

CONFIDENTIAL

**Minority Report on the Investigation into the matter stated in
the motion moved under Rule 49B(1A) of the Rules of Procedure
to censure Hon Holden CHOW Ho-ding**

July 2020

I. Introduction

1. This matter consists of an incident involving two public officials who leveraged their positions of authority for personal gain and political opportunism. Then-Chief Executive, Mr. Leung Chun-ying (“Mr. Leung”) and a Legislative Council (“LegCo”) Member, Mr. Chow Ho-ding (“Mr. Chow”), privately planned to manipulate the scope of a legislative oversight investigation into Mr. Leung. The oversight investigation concerned Mr. Leung’s involvement with the Australian firm UGL Limited and possible unlawful actions taken by Mr. Leung. In carrying out their plan, the two officials benefitted from access and influence that would never be afforded to ordinary citizens under similar circumstances. Thanks to the vigilance of public servants within the Legislative Council’s (“LegCo”) secretariat’s office, these two public officials were caught and their plan was revealed to the public.
2. On 7 June 2017, the Hon Claudia MO Man-ching’s moved under Rule 49B(1A) of the Rules of Procedure to censure Mr. Chow for his involvement in the foregoing incident (“Censure Motion”). The Censure Motion alleges that Mr. Chow engaged in misbehavior and breached his LegCo Oath under Article 104 of the Basic Law for engaging in conduct related to the Select Committee to Inquire into Matters about the Agreement between Mr. Leung and the Australian firm UGL Limited (“Select Committee”).¹
3. The Censure Motion alleges that Mr. Chow: (a) Improperly interfered with and obstructed the Select Committee’s inquiry; (b) Is in contempt of LegCo; (c) Made false representations in LegCo; and (d) Misbehaved and is in breach of his LegCo oath. The Censure Motion’s factual allegations include:
 - a. Mr. Chow secretly discussed the Select Committee’s major areas of study with the subject of inquiry, Mr. Leung;
 - b. Mr. Chow accepted Mr. Leung’s request to amend the Select Committee’s major areas of study and directly submitted Mr. Leung’s proposed amendments to the Select Committee for discussion at its meeting on 25 April 2017;

¹ In October 2014, it was reported that Mr. Leung, the former Chief Executive, signed an agreement in 2011 with UGL Limited (“UGL”), in relation to its takeover of DTZ Holdings, PLC, a real estate services company listed in the United Kingdom in which Mr. Leung had a direct stake (the “Agreement”). In the Agreement, UGL undertook to pay Mr. Leung £4 million in two instalments at end-2012 and end-2013 respectively, subject to specific conditions. These payments concurred with the term of office of Mr. Leung as the CE between 2012 and 2017 and prompted public concern over conflict of interest, taxation implications, and declaration of interests. In response, on February 3, 2017, the House Committee of the Legislative Council nominated and elected members for appointment to the Select Committee to Inquire into the Matters about the Agreement between Mr. Leung and UGL (the “Select Committee”). Eleven Members were elected, including Mr. Chow who was elected as Deputy Chairman of the Select Committee.

- c. In submitting Mr. Leung’s proposed amendments to the Select Committee, Mr. Chow intended to mislead the Select Committee into believing that the proposed amendments were genuinely raised by Mr. Chow himself; and
 - d. In submitting Mr. Leung’s proposed amendments to the Select Committee, Mr. Chow was attempting to create results advantageous to Mr. Leung.
4. Effectively, the Censure Motion places two questions before this Investigation Committee: (1) whether Mr. Chow’s conduct constitutes misbehavior; and/or (2) whether Mr. Chow’s conduct is in breach of his LegCo Oath.² If Mr. Chow’s conduct fulfills either paradigm, misbehavior or breach of oath, then LegCo must consider whether to censure and expel Mr. Chow from LegCo pursuant to Basic Law Article 79(7) and LegCo Rule of Procedure 49B(1A).
5. Under both paradigms, misbehavior and breach of oath, the analysis is centered upon a theory that Mr. Chow misled the house. In this case, the “house” is the Select Committee, and thus, LegCo. Under common law, misleading the House is a form of misbehavior and contempt, and various overseas legislatures have censured members for the offense.³ If it is established that Mr. Chow misled the Select Committee, then Mr. Chow’s conduct amounts to misbehavior, *per se*, and is strong evidence of breach of oath. This report separately discusses Mr. Chow’s culpability for misleading the house, misbehavior, and breach of oath. First, it is helpful to review some procedural matters.

