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Committee on Members' Interests **Paper for the ninth meeting on 23 April 2012**

Report on the study of the feasibility of appointing a commissioner to handle complaints against Members

Purpose

This paper reports on the study conducted by the Legislative Council ("LegCo") Secretariat on the feasibility of introducing an independent person/office, similar to the concept of a commissioner as in the cases of some overseas parliaments, for assisting LegCo in handling complaints against Members.

Background

2. At its meeting held on 9 January 2012, the Committee on Members' Interests ("CMI") noted the existing mechanisms provided under the Rules of Procedure ("RoP") for handling complaints against Members' conduct in their capacity as such, i.e. CMI (Rule 73), investigation committee ("IC") (Rule 49B(2A)) and select committee ("SC") (Rule 78(1)) as well as the problems with these mechanisms as follows:

- (a) CMI is only tasked to consider complaints made against Members relating to the registration of Members' interests (Rule 83), disclosure of pecuniary interests (Rule 83A) and claims for reimbursement of operating expenses ("OER") and applications for advance of operating funds (Rule 83AA);
- (b) IC is only tasked to consider complaints made against Members' misbehaviours which are serious enough as to have brought the Council into disrepute or breach of oath where disqualification from office is warranted;

- (c) although an SC may be appointed by the Council to consider complaints about Members' conduct which fall outside the remit of CMI and IC, the fact that this has never been done may suggest that it is not the appropriate mechanism to deal with such complaints for reasons such as unnecessarily exposing the identity of the Member being named, the absence of power provided under RoP for SC to recommend sanctions and the lack of a standing practice and procedure for handling such complaints; and
- (d) a common problem with these mechanisms is that investigation conducted by CMI, IC and SC could be perceived by the public as Members conducting investigation into the conduct of their fellow legislators. This might affect the credibility not only of the committees but also that of the Council.

3. Members are generally of the view that the proposal of appointing an independent person as commissioner to handle complaints against Members which fall within the remit of CMI, i.e. relating to registration and declaration of interests and claims for OER and applications for advance of operating funds, is worth pursuing, and have requested the Secretariat to study the feasibility of introducing such a concept to the present mechanism and work out a more detailed proposal for CMI's consideration.

Feasibility of appointing a commissioner to handle complaints against Members

Scope of complaints against Members

4. Since the First LegCo (1998-2000), a total of 23 complaints were received by CMI. Among them, six complaints were considered by CMI whereas no further action was required for the remaining 17 complaints due to the facts that these complaints were outside the remit of CMI and/or the complaints were frivolous or anonymous.¹

5. Under the Redress System, the Complaints Division also receives views about Members in relation to their performance and views expressed in LegCo. Some of these can be regarded as complaints against individual Members, but as these complaints are outside the remit of CMI, these

¹ An information note on the complaints cases handled by CMI since the First Legislative Council is in **Appendix I**.

complaints are usually circulated to the Duty Roster Members ("DRM") who may suggest how such complaints should be dealt with. On most occasions, the complaints are referred back to the Members concerned for them to note the views expressed and decide if any further actions should be taken to address the complainants' concerns. During the first three years of the current Term, the number of views received about individual Members is on average 24 per month.

6. In October 2009, in following up the complaints received about a Member's dismissal of his Personal Assistant, a proposal was made by DRMs to the House Committee for authorizing CMI to investigate into the case. After detailed discussion, it was decided that the proper procedure was for the matter to be dealt with under Rule 49B (1A) of RoP, i.e. by way of a censure motion moved pursuant to Article 79(7) of the Basic Law for disqualification of the Member's LegCo membership. A censure motion was moved on 9 December 2009 and an IC was appointed. On 28 March 2012, IC tabled a report in the Council. In its report, it is pointed out that what the current RoP is most in need of is a comprehensive mechanism for handling complaints against Members' misconduct of varying gravity. In dealing with a Member who has committed a misconduct (outside the remit of CMI), LegCo may only choose between disqualifying the Member from office and not imposing any sanction at all. IC noted that the establishment of a mechanism for handling complaints against Members' misconduct has always been a controversial issue. In 1995 and 1996, the former LegCo twice debated a resolution to authorize CMI to monitor the conduct of Members, but both resolutions were negated. IC considered 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.

