complicated nature of the subject, CRoP had made reference to the practices of overseas legislatures¹ and local professional bodies, and conducted a consultation exercise among Members. CRoP noted that it was common practice in overseas jurisdictions that the acts in question were related invariably to the conduct of Members of Parliament in the performance of their duties as such. The major consideration was whether the act has brought about such serious disrepute to the House as to constitute a contempt. CRoP concluded that it would be more appropriate for the Council of the day to make a decision on the kind of behaviours which warrant the taking of action under BL 79(7). The acts in question should also be judged if they had brought the Council into disrepute.

4. Having regard to the serious consequence of an allegation made under BL 79(7), CRoP considered it essential for a mechanism to be established for investigating and assessing such an allegation following the moving of a censure motion in the Council. This mechanism should be kept separate from that for handling a complaint against a Member which may lead to a lesser form of punishment. The mechanism should also prevent accusations of a frivolous nature and guard against persecution of minority groups in the Council. In fairness to the Member under complaint, the mechanism should allow the matter which was the subject of allegation to be investigated by an investigation committee appointed on a case-by-case basis for the purpose before the motion to censure a Member for misbehaviour under BL 79(7) was debated and voted upon. On 28 April 1999, the Council passed a resolution to put in a place a mechanism for the implementation of BL 79(7) by adding the following provisions in the RoP:

- (a) Rule 30(1A) which provides that the notice of a motion for the disqualification of a Member from office shall be signed by the Member wishing to move the motion and three other Members;
- (b) Rule 49B(1A) and (2A) which prescribes how the motion should be worded, moved, adjourned and referred to an investigation committee;
- (c) Rule 73A which prescribes the procedure for the establishment and operation of the investigation committee, and its terms of reference; and
- (d) Rule 40(6A) which stipulates that a debate adjourned under Rule 49B(2A) shall be resumed at the earliest Council meeting after the report of the investigation committee has been laid on the Table of the Council.

The texts of the relevant provisions are set out in **Appendix I** for members' reference. An extract from the 1998-1999 progress report of CRoP setting out the deliberations on the subject is in **Appendix II**.

¹ The overseas legislatures included the United Kingdom, Australia, Canada and the United State of America.

Mechanism for implementing BL 79(7)

5. The mechanism for implementing BL 79(7) consists of three stages: (i) moving of a censure motion, (ii) investigation by an investigation committee, and (iii) resumption of debate and voting on the censure motion. For easy reading, a flow chart showing the mechanism is provided in **Appendix III**.

Stage 1: Moving of a censure motion

6. Where a Member is of the view that another Member has committed a misbehaviour which he believes to have brought serious disrepute to the Council, he may move a motion to censure the Member for that misbehaviour, subject to the normal rules on motions such as notice period having been met. The notice of this censure motion has to be signed by the mover and also three other Members. This requirement of one plus three Members to sign the notice is to deter abuse of the mechanism, while not barring minority Members from initiating action under BL 79(7).

7. The wording of the motion is prescribed in Rule 49B(1A) to avoid ambiguity over the intention of the motion. Details of the reasons or circumstances to support the proposed censure have to be particularized in the schedule to the motion. The motion is not subject to amendment as it was considered by CRoP that the wording of a motion under BL 79(7) and the purpose of the motion should be very specific.

8. Once a censure motion has been moved, it cannot be withdrawn without the consent of the Council. The debate on the motion will stand adjourned upon the moving of the motion, and the matter will then be referred to an investigation committee with its members to be appointed by the President. Any Member who disagrees with the referral may move, without notice, a motion for the Council to order otherwise. If that motion of not referring the matter to an investigation committee is passed, the censure motion will not be proceeded with.

Stage 2: Investigation by an investigation committee

9. An investigation committee, once established, is responsible for establishing the facts stated in the censure motion moved under Rule 49B(1A) and giving its views on whether or not the facts as established constitute grounds for the censure. The facts so established and the views given on those facts are to be reported to the Council for reference by all Members when debating the censure motion. In accordance with Rule 40(6A), that debate will take place at the Council meeting next following the tabling of the report at which normal business is to be transacted.

10. The membership size of the investigation committee is set at seven, comprising a chairman, a deputy chairman and five members. It was considered by CRoP that such size, which should be subject to periodic review, would allow for a fair representation of the different political groups or interests in the Council.