II. Procedure

6. This Investigation Committee, established under Rule 49B(2A) of the Rules of Procedure in respect of the Censure Motion (“Investigation Committee”), must give its views on whether the facts, as established by this Investigation Committee, constitute grounds for censure.
7. Pursuant to LegCo Rule of Procedure 73A (Investigation Committee) (10)(a), this report is provided to the Investigation Committee for consideration.⁴

² The common law provides that “misleading the house” is a form of “misbehavior.” The LegCo Oath requires Members to serve the HKSAR: “conscientiously, dutifully, in full accordance with the law, honestly and with integrity.”

³ See: The Stephen Byers Case in the UK, the Craig Thomson case in Australia,

⁴ LegCo Rule of Procedure 73A (Investigation Committee) (10)(a) provides that a member of an investigation committee may bring a report for the committee's consideration.

8. Prior LegCo investigation committees have provided some general principles and guidelines that this Investigation Committee should utilize in evaluating whether Mr. Chow is guilty of either (1) misbehavior; or (2) breach of oath.
9. First, neither the term “misbehaviour” nor the term “breach of oath” is defined in the Basic Law or LegCo Rules of Procedure. No judicial authorities have been identified on the meaning of “misbehaviour” or “breach of oath” in a context similar to that of the Censure Motion. Nor is there any record of discussion by the Basic Law Drafting Committee and the Basic Law Consultative Committee about the meaning or scope of “misbehaviour” or “breach of oath” referred to in Basic Law 79(7).
10. Second, LegCo Rules of Procedure provide that the Council of the day should determine the rules of its proceedings and punishment of Members for misbehavior or breach of oath. In considering censure motions, prior investigation committees considered general principles of law and procedures adopted by other committees of LegCo in conducting investigations. General principles of law include the common law.
11. Third, in choosing a standard of proof, prior investigation committees noted the criminal standard of “proof beyond a reasonable doubt,” and the civil standard “proof on a balance of the probabilities,” and concluded that the more serious the allegation, the more compelling the evidence is required to establish the allegation. With regard to evidentiary standards, prior investigation committees noted that the law of evidence are not applicable to investigation committees, but that the committees will take into consideration the relevance, directness,⁵ and reliability of the evidence.

III. Established Facts and Chronology

12. The following is a brief chronology of the events of this matter:

2 November 2016	The Select Committee is established to inquire into the UGL incident involving Mr. Leung’s possible unlawful behavior.
24 April 2017	Mr. Chow, Deputy Chairman of the Select Committee, submitted to the Chairman of the Select Committee a document with proposed amendments to the major areas of

⁵ Direct evidence directly proves a fact. For example, eyewitness testimony is often direct evidence. An eyewitness testifying that he or she saw an individual commit an act *directly* proves that the individual committed the act. Common examples of direct evidence are eyewitness testimony, an individual’s confession, or a video or recording of the individual committing the act. Factual allegations relying on direct evidence are easier to prove because there is less potential for reasonable doubt.

	<p>study of the Select Committee (“Proposed Amendments”). Thereafter the Chairman submitted the Proposed Amendments document to the Secretariat.</p> <p>The edits on the electronic copy of the Proposed Amendment document submitted by Mr. Chow to the Chairman of the Select Committee includes edits made by a user with the username “CEO-CE.”</p>
25 April 2017	<p>The Secretariat tabled Mr. Chow’s Proposed Amendments (i.e. color printed copies showing the proposed amendments in marked-up mode) at the meeting for Members’ reference.</p> <p>Select Committee meeting Committee Members discussed Mr. Chow’s Proposed Amendments.</p> <p>During the meeting, Mr. Chow never disclosed that the subject of the investigation, Mr. Leung, was the author of the Proposed Amendments, nor did Mr. Chow correct Members who repeatedly referred to the Proposed Amendments as belonging to Mr. Chow.</p> <p>At the meeting, Mr. Chow repetitively claimed the amendments were his own opinion and failed to correct other Members’ statements indicating the same.</p> <p>During the meeting, Mr. Chow requested, and the Chairman ordered, that the meeting be suspended for 10 minutes. The meeting was, in fact, suspended from 5:55pm to 6:09pm, and again from 6:13pm to 6:22pm.</p>
26 April 2017	<p>In line with established procedure, the Secretariat issued printed copies and electronic copies of Mr. Chow’s Proposed Amendments to Members for retention.</p> <p>A staff member of the Secretariat discovers that the edits, or proposed amendments, on the electronic copy of Mr. Chow’s Proposed Amendments were made by a user with the username “CEO-CE.”⁶ The staff member notified the Clerk of the issue.</p> <p>The Clerk reports the incident to the Assistant Secretary</p>

⁶ The “Track Changes” feature allows users to amend a document and identifies “user information” in the computer used to make changes.