7. In considering the feasibility of appointing a commissioner to assist CMI in handling complaints against Members, the Secretariat has studied the work of the Parliamentary Commissioner for Standards in the United Kingdom and the Conflict of Interest and Ethics Commissioner in Canada. Two papers, namely LegCo Paper No. CMI 93/10-11 and LegCo Paper No. 94/10-11, were issued for CMI's discussion at its meeting on 20 May 2011. A comparison table showing the roles and functions, eligibility and working relationship with the relevant Parliamentary committees is provided at **Appendix II**.

Suggested arrangements

Role and responsibilities of the commissioner

8. To address the public's concern about complaints against Members being handled by Members themselves, a commissioner may be appointed to receive and conduct investigation into complaints against Members relating to registration and declaration of interests and claims for OER and applications for advance of operating funds, and report to CMI on the outcome of his investigations. CMI will oversee the work of the commissioner. As the aforesaid primary responsibility of the commissioner is closely linked to the operation of Rules 83, 83A and 83AA of RoP, he/she should also be responsible for (i) advising CMI and individual Members on the interpretation of these Rules and the requirements contained in the Registration Form on Members' Interests; (ii) compiling and maintaining the Register of Members' Interests; and (iii) monitoring the operation of the registration and declaration system and claims for OER and applications for advance of operating funds and proposing improvement for CMI's consideration.

9. As it is also the function of CMI to consider matters of ethics in relation to the conduct of Members in their capacity as such, and to give advice an issue guidelines on such matters, the commissioner should also review the views about Members received by the Complaints Division, although no further action is to be taken in respect of such views received, and give advice to CMI if the current guidelines ought to be modified or enhanced.

10. It is proposed that the commissioner should follow the Procedure adopted by CMI in handling complaints. Subject to the approval of CMI, the commissioner should be allowed to engage outside specialist advisors where warranted.

Appointment of a commissioner

11. The commissioner should be an officer of LegCo, preferably appointed by the President upon the passing of a motion in the Council on the recommendation of the LegCo Commission which will take into account the views of CMI.

12. To maximize the pool of potential candidates an open recruitment exercise may be conducted to fill the post of the commissioner. The commissioner does not necessarily have to be a former judge or have legal background as in the case of the Canada's Conflict of Interest and Ethics Commissioner, but should possess the following attributes: (i) held in high regard by the general public as well as Members; (ii) politically neutral; (iii) possess excellent command of written and spoken English and Chinese; and

(iv) has demonstrated expertise in at least one of the following areas: conflict of interest, dispute resolution, financial arrangements, professional regulation and discipline or ethics.²

13. As regards the length of appointment of the commissioner, it appears that an appointment of a four-year term with one renewal is appropriate. To ensure continuity of services to the Council, the four-year term of office of the commissioner should commence in the third legislative session of the term.³

14. As the workload of the commissioner is unclear until the position commences and complaints are made, the commissioner may first be appointed on a part-time basis to work for a fixed number of hours per week and as and when required.

Financial implications

15. Depending on whether the commissioner will work for a fixed number of hours per week initially and engaged for a designated period for investigating into specific cases as and when required, the following arrangement may be considered:

- (a) a monthly fee computed at 25% of the monthly remuneration of that of a judge in the Court of First Instance, i.e. \$52,525, for working up to, say, 11 hours per week, to review the views about Members received by the Complaints Division and/or to receive enquiries from Members, Members' staff, staff of the Secretariat on matters relating to conflict of interest, registration and declaration of interests and other related matters; and
- (b) where the service of the commissioner is required for investigation into specific cases, he will be paid on an accountable basis a daily rate calculated from the monthly remuneration of a judge in the Court of First Instance which is \$210,500 as at 1 April 2012.