11. To be fair to both the Member moving the motion and the Member under investigation, and in order to avoid conflict of interests, the mover of the motion, the Members sponsoring the motion and the Member who is the subject of investigation shall not be appointed to the investigation committee.

12. To encourage maximum participation of members in meetings of the investigation committee, the quorum of the committee is set at five including the chairman. Although not provided for in the RoP, it was CRoP's view that provision should be made in the investigation committee's own procedure to enable the chairman to adjourn a meeting whenever there is no quorum.

13. Meetings of the investigation committee are to be held as closed meetings with the exception that the Member under investigation may, before the first meeting when a witness is to appear, elect to have the meetings held in public. However, the investigation committee may decide on sufficient reason to accede to a request made by any of its members or an application made by a witness to hold a meeting or part of such a meeting as a closed meeting.

14. Though not provided for in the RoP, CRoP was also of the view that all parties appearing before an investigation committee should be allowed to be accompanied by a person, regardless of whether he was a lawyer. Should an investigation committee decide to adopt this view, it may be given effect in the practice and procedure to be determined by it under Rule 73A(13).

15. Pursuant to section 9(2) of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382) and as reflected in Rule 80(b) of the RoP, an investigation committee may be specially authorized by a resolution of the Council to exercise the power to summon witnesses as provided under section 9(1) of the Ordinance. Whether such an authorization should be sought would be for a particular investigation committee to decide subsequent to its establishment after a censure motion has been moved in the Council.

Stage 3: Resumption of debate and voting on the censure motion

16. As described in paragraph 9 above, the investigation committee's report serves as a reference for all Members when debating the censure motion. The decision of whether the Member under investigation should be censured and therefore disqualified from his office as a Member of the Council lies with the Council rather than the investigation committee.

17. In accordance with BL 79(7) and Rule 49B(3) and (4), the passage of a censure motion requires a two-thirds majority vote of the Members present, and if the motion is so passed, the President will forthwith declare that the Member is no longer qualified for his office.

18. The normal rules governing a Member's right to speak, the order and the number of times a Member may speak apply to the debate on the censure motion. All Members except the Member who is the subject of the motion are entitled to speak as of right. That excepted Member may only speak after he has declared that he has direct pecuniary interest in the motion because passage of it will lead to his disqualification from his office as a Member and will result in his loss of entitlement to remuneration paid to him as a Member.

19. Pursuant to Rule 38(1), a Member may not speak for more than once at the debate on the censure motion except with leave of the President. CRoP held the view that the Member who is the subject of the censure motion should be given leave to speak more than once by the President if he so requests.

20. As regards the voting on the censure motion, as required by Rule 84(1) and (1A), the Member who is the subject of the motion shall not vote and has to withdraw from the Council meeting when a vote is being taken on it.

Issues relating to the moving of a censure motion on Hon KAM Nai-wai

21. At the House Committee meeting on 9 October 2009, Members agreed that allegations in respect of Hon KAM Nai-wai should be followed up by the moving of a motion under Rule 49B(1A), i.e. a censure motion leading to the disqualification of the Member from office under BL 79(7). It was also agreed that the Chairman of the House Committee should be the mover of the motion to ensure the neutrality of the motion and a subcommittee be formed to discuss and make recommendations on the wording of the censure motion and the details to be set out in the schedule to the motion.

22. Members may wish to note that the mechanism for implementing BL 79(7) is for dealing with allegations which are serious enough as to have brought the Council into disrepute and should be kept separate from those mechanisms for dealing with complaints against a Member which may lead to a lesser form of punishment. At present, there is no other mechanism in the RoP which deals with Members' misbehaviour that may lead to a lesser form of punishment. Other than disqualification from office, the other forms of punishment provided in the RoP are sanctions in the form of admonishment, reprimand or suspension by the Council in relation to failures to comply with Rules in the RoP that concern registration or disclosure of Members' interests, or claims for reimbursement of operating expenses. There is also the Committee on Members' Interests ("CMI"), which is the only standing committee given the power to investigate complaints against Members, but only in respect of matters relating to the declaration or disclosure of Members' interests and Members' claims for reimbursement of operating expenses and applications for advance of funds. Whilst CMI's power to investigate is limited in scope, it may consider matters of ethics in relation to the conduct of Members, and to give advice and issue guidelines on such matters². On two occasions, one in 1995 and the other in 1996, motions had been moved

² Since July 1998, CMI had discussed three cases of Members' conduct and revised the guidelines accordingly.

in the Council to empower CMI to carry out investigation into complaints about other types of misconduct of Members. Both motions were negated. The reasons advanced for objecting the motions were that it was difficult to define "proper conduct"; the mechanism might be abused; Members' conduct was already under public scrutiny; and if needed, a select committee might be appointed to consider such complaints about Members' misconduct.