	<p>General, who reported the incident to the Chairman.</p> <p>The Secretariat confirmed Mr. Chow’s electronic Proposed Amendment is the same document as the electronic document including the CEO-CE changes.</p>
15 May 2017	<p>Media reports revealed to the public that the edits made to the electronic version of Mr. Chow’s Proposed Amendments were made by the user “CEO-CE”). On the same day, Mr. Leung responded to media questions about the incident</p>
16 May 2017	<p>Mr. Leung again met with the media and admitted that he had provided his views and comments to Mr. Chow on amendments to the Select Committee’s “Proposed major areas of study.”</p> <p>Mr. Chow separately met with the media and also admitted that he had discussed the “Proposed major areas of study” of the Select Committee with Mr. Leung.</p>
17 May 2017	<p>Mr. Leung again met with the media and reiterated his explanation for making his changes to the “Proposed major areas of study” of the Select Committee.</p>
18 May 2017	<p>Mr. Leung appoints Mr. Chow as a board member of the Equal Opportunity Commission (“EOC”)</p>
19 May 2017	<p>Mr. Chow wrote to the Chairman of the Select Committee to withdraw from the Select Committee with immediate effect.</p>

13. In evaluating the Censure Motion, this Investigation Committee’s first task is to establish the facts. The majority of the evidence on record is direct, reliable, and supports the findings and conclusions in this report. Indeed, the facts are established mainly through Mr. Chow’s own recorded oral and written statements.
14. This evidence on record demonstrates that: (a) Mr. Chow privately communicated with Mr. Leung concerning the Select Committee’s “Proposed major areas of study”; (b) at the 25 April 2017 Select Committee meeting, Mr. Chow made representations to committee members that Mr. Chow was the author and owner of the Proposed Amendments; (c) Mr. Chow failed to disclose Mr. Leung’s involvement with, and authorship of, the Proposed Amendments until forced to do so by the public disclosure of Mr. Leung’s involvement; and (d) the Proposed Amendments, if accepted, would obstruct and pervert the course of the inquiry proceedings of the Select Committee and create results advantageous to Mr. Leung.

IV. Misleading the House

15. As previously noted, the Censure Motion places two questions before this Investigation Committee: (1) whether Mr. Chow's conduct constitutes misbehavior; and/or (2) whether Mr. Chow's conduct is in breach of his LegCo Oath.⁷ Under both paradigms, misbehavior and breach of oath, the analysis is centered upon a theory that Mr. Chow misled the house. Under common law, misleading the house is a form of misbehavior and contempt, and various overseas legislatures have censured members for the offense.⁸ Under the Basic Law, Hong Kong is obliged to follow common law precedent.⁹ Thus, if it is established that Mr. Chow misled the Select Committee, then Mr. Chow's conduct amounts to misbehavior, *per se*, and is strong evidence of breach of oath.

16. The preeminent test for misleading the house is the *McGee* test.¹⁰ The *McGee* test is recognized by numerous overseas parliaments and has three prongs:

- a. the statement must, in fact, have been misleading;
- b. it must be established that the member making the statement knew at the time the statement was made that it was incorrect; and
- c. in making it, the member must have intended to mislead the House.

17. In elaborating on the test to determine whether a statement was deliberately misleading, *McGee* provides:

... there must be something in the nature of the incorrect statement that indicates an intention to mislead. ... ***But where the member can be assumed to have personal knowledge of the stated facts and made the statement in a situation of some formality (for example, by way of personal explanation), a presumption of an intention to mislead the House will more readily arise.***¹¹ (emphasis added).