² While there are no special requirements for the Parliamentary Commissioner for Standards in the House of Commons of the Parliament of the United Kingdom ("UK"), the Conflict of Interest and Ethics Commissioner in the House of Commons of the Canadian Parliament must be a former judge of a superior or provincial court; or a former member of a federal, or provincial board, commission or tribunal who has demonstrated expertise in at least one of the following areas: conflict of interest, financial arrangements, professional regulation and discipline or ethics; or a former Senate Ethics Officer or former Ethics Commissioner.

³ The Parliamentary Commissioner for Standards in the UK House of Commons is appointed on a non-renewable five-year term. In the House of Commons of the Canadian Parliament, the Conflict of Interest and Ethics Commissioner is appointed for a renewable seven-year term.

16. As the number of complaint cases requiring investigation in a year should not be high, the work of the commissioner can be supported by existing Secretariat staff initially. The overall financial implication for engaging a commissioner will be in the region of \$800,000 per annum.

Advice sought

17. Members are invited to note the findings in this report and the suggested arrangements for the appointment of a commissioner to handle complaints against Members as set out in paragraphs 4 to 16 above.

Council Business Division 3
Legislative Council Secretariat
20 April 2012

**Information note on the six complaint cases considered by
the Committee on Members' Interests since the First Legislative Council**

	Date of receipt of complaint	Subject of the complaint	CMI Report to the Council
1.	23 Aug 2004	The complaint alleged that a Member failed to register his shareholding interest in a company with the Clerk to the Legislative Council ("LegCo") as required under Rule 83 of the Rules of Procedure ("RoP") and claimed reimbursements from the public coffers of rental expenses at a level above the market rate for renting a sitting room of a property owned by that company as his LegCo Member's District Office from June 1998 to July 2001.	Yes (on 9 March 2005)
2.	24 Nov 2009	The complaint alleged that a Member, being a member of Select Committee to Inquire into Matters Relating to the Post-service Work of Mr LEUNG Chin-man, failed to register and disclose his and his spouse's remunerated professional services to a company, which was one of the subjects of investigation by the Select Committee, as required under Rules 83 and 83A of RoP.	No
3.	31 Dec 2009	The complaint alleged that three Members failed to disclose their pecuniary interests before they spoke at several meetings of the Subcommittee on Matters Relating to Railways, by virtue of their being non-executive directors of the companies involved in a project under consideration by the Subcommittee, as required under Rule 83A of RoP.	Yes (on 13 July 2011)
4.	31 Dec 2009	The complaint alleged that a Member breached Rule 83AA of RoP by using public money to take out employee insurance policy from his employee so that the employee could earn a 10% commission from the insurance company concerned.	Yes (on 26 May 2010)
5.	5 Oct 2010	The complaint alleged that a Member failed to register his shareholdings and land and property interests with the Clerk to LegCo as required under Rule 83 of RoP.	Yes (on 13 April 2011)
6.	28 Apr 2011	The complaint alleged that six Members failed to register their directorships and/or shareholdings interests with the Clerk to LegCo as required under Rule 83 of RoP.	Yes (on 16 Nov 2011)

**Comparison between the Parliamentary Commissioner for Standards
in the United Kingdom and the Conflict of Interest and Ethics
Commissioner in Canada**