23. Members may also wish to note that when the mechanism to implement BL 79(7) was devised, it was not envisaged that the censure motion would be moved by a Member in the capacity of the Chairman of the House Committee and a subcommittee would be formed to formulate the details of the alleged misbehaviour. According to that mechanism, the onus is on the mover of the motion to set out the details of the misbehaviour in the schedule to the motion and as a result, the mover and the three Members who sign the notice of motion are not qualified for appointment to the investigation committee in accordance with Rule 73A (1). The present situation gives rise to the following technical difficulties which need to be addressed immediately:

- (a) who would be the three other Members who will join the Chairman of the House Committee in signing the notice of the censure motion; whether these three Members should be decided by the House Committee or it would be for individual Members to volunteer themselves;
- (b) if the primary task of the subcommittee is to discuss and make recommendations on the wording of the motion, whether members of the subcommittee would be regarded as having taken part in the framing of the motion and therefore should not be nominated as a member of the investigation committee; and
- (c) given the complication in (b) above, whether the subcommittee should assist the House Committee in considering matters other than the drafting of the censure motion, which would be left to the mover and the three other Members to decide. These matters may include the formation and preliminary work of the investigation committee, such as proposal on the membership of the investigation committee, drafting the practice and procedure of the investigation committee, etc.

Advice sought

24. Members are invited to consider and decide on the issues set out in paragraph 23 above.

Council Business Division 3
Legislative Council Secretariat
15 October 2009

Extract from the Rules of Procedure

* * * * *

30. Manner of Giving Notice of Motions and Amendments

(1A) Notice of a motion moved under Rule 49B(1A) (Disqualification of Member from Office) shall be signed by the Member wishing to move the motion and 3 other Members.

38. Occasions when a Member may Speak more than once

- (1) A Member may not speak more than once on a question, except –
- (a) in committee of the whole Council; or
 - (b) as provided in subrule (2); or
 - (c) in explanation as provided in subrule (3); or
 - (d) in the case of the mover of a motion, in reply at the end of the debate on the motion; or
 - (e) *(Repealed L.N. 86 of 2000)*
 - (f) upon a Member's motion as provided in subrule (8); or
 - (g) with the leave of the President.

40. Adjournment of Debate or of Proceedings of a Committee of the Whole Council

(6A) A debate adjourned under the provisions of Rule 49B(2A) (Disqualification of Member from Office) shall be resumed at the earliest meeting of the Council at which normal business is transacted after the report of the investigation committee has been laid on the Table of the Council.

49B. Disqualification of Member from Office

(1) A motion to relieve a Member of his duties as a Member under Article 79(6) of the Basic Law shall be moved in the following form:

“That whereas (name of Member) was convicted on (date) in (court) in (place) of a criminal offence(s) and was sentenced on (date) by (court) to imprisonment for one month or more (as particularized in the Schedule to this motion), this Council relieves (name of Member) of his/her duties as a Member of the Legislative Council.”

(1A) A motion to censure a Member under Article 79(7) of the Basic Law shall be moved in the following form:

“That this Council, in accordance with Article 79(7) of the Basic Law, censures (name of Member) for misbehaviour/breach of oath under Article 104 of the Basic Law/misbehaviour and breach of oath under Article 104 of the Basic Law (details as particularized in the Schedule to this motion).”.

(2) No amendment may be moved to a motion moved under subrule (1) or (1A).

(2A) Upon the moving of a motion under subrule (1A), debate shall be adjourned and the matter stated in the motion shall be referred to an investigation committee unless the Council, on a motion which may be moved without notice by any Member, otherwise orders. If the latter motion is agreed to by the Council, no further action shall be taken on the motion moved under subrule (1A).

(3) The passage of a motion moved under subrule (1) or (1A) shall require a two-thirds majority vote of the Members present.

(4) Where the Council has decided to relieve a Member of his duties or to censure a Member, the President shall declare forthwith that the Member is no longer qualified for his office.