18. The final aspect of the test is in relation to the appropriate standard of proof, identified by *McGee* as:

... the civil standard of proof on a balance of probabilities but, given the serious nature of the allegations, proof of a very high order. Recklessness in the use of words in debate, though reprehensible in itself, falls short of the

⁷ The common law provides that "misleading the house" is a form of "misbehavior." The LegCo Oath requires Members to serve the HKSAR: "conscientiously, dutifully, in full accordance with the law, honestly and with integrity."

⁸ See: The Stephen Byers Case in the UK, the Craig Thomson case in Australia,

⁹ Director of Immigration v. Chong Fung Yuen (2001) 4 HKCFAR 211.

¹⁰ McGee, D., *Parliamentary Practice in New Zealand*, 3rd Ed, 2005, pp. 653-654.

¹¹ McGee, D., *Parliamentary Practice in New Zealand*, 3rd Ed, 2005, p. 654.

standard required to hold a member responsible for deliberately misleading the House.¹²

19. In Applying the *McGee* test to the matter before this Investigation Committee, it is evident that Mr. Chow's conduct fulfills all three prongs of the test. Mr. Chow's statements and omissions to the Select Committee were false and misleading, Mr. Chow knew his statements and omissions were false at misleading, and Mr. Chow intended to mislead the Select Committee. More, the direct evidence on record proving that Mr. Chow misled LegCo more than fulfills *McGee's* prescribed standard of proof.
20. Indeed, there is direct evidence that Mr. Chow misled the Select Committee and is in the form of: (a) Mr. Chow's recorded statements and admissions made during the 25 April 2017 Select Committee meeting and subsequent press conferences; (b) Mr. Leung's recorded statements and admission made during press conferences; (c) the original electronic version of the Proposed Amendments that Mr. Chow submitted to the Select Committee and that contained the "CEO-CE" edits; and (d) eyewitness statements from various Select Committee members recounting Mr. Chow's multiple express and implied statements (and material omissions of fact) that the Proposed Amendments were his own work-product.

A. Mr. Chow's statements were, in fact, misleading

21. The statements in question include: (1) Mr. Chow's representations made at the 25 April 2017 meeting where Mr. Chow expressed authorship and ownership of the Proposed Amendments; and (2) Mr. Chow's omissions and failure to clarify or correct his colleagues in their understanding that Mr. Chow was the sole author of the Proposed Amendments (collectively, the "Statements").
22. At the 25 April 2017 meeting, Mr. Chow's Statements include:

"I can see that everyone wants to know more about this situation. After going back and thinking over and over again, I felt that, since this is the case, it is better for us to entertain everyone's ideas to include these in the scope of research." (Verbatim record, page 5)

"Thank you Chairman and thank you for giving me time to say more. Because, just now I mentioned the original intention of reporting property in item II (c). Maybe I would say more about why I amended it this way." (Verbatim record, page 18)

¹² McGee, D., *Parliamentary Practice in New Zealand*, 3rd Ed, 2005, p. 654.

“If everyone cannot accept the word "original intent" today, maybe I would go back by myself and spend some time on the content of item II (c), fine-tune the content and I will come back next time.”(Verbatim Records, pages 39 to 40)

“I am just explaining why I used the word "original intent" ... So; I explained why I was so insistent on the words ...” (Verbatim page 41)

“I personally think that I have written this document.” (Verbatim record P.41)

“Chairman, as the drafter of this amendment myself, when doing this work, and forgive me; I have some insistence on certain things.”(Verbatim page 49)

23. In addition, Mr. Chow made material omissions during the Select Committee meeting. Not once did Mr. Chow disclose to the Select Committee that he discussed the Proposed Amendments with Mr. Leung or that Mr. Leung had authored the same. Nor did Mr. Chow correct other members’ understanding that Mr. Chow was the only owner and author of the Proposed Amendments.

24. In comparison, during his May 16, 2017 press conference, Mr. Chow stated:

“Mr. Leung Chun-ying contacted me, and then he and I talked about the content of this public document, and he also had some opinions on the content of this public document ... He integrated his opinions and gave them to me. I ... I thought about it, I saw it and thought it would be appropriate, and then referred it to the committee for discussion.” (Investigation Committee Document SI (6) of the, lines 24 to 28)

“I admit that ... I may be, some of my friends have told me that I should have told everyone earlier, that these documents contain some opinions of Mr. Leung Chun-ying.” (Investigation Committee Document SI (6) of the Commission of Inquiry, lines 86 to 88)