	Parliamentary Commissioner for Standards in UK	Conflict of Interest and Ethics Commissioner in Canada
The office		
Appointment	<p>Independent officer of the House of Commons</p> <p>Appointed by the House on the recommendation of the House of Commons Commission and through open competition</p>	<p>Independent officer of the Parliament</p> <p>Appointed by the Governor in Council, after consultation with the leader of every recognized party in the House of Commons and after approval of the appointment by resolution of the House</p>
Eligibility	<p>No special requirements</p> <p>The current and previous commissioners are either former senior civil servants or have public service backgrounds</p>	<p>Must be:</p> <ul style="list-style-type: none"> - a former judge of a superior or provincial court; or - a former member of a federal, or provincial board, commission or tribunal who has demonstrated expertise in at least one of the following areas: conflict of interest, financial arrangements, professional regulation and discipline or ethics; or - a former Senate Ethics Officer or former Ethics Commissioner

	Parliamentary Commissioner for Standards in UK	Conflict of Interest and Ethics Commissioner in Canada
The office		
Roles and functions	<ul style="list-style-type: none"> - Maintains the register of Members' financial interests and other registers of interests; - Advises Members and the Committee on Standards and Privileges on interests and standard issues; and - Investigates complaints about Members' conduct 	<ul style="list-style-type: none"> - Provides advice to public office holders and Members on compliance with the Conflict of Interest Act and the Conflict of Interest Code for Members of the House of Commons ("the Code") respectively; - Reviews their confidential reports on matters such as assets, liabilities and activities; - Investigates possible contraventions; and - Reports to the Parliament
Length of appointment	Five-year non-renewable term	Seven-year renewable term
Removal from office	By a substantive resolution of the House	By the Governor in Council following a resolution of the House
Oversight of the office	Committee on Standards and Privileges	House of Commons
Oversight of the Code of Conduct / Conflict of Interest	Committee on Standards and Privileges	Standing Committee on Procedure and House Affairs
Mode of operation	Part-time (four days a week)	Full-time
Number of staff of the office	Full-time equivalent staff of 7.5	46 full-time staff
Annual budget	£606,700 for 2010-2011 (about HK\$7,645,000)	Remains at about CAN\$7.1 million since 2008 (about HK\$53,600,000)

	Parliamentary Commissioner for Standards in UK	Conflict of Interest and Ethics Commissioner in Canada
Investigation		
Initiation of investigation	Act on complaint received, and may initiate investigation upon having sufficient evidence	Can start an inquiry when a Member files a complaint against another Member for alleged non-compliance of the Code. Under the Code, has the discretion to initiate an inquiry against a Member provided there are reasonable grounds to believe that a contravention took place.
Handling of anonymous complaints	No	No
Investigation process	Consists of three stages: initial consideration, preliminary inquiry and full investigation	Consists of four stages: initial consideration, preliminary inquiry, full investigation and reporting to the House
Power to compel evidence	No	No
Rectification mechanism	Has discretion to rectify the matter without having to report fully to the Committee on Standards and Privileges, if the Member under complaint already admits to failing to register or declare an interest or where the interest involved is minor or the failure to register or declare was inadvertent	No
Recommendation of sanctions	No	Yes

	Parliamentary Commissioner for Standards in UK	Conflict of Interest and Ethics Commissioner in Canada
Investigation		
Reporting	<p>At the conclusion of an investigation, a memorandum will be submitted to the Committee on Standards and Privileges which would then decide whether or not to recommend a sanction against the Member under complaint.</p> <p>Moreover, even if a decision has been made not to uphold the complaint, a memorandum may be submitted to the Committee on Standards and Privileges because of the public interest in the complaint or because it raised wider issues.</p> <p>The Committee's report together with the memorandum will be submitted to the House for a decision.</p>	<p>At the conclusion of an inquiry, a report recommending a sanction, if any, will be provided to the Speaker for tabling in the House and made public. After tabling the report in the House, the Member under complaint has a right to make a statement regarding the report to the House. A motion to concur the report may be moved and debated. If no motion is moved and disposed of prior to the 30th sitting day after the day on which the report is presented, the motion to concur will be deemed moved and the Speaker will put the question to dispose of the motion to the House. The House can refer the report back to the Commissioner for further consideration, with or without instruction.</p>

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