73A. Investigation Committee

(1) An investigation committee required to be established under Rule 49B(2A) (Disqualification of Member from Office) shall consist of a chairman, a deputy chairman and 5 members who shall be Members appointed by the President in accordance with an election procedure determined by the House Committee. The mover of the motion under Rule 49B(1A), the Members jointly signing the motion, and the Member who is the subject of the motion shall not be appointed to the committee.

(2) The committee shall be responsible for establishing the facts stated in the motion moved under Rule 49B(1A) (Disqualification of Member from Office), and giving its views on whether or not the facts as established constitute grounds for the censure.

(3) The quorum of the committee shall be 5 members including the chairman.

(4) Subject to subrule (5), all meetings of an investigation committee shall be held in camera.

(5) (a) Upon an election made by the Member who is the subject of the motion under Rule 49B(1A) (Disqualification of Member from

Office), meetings at which a witness or witnesses appear shall be held in public, provided that such election is made before the first of such meetings.

- (b) Notwithstanding an election made under paragraph (a), the committee may decide on sufficient reason, upon a request made by a member of the committee or an application made by a witness, to hold any such meetings or any part thereof in camera.

(6) In the event of the temporary absence of the chairman and deputy chairman, the committee may elect a chairman to act during such absence.

(7) The clerk to the committee appointed under Rule 6(7) (Duties of the Clerk) shall attend meetings of the committee and shall keep the minutes of proceedings of the committee.

(8) Divisions in an investigation committee shall be taken by the clerk to the committee who shall ask each member of the committee separately how he wishes to vote and record the votes accordingly.

(9) Neither the chairman nor any other member presiding shall vote, unless the votes of the other members are equally divided in which case he shall give a casting vote.

- (10) (a) A member of an investigation committee may bring a report for the committee's consideration. When all the reports have been brought up the chairman shall propose the reports in order until one is accepted as a basis for discussion, beginning with his own report and proceeding with the remainder in the order in which they were brought up. The question to be proposed by the chairman on a report shall be that the chairman's (or Mr.'s) report be read a second time paragraph by paragraph. When this question has been agreed to, it shall not be proposed on further reports but portions thereof may be offered as amendments to the report under consideration if they are relevant to it

- (b) The committee shall then go through the report paragraph by paragraph and when concluded, the chairman shall put the question that this report be the report of the committee to the Council.

(11) The minutes of proceedings of the committee shall record all proceedings on consideration of a report with a note of divisions, if divisions were taken in the committee, showing the names of members voting in the division or declining to vote.

(12) An investigation committee shall, as soon as it has completed investigation of the matter referred to it, report to the Council thereon and the committee shall be dissolved accordingly. The investigation committee may be revived to deal with any further matters arising therefrom by resolution of the Council.

(13) Subject to these Rules of Procedure, the practice and procedure of the investigation committee shall be determined by the committee.

80. Attendance of Witness

- (a) Any standing committee may summon, as required when exercising its powers and functions, persons concerned to testify or give evidence; and
- (b) the House Committee or a Bills Committee, Panel, select committee, investigation committee or any other committee, where so authorised by the Legislative Council, may summon, as required when exercising the committee's powers and functions, persons concerned to testify or give evidence,

but the Chief Executive may decide, in the light of security and vital public interests, whether Government officials or other personnel in charge of Government affairs should testify or give evidence before the Legislative Council or its committees.

84. Voting or Withdrawal in case of Direct Pecuniary Interest

(1) In the Council or in any committee or subcommittee, a Member shall not vote upon any question in which he has a direct pecuniary interest except where his interest is in common with the rest of the population of Hong Kong or a sector thereof or his vote is given on a matter of Government policy.

(1A) In the Council or a committee of the whole Council, a Member shall withdraw when a vote is taken on a question in which he has a direct pecuniary interest except where his interest is in common with the rest of the population of Hong Kong or a sector thereof or his vote is given on a matter of Government policy.

* * * * *

**Extract from the progress report
of the Committee on Rules of Procedure
for the period July 1998 to April 1999**

* * * * *

The procedure for the censure of a Member under Article 79(7)

2.39 Article 79(7) provides for the censure of a Member for misbehaviour or breach of oath by a vote of two-thirds of the Members of the Legislative Council present, and has the same effect as Article 79(6) of disqualifying a Member from office. However, unlike the case of Article 79(6) the application of which depends on existence of a conviction and sentence to imprisonment for a criminal offence, the circumstances under which Article 79(7) may be triggered off depend on an evaluation of whether the condition of either “misbehaviour” or “breach of oath” is satisfied.