“And I should have informed everyone earlier ... I admit that ... I am the one who has discussed the content with Mr. Leung. And I will mention it again, this document ... also contains some of his opinions.” (Investigation Committee Document SI (6), lines 133 to 136)

25. In determining whether Mr. Chow’s Statements were factually incorrect, and therefore misleading, it is sufficient to compare the Statements, on one hand, and Mr. Chow’s subsequent admissions made to the press on 16 May 2017. Given the probity of this evidence, there is no need to go beyond these sources of recorded, direct evidence. Because the two representations outright contradict one another, with the

subsequent admissions superseding the former Statements, one must conclude that Mr. Chow's Statements on 25 April 2017 were false.

26. More, a material intervening event occurred between the two inconsistencies: The Secretariat Office's discovery of the "CEO-CE" track changes in the Proposed Amendments. Clearly, Mr. Chow's superseding admission is a consequence of the press "outing" him to the public. These circumstances raise the question: but for the press' disclosure, would Mr. Chow have divulged Mr. Leung's involvement? There is nothing on record demonstrating Mr. Chow would have made the disclosure of his own volition. Mr. Chow's silence is indicative of the falsity of his statements and an intention to mislead. It is of paramount importance that Members give accurate and truthful information to LegCo and its Committees. Any inadvertent error or omission, let alone a material misrepresentation, should be corrected at the earliest opportunity. Without the work of public servants in the Secretariat's office and the press' disclosure, it is clear that the Select Committee and public would never have learned of Mr. Leung's involvement in the Proposed Amendments.
27. Additionally, it should be noted that Mr. Chow's Statements were not trivial in nature but concerned and concealed the following material facts: (a) that Mr. Chow and Mr. Leung had privately communicated about the Select Committee's investigation into Mr. Leung; and (b) that Mr. Leung authored the Proposed Amendments. These facts are material because the truthfulness of the origin and authorship of the Proposed Amendments would have influenced other committee members' consideration and acceptance of the Proposed Amendments. Indeed, several Select Committee members advised that, had they known the true authorship of the Proposed Amendments, they would have immediately dismissed the proposals on conflict of interest and self-dealing grounds.
28. Based upon all available evidence, there is no doubt that Mr. Chow's Statements were false and misleading.

B. It is established that Mr. Chow knew at the time the statements were made that the statements were incorrect

29. The second prong of *McGee* requires the establishment that the member making the statement knew at the time the statement was made that it was incorrect.
30. Based upon a comparison between his Statements at the 25 April 2017 Select Committee meeting and subsequent admissions, Mr. Chow had actual knowledge that his Statements were incorrect at the time of the 25 April 2017 Select Committee Meeting. During the meeting, Mr. Chow knew that he had communicated with Mr. Leung about the Select Committee's investigation and "Proposed major areas of

study,” and that Mr. Leung had authored the changes to the Proposed Amendments. In comparison, Mr. Chow’s 25 April 2017 Statements indicated just the opposite, that Mr. Chow owned and authored the Proposed Amendments.

31. A comparison between what Mr. Chow knew to be true at the time he made the Statements and the substance of his Statements is proof that he made the 25 April 2017 Statements with knowledge of their falsity. More, the materiality of the Statements obviates any “mistake of fact” defense that Mr. Chow’s actions were inadvertent. Mr. Chow cannot negate the fact that he knew his Statements were false by claiming political ignorance.
32. At the time of the 25 April 2017 Select Committee meeting, Mr. Chow knew that his Statements were false. Hence, prong two of *McGee* is fulfilled.

C. It is established that Mr. Chow intended to mislead LegCo

33. Mr. Chow’s state of mind, i.e. whether he intended to mislead, is a factual question. Since intent must be inferred from conduct of some sort, it is permissible to draw reasonable inferences as to intent from overt acts. The law assumes every man to intend the natural consequences which one standing in his circumstances and possessing his knowledge would reasonably expect to result from his acts. In determining Mr. Chow’s intent, LegCo may consider Mr. Chow’s statements and acts done or omitted.
34. Hong Kong Courts have held that in establishing the element of “intent to mislead,” if a person knows that the representation is false, that person already has the intent to deceive.¹³
35. In its application of the *McGee* test, a 2016 Standing Committee of the House of Representatives of Australia concluded that a member had intentionally misled the House. In finding that the member acted intentionally, the committee considered that: (a) he expressly sought to address the House; (b) he had personal knowledge of the matters he raised; (c) he made the statement in a situation of formality; and (d) he had a significant period of time whether to make a statement and to consider his words.¹⁴ The Committee found no evidence to rebut such a presumption and the Member was found guilty of contempt.
36. Under *McGee*, where a member can be assumed to have personal knowledge of the stated facts and made the statement in a situation of some formality, a presumption of

¹³ HKSAR v Wu Ka Fai, Court of First Instance), CFI, Magistracy Appeal No 374 of 2008, 15 October 2008 at para. 35.

