

Chapter 5 Other observations and views of the Investigation Committee

5.1 While Chapter 4 sets out the views given by the Investigation Committee under Rule 73A(2) of the Rules of Procedure (“RoP”) on whether the two allegations in the Schedule to the censure motion and the facts as established in Chapter 3 constitute grounds for the censure of Hon KAM Nai-wai, this Chapter details the other observations and views of the Investigation Committee for the future reference of the Legislative Council (“LegCo”) when it considers refining the mechanism in RoP for handling complaints relating to Members’ conduct and to facilitate future investigation committees or other committees in improving their investigation procedures.

The mechanism for implementing Article 79(7) of the Basic Law

5.2 Article 79(7) of the Basic Law (“BL 79(7)”) provides that the President of LegCo of the Hong Kong Special Administrative Region shall declare that a Member is no longer qualified for the office when he or she is censured for misbehaviour or breach of oath by a vote of two-thirds of the Members present. RoP contains provisions for handling censure motions (as summarized in paragraph 1.8 of Chapter 1), through which the mechanism for the disqualification of a Member from the office under BL 79(7) is implemented. Since this Investigation Committee is the first investigation committee established under the relevant provisions, members consider it appropriate to put forward their views on the mechanism based on the experience they have gained in the investigation process.

Review on the mechanism for the disqualification of a Member from the office

5.3 The Investigation Committee notes that the requirements stipulated in RoP for the moving of a censure motion by a Member are more stringent than those for moving an ordinary Member's Motion: Rule 30(1A) provides that a notice of a censure motion is required to be signed, not only by the Member who intends to move it as in the case of an ordinary Member's motion, but also by three other Members.

5.4 The Investigation Committee notes that while Hon Miriam LAU, in collaboration with three other Members, initiated the censure motion in her own personal capacity as a Member, she was in fact asked, at the meeting of the House Committee ("HC") on 9 October 2009, to act in her capacity as HC Chairman on the HC's decision on that day to activate the only mechanism in RoP (other than Rule 73(1)(c) and (ca)) for investigating the misconduct of a Member, that is, moving a censure motion in accordance with Rule 49B(1A) of RoP. At the meeting held on 16 October 2009, HC, having studied the relevant procedures, considered it inappropriate for Ms LAU to move the censure motion in her capacity as HC Chairman and for a committee under LegCo to be given the responsibility of drafting the details of the misbehaviour of a Member to be set out in the Schedule to the censure motion. As such, HC asked Ms LAU to move the censure motion in her own personal capacity as a Member. In view of HC's decision, Ms LAU and the three Members who jointly signed the notice of the censure motion participated in the work of drafting the details of the motion.

5.5 Against the background mentioned above, the Investigation Committee is of the view that in moving the censure motion, Hon Miriam LAU was in fact acting in accordance with the wish of the majority of members of HC, and it was not simply the case that she, on account of the information she had gathered, considered it necessary to act. Nevertheless, when Ms LAU moved the censure motion at the Council meeting on 9 December 2009, she said, “In the process of drafting the motion, I, together with the three Members jointly signing the notice, have exercised prudence in making assessment, and we believe that if the misbehaviour alleged in the motion is established, it would be adequate to make some people think that the Member in question should be disqualified.” The Investigation Committee considers that LegCo should consolidate the experience drawn from this investigation and conduct a review on the mechanism for the disqualification of a Member from the office, including the number of Members required to initiate a censure motion, what evidence and information Members have to put forward when initiating the censure motion, and whether a preliminary investigation should be conducted to establish whether there is a prima facie case.

Definition of “misbehaviour”

5.6 The Investigation Committee notes that when the Committee on Rules of Procedure (“CRoP”) of the First LegCo made rules in 1999 for putting in place a mechanism for implementing of BL 79(7), it had looked into what kinds of conduct of a Member would constitute “misbehaviour” as stated in that article, such that at least two-thirds of LegCo Members would consider that he or she should be disqualified from the office. CRoP learned that overseas legislatures had not drawn up an exhaustive list

of misconduct and each case was judged according to its gravity; and the acts involved in those cases were invariably related to the discharge of duties in the legislatures by their members. The major consideration was whether the misbehaviour has caused such serious disrepute to the parliament as to constitute contempt. After making reference to the practices adopted by overseas legislatures and local professional bodies, as well as consulting the views of LegCo Members then, CRoP concluded that it would be more appropriate for LegCo of the day to determine whether the BL 79(7) mechanism should be activated by the specific conduct, instead of prescribing what constitutes “misbehaviour” beforehand.