2.40 In view of the serious and complicated nature of the subject, the Committee has conducted its study in two dimensions:

- (a) what behaviours should be regarded as falling within the meaning of “misbehaviour” or “breach of oath” and which are serious enough as to justify the censure of a Member and his disqualification from the office of a Member of the Legislative Council; and
- (b) what mechanism should be established to deal with an allegation of such behaviours.

In the course of its studies on the procedural rules for implementing Article 79(7), the Committee has made reference to practices in overseas legislatures and local professional bodies. A consultation exercise among Members was also conducted.

Defining “misbehaviour” and “breach of oath”

Misbehaviour

2.41 In determining the scope of “misbehaviour” in the context of Article 79(7), the Committee has examined the relevant provisions in the Legislative Council Ordinance, Legislative Council (Powers and Privileges) Ordinance and the Rules of Procedure of the Council, and discussed whether such “behaviours” should be confined strictly to the conduct of Members in their capacity as such and which has brought the Council into disrepute.

2.42 The Committee notes that by virtue of section 15(3) of the Legislative Council Ordinance (Cap. 542), the kind of “misbehaviour” for which a Member may be censured

under Article 79(7) includes, but is not limited to, a breach of an oath given under section 40(1)(b)(iii) of the Legislative Council Ordinance (Cap. 542). Section 40(1)(b)(iii) requires a person, when nominated as a candidate for election to the Council, to give a promissory oath to the effect that, if elected, he will not do anything during his term of office that would result in his:

- (a) becoming a prescribed public officer, or an officer of the Legislative Council or a member of staff of The Legislative Council Commission;
- (b) being sentenced to death, convicted of treason or corrupt practices;
- (c) being disqualified from being elected as a Member at an election because of the operation of Cap. 542 or any other law;
- (d) becoming a representative or salaried functionary of a government of a place outside Hong Kong;
- (e) becoming a member of any legislature outside Hong Kong (other than a people's congress or people's consultative body of the People's Republic of China) or a member of the armed forces of the Central People's Government or any other country; or
- (f) in the case of a Member elected for a functional constituency, ceasing to have a substantial connection with the constituency.

2.43 In the course of deliberation, however, some members of the Committee have expressed doubt on the appropriateness for classifying breach of the promissory oath as a kind of "misbehaviour" for which a Member may be censured under Article 79(7). This view has been referred to the Legislative Council Panel on Constitutional Affairs, and the Administration has subsequently advised that the matter will be taken up in the context of the Legislative Council (Amendment) Bill 1999.

2.44 As regards the Legislative Council (Powers and Privileges) Ordinance, while the Ordinance provides for certain powers, privileges and immunities for Members in the conduct of Council business, such as the freedom of speech and debate and immunity from legal proceedings for words spoken before the Council, Members are on the other hand expected to behave at a certain standard so as not to bring discredit upon the Council.

2.45 In the Rules of Procedure, there are provisions which govern the conduct of Members during meetings and set out the requirements of certain conduct of Members the non-compliance of which may attract some form of penalties. Sanctions for certain "misbehaviour" are provided for, for example, under Rule 45 (Order in Council and Committee), Rule 81(2) (Premature Publication of Evidence) and Rule 85 (Sanctions relating to Interests). However, such "misbehaviour" may not necessarily fall within the ambit of "misbehaviour" under Article 79(7).

2.46 In view of the unprecedented nature of the subject, the Committee has also studied the practices in overseas legislatures, including UK, Australia, Canada and the USA. In these places, the conduct of Members of Parliament (MPs) is set out in one form or another to provide a framework against which acceptable conduct should be judged, e.g., a Code of Conduct/Official Conduct, resolutions of the House, statements of the Speaker, or in a Parliamentary Act. In general, the requirements for MPs' conduct are for them to act in the interests of the nation and conduct themselves creditably as MPs. MPs should not abuse their privilege or act in such manner as to bring the Parliament into disrepute.

2.47 In none of the overseas legislatures has it been possible to draw up an exhaustive list of misconduct, or indeed the types of sanction which may be imposed. Each case is judged by the House according to the degree of seriousness involved. Two general features of these cases are, firstly, that such acts are related invariably to the conduct of MPs in the performance of their duties as Member of the legislature and, secondly, the sanctions applicable range from apology to denial of right, fine, reprimand, censure, suspension of service or expulsion. The major consideration is whether the misbehaviour has brought about such serious disrepute to the House as to constitute a contempt. It is also noted that these overseas legislatures uphold the guiding principle that the House should exercise its penal jurisdiction as sparingly as possible and only when satisfied that it is essential to do so in order to provide reasonable protection for the House and its Members.

Breach of Oath

2.48 The Committee considers that the "oath" referred to in the context of Article 79(7) is the oath/affirmation taken by Members of the Council at the swearing-in ceremony. The same principle has also been applied by overseas legislatures. Nevertheless, the Committee notes that while the oath itself is explicit, how an act of a Member will constitute a breach of the oath requires consideration.

2.49 After deliberation, the Committee has come to the view that it would be more appropriate for the Council of the day to make a decision on the kind of behaviours which would be regarded as a "misbehaviour" or "breach of oath" leading to the disqualification of a Member from office under Article 79(7). It is, therefore, not necessary for the scope of behaviours to be pre-determined or for a Code of Conduct to be drawn up for the purpose of the Article.

2.50 However, having regard to the serious consequence of an allegation made under the Article, the Committee considers it essential for a mechanism to be established for investigating and assessing such an act upon a motion being moved in the Council. This mechanism should be kept separate from that for handling a complaint against a Member which may lead to a lesser form of punishment.

Mechanism for dealing with alleged cases

2.51 In drawing up the mechanism for dealing with an allegation made under Article 79(7), the Committee has agreed on the following principles:

- (a) A motion moved under Article 79(7) will not be debated or voted upon before the matter which is the subject of the motion has been investigated. If it is decided by the Council that no investigation is required, the motion will not be proceeded with; and
- (b) The investigation process should be fair to both the Member moving the motion and the Member under complaint; a committee given the responsibility to investigate the matter should only be required to establish the facts and give views on the behaviours under allegation. The decision on whether the Member should be disqualified under Article 79(7) should be made by Members of the Council in accordance with the requirement of the Basic Law.

Moving of a motion under Article 79(7)

2.52 For the moving of a motion under Article 79(7), the Committee considers it necessary for a more stringent requirement to be laid down so as to deter frivolous allegations against Members. The Committee takes the view that the motion should be sponsored by three other Members of the Council apart from the mover of the motion. This requirement is similar to the arrangement in the former Legislative Council before July 1995 when a motion moved by non-Government Members of the Council required the signature of no less than four Members. The Committee considers that the requirement for a total of four Members to initiate the motion is appropriate, as it should deter abuse of the mechanism, and at the same time would not bar minority Members of the Council from initiating action under Article 79(7).

2.53 As for other procedures, the Committee considers that the normal rules governing the giving of notice and the debate of a motion in Part G (Motions) and Part H (Rules of Speaking) of the Rules of Procedure should apply. However, to avoid ambiguity over the intention of the motion, the Committee deems it appropriate for the wording of the motion to be prescribed in the Rules of Procedure. Particulars of the reasons or circumstances to support the censure proposed in the motion should be given in a schedule attached to, and which forms part of, the motion. The motion is not subject to amendment.

2.54 The Committee is aware of the restrictions on the handling of the motion once it is moved, and has examined the possibility of referring the matter to a committee immediately upon the receipt of the notice of the motion. However, to avoid abuse of the mechanism, the Committee considers that the motion should be moved before any formal proceedings are taken on the matter.

2.55 The debate on the motion, once moved, will stand adjourned in accordance with the proposed Rules of Procedure and be referred to an investigation committee to be appointed by the President. Any Member who disagrees with the referral may move without notice that no investigation is required. If this motion of not referring the matter to an investigation committee is agreed to by the Council, the original motion will not be proceeded with. The reason for not proceeding with the original motion is to ensure that no motion for the censure of a Member under Article 79(7) is debated without an investigation into the allegation being undertaken. The provision to dispense with the investigation is to allow the Council an opportunity to dispose of frivolous allegations.

Formation of investigation committee

2.56 The Committee considers that investigation committees should be established on an ad hoc case-by-case basis, and the scope of investigation will be confined to the particulars set out in the schedule of each motion. Unlike other jurisdictions in which major parties have controlling influence in the parliament and where there are well established practices to deal with disciplinary matters, it would not be easy for Members in the Hong Kong Legislature in the present setting to agree on the membership of a standing committee responsible for investigating into the conduct of individual Members. Nevertheless, in view of the ad hoc nature of the membership of the investigation committee, the Committee considers it necessary to stipulate the manner in which the committee is formed and the way it conducts its business.