5.7 The Investigation Committee is of the view that the disqualification of a Member from the office is the most severe sanction that may be imposed on an individual Member, which is in effect tantamount to overturning the decision made by voters in an election, and hence prudence must be exercised. The Investigation Committee notes that no standards for the ethical conduct of Members have been laid down in the current RoP. The Committee on Members’ Interests of various LegCo terms had issued, under Rule 73(1)(e) of RoP, “Advisory Guidelines on Matters of Ethics in relation to the Conduct of Members of the Legislative Council of the Hong Kong Special Administrative Region in their capacity as such” (**Appendix 5.1**) (“Guidelines”) to Members at the beginning of each term to remind Members of the need to act prudently in order not to affect their credibility and legitimacy, and even those of LegCo as a whole. Paragraph 1 of the Guidelines clearly states that a Member should ensure that his conduct must not be such as to bring discredit upon LegCo. The Investigation Committee considers however that as the Guidelines is only advisory in nature, it serves only as a reference in the

event that it is necessary to make judgement on the conduct of a Member. The Investigation Committee is of the view that it is by no means easy for it to gauge the damage caused by the conduct of individual Members to the reputation of LegCo, and there could not be a generalization of the conduct involved. It is therefore by no means easy to formulate clear and explicit criteria for defining “misbehaviour”. Besides, while BL 79(7) has not explicitly stipulated that “misbehaviour” should cover only the conduct of Members in the discharge of their duties as Members, the Investigation Committee is of the view that the mechanism in question should not be applicable to conduct purely related to a Member’s personal or private life, unless such conduct seriously affect the reputation of LegCo as a whole.

5.8 As the Investigation Committee has only investigated one case of alleged misbehaviour against a Member and, based on which, expressed its views, it considers that that could not form the basis for proposing a list of misbehaviours or a set of criteria for determining whether a specific conduct constitutes “misbehaviour” on the basis of one case only.

The mechanism for handling misconduct of varying gravity

5.9 The Investigation Committee is of the view that what the current RoP is most in need of is a comprehensive mechanism for handling complaints against Members’ misconduct of varying gravity.

5.10 According to RoP, if a Member fails to comply with Rule 81 (Premature Publication of Evidence), he may be admonished or reprimanded by LegCo on a motion to that effect. If a Member fails to comply with Rule 83 (Registration of Interests), 83A (Personal Pecuniary

Interest to be Disclosed), 83AA (Claims for Reimbursement of Operating Expenses or Applications for Advance of Operating Funds) or 84(1) or (1A) (Voting or Withdrawal in case of Direct Pecuniary Interest), he may be admonished, reprimanded or suspended by the Council on a motion to that effect. As for complaints against other misconduct of a Member, the only way to handle such cases is to activate the mechanism for the disqualification of the Member from the office under BL 79(7).

5.11 In dealing with a Member who has committed misconduct under the mechanism mentioned above, LegCo may only choose between disqualifying the Member from the office and not imposing any sanction at all, and there is no other form of sanction. LegCo is facing a dilemma: if the disqualification of a Member from the office, which is the ultimate and only sanction, is imposed regardless of the gravity of his misconduct, it may be excessively severe; on the contrary, if no sanction at all is imposed on account of the fact that the gravity of the misconduct in question does not warrant the disqualification of the Member from the office, it could give rise to public perception that LegCo is shielding the Member in question, thus undermining the credibility of LegCo.

5.12 The Investigation Committee notes that under the current mechanism stipulated in Rule 49B(1A) of RoP for disqualification of Members from the office, upon the moving of a censure motion by a Member jointly with three other Members, the only procedure under which the commencement of investigation may be blocked is that a motion of not referring the matter stated in the censure motion to an investigation committee (“non-referral motion”) is moved by any Member under Rule 49B(2A) of RoP, and that the motion is passed by LegCo. Immediately

upon the moving of a motion to censure Hon KAM Nai-wai by Hon Miriam LAU, Hon Paul TSE moved a non-referral motion and his reasons included: even if the allegations set out in the censure motion were substantiated, the misconduct of Mr KAM was not so serious as to warrant disqualification of him from the office, and thus no investigation should be commenced. However, there were Members who considered that members of the public would have no way of knowing the truth if the matter was not investigated and left unresolved, making it difficult to do justice to those persons concerned. The non-referral motion was subsequently negated, which showed that the Council did not agree that the commencement of an investigation on the alleged misconduct of Mr KAM should be blocked pursuant to the above procedure. As a matter of fact, the above procedure was made by CRoP of the First LegCo to enable LegCo to decide not to commence an investigation on frivolous or vexatious allegations; it is not a procedure for blocking an investigation into allegations of misconduct of lesser gravity.

5.13 The Investigation Committee considers that the situation mentioned above has emerged because LegCo has not formulated an appropriate mechanism for handling complaints and put in place proportionate sanctions (e.g. issuance of warnings) for misconduct which is not so serious as to warrant the disqualification of the Member in question from office.

5.14 The Investigation Committee understands that the establishment of a mechanism for handling complaints against Members' misconduct has always been a controversial issue. On 19 July 1995 and 3 April 1996 respectively, the former LegCo twice debated a resolution to

authorize the Committee on Members' Interests to monitor the conduct of Members, but both resolutions were negatived. The Investigation Committee considers that with the change of time, LegCo should consider afresh the need to review the current mechanism in order to ensure that there are appropriate mechanisms and proportionate sanctions for dealing with complaints against Members' misconduct of varying gravity, so as to safeguard the credibility of LegCo.