2.57 The Committee is of the view that the investigation committee should have seven members, including a chairman and a deputy chairman, appointed by the President who will take into account the recommendations of the House Committee. To avoid conflict of interest, the Members moving and sponsoring the motion and the Member alleged of misbehaviour or breach of oath should not be appointed to the investigation committee. The size of the investigation committee should, however, be subject to periodic review to allow for a fair representation of different political groups or interests in the Council. The investigation committee may have the power to determine its own procedure for conducting the investigation subject to the Rules of Procedure.

2.58 To encourage maximum participation in meetings of the investigation committee, the quorum should be five members including the chairman or the member presiding at the meeting. Provision should be made in the investigation committee's own procedure to enable the chairman to adjourn a meeting whenever there is no quorum.

Investigation process

2.59 The functions of an investigation committee are to establish the facts of the case and to give its views on whether or not the facts established constitute grounds for censure. In the absence of definitions for "misbehaviour" and "breach of oath" within the context of Article 79(7), it may also be necessary for the investigation committee to

also give its view in this respect having regard to, among other things, the circumstances of individual cases and the standard of behaviour expected of a Member by the community. However, the decision on whether or not the Member should be censured, hence disqualified from office, should rest with the Council, by a two-third majority vote of the Members of the Council present.

2.60 The Committee is aware that in other jurisdictions as well as local professional bodies, preliminary investigation is usually conducted to establish whether there is a prima facie case before undertaking a full investigation. As the process of and the publicity attracted by preliminary investigations are no different from that of a full investigation, the Committee considers that once the motion is referred to an investigation committee, full investigation should be undertaken immediately.

2.61 The Committee considers that the investigation committee should, by resolution of the Council, have the power to summon persons to testify or give evidence and to call for papers and documents. Having regard to the need to maintain fairness in the investigation process, the Committee considers it appropriate for the hearing of witnesses to be conducted in camera. Upon an election made by the Member being accused at the beginning of the investigation that hearings should be open to the public, the hearings shall be conducted in public throughout the entire investigation. However, the investigation committee may decide on sufficient reason, upon a request made by a member of the committee or an application made by a witness, to conduct any part thereof in camera. Internal deliberations shall always be held in camera. Irrespective of whether hearings are conducted in public or in camera, the transcript of evidence should be published in full as far as possible and form part of the report of the investigation committee.

Proceedings following completion of investigation

2.62 Upon completion of the investigation process, the investigation committee should table its report in the Council. As the report contains the investigation committee's views on which of the facts in the motion are established and whether the facts established constitute grounds for censure, there is no need for a separate motion to endorse the report. The report only serves as a reference for Members to decide whether the Member concerned should be disqualified from office under Article 79(7). The investigation committee will be dissolved upon the tabling of its report in the Council. However, if further matters arising from the motion have to be considered, the investigation committee could be revived.

2.63 To ensure that the debate on the motion will be resumed without delay, the Committee considers that it should be written into the Rules of Procedure that debate on the motion will be resumed automatically upon the tabling of the committee's report in the Council, irrespective of the findings of the Committee. The debate should take place at the earliest meeting of the Council at which normal business is transacted next following the tabling of the investigation committee's report.

2.64 During the resumed debate, all Members including the Member alleged may speak on the motion. The Member alleged should be allowed to speak more than once, if the Member so requests, as in the case of a motion moved under Article 79(6). As to whether the Member alleged has the right to vote, present rules already provide that any Member with a direct pecuniary interest should not vote; but if he does vote, there is a mechanism to disallow his vote. The Committee is of the view that the Member alleged has a direct pecuniary interest, but there is no need to make any special provision in this respect.

2.65 After Members have voted on the motion and if the motion is passed by two-thirds of the Members present, the President shall immediately declare the Member disqualified from office.

Rules

2.66 The Committee has prepared amendments to the Rules of Procedure to put in place certain specific rules to deal with a motion moved under Article 79(7). Other related procedures, for example, those provided in Rules 80 (Attendance of Witness) and 81 (Premature Publication of Evidence), should continue to apply. As for voting, the Committee considers that, with the exception of the motion moved under Article 79(7), all other motions moved in relation to the motion should be decided in accordance with the Rules in Part J (Voting) of the Rules of Procedure.

* * * * *

Appendix III

Mechanism for disqualification of a Member from office under Article 79(7) of the Basic Law of the Hong Kong Special Administrative Region