¹⁴ See House of Representatives of Parliament of Australia (2016), Craig Thompson matter.

an intention to mislead the House will more readily arise.¹⁵ These are precisely the circumstances in which Mr. Chow made the misleading Statements to the Select Committee. At the time of his Statements:

- a. Mr. Chow had personal knowledge that his Statements were contrary to the truth of the matter asserted;
- b. Mr. Chow was in a situation of formality, i.e. the Select Committee meeting of which Mr. Chow was Deputy Chairman, a position of authority; and
- c. Mr. Chow had a significant period of time to consider whether to make a statement and to consider his words. Indeed, the timeframe which Mr. Chow had to consider his statements ranged from the time the clerk circulated the initial “Proposed major areas of study” on 3 March 2017 until 15 May 2018 when the press publicly outed Mr. Chow and Mr. Leung.

Accordingly, it is appropriate to draw a presumption that Mr. Chow intended to mislead the Select Committee.

37. Mr. Chow has not offered this committee any evidence to rebut the presumption that he acted intentionally.

38. In addition to the presumption of intent drawn under *McGee*, Mr. Chow’s intent to mislead is demonstrated through his engagement in a pattern of deceit, beginning with his initial private communications with Mr. Leung over the Select Committee’s “Proposed major areas of study.” Then, on April 24, 2017, Mr. Chow provided the Select Committee with the Proposed Amendments document, as authored by Mr. Leung, without any clarifying comments or qualifications regarding the authorship of the amendments. The next day, Mr. Chow participated in the Select Committee meeting discussing the Proposed Amendments and made voluminous and continuous representations that he owned and authored the Proposed Amendments. At no time during the meeting did Mr. Chow disclose or allude to the fact that there was another individual behind the Proposed Amendments or that Mr. Leung had any involvement with the Proposed Amendments. After the 25 April 2017 meeting, Mr. Chow could have corrected the record and clarified his Statements, but he did not do so. Mr. Chow took no action to correct his Statements until after the press publicly exposed him. This pattern demonstrates that Mr. Chow’s Statements were strategic, intentional and deliberate.

39. The facts simply do not support a finding that Mr. Chow acted in any other manner but intentionally. His Statements were not a single and isolated mis-statement but

¹⁵ Citing (1986) 476 NZPD 5961 Wall.

were a compounded series of acts and falsities that started with his private communications with Mr. Leung and ended with the press' exposure of the collusion. More, the Statements were made in a context of formality – the formal Select Committee meeting of which Mr. Chow was the Deputy Chairman – and were made with knowledge of the Statements' falsity. Mr. Chow had a period of months to consider his statements and behavior and to disclose his communications with Mr. Leung, but he purposefully chose not to do so. A reasonable person in Mr. Chow's position, let alone a seasoned politician like Mr. Chow, would have known that Mr. Leung's involvement was a material fact that, at a minimum, should have been disclosed to Select Committee members. At best, Mr. Chow would have refused to entertain any private communications with Mr. Leung about the ongoing Select Committee on a basis of conflict of interest, transparency and the institutional integrity and independence of LegCo. In short, Mr. Chow made inconsistent remarks to the Select Committee and the media. It was a conscious decision of Mr. Chow's not to disclose information which was crucial to understanding the circumstances of the origin of the Proposed Amendments and the goals behind the Proposed Amendments.

40. Drawing from all circumstances in the evidence on record, it is clear that Mr. Chow intended to mislead the Select Committee regarding Mr. Leung's involvement and authorship of the Proposed Amendments. Accordingly, all three prongs of the *McGee* test are satisfied. Mr. Chow is guilty of misleading LegCo.

V. Misbehavior

41. Drawing from the finding that Mr. Chow is guilty of misleading LegCo, it follows that Mr. Chow is *per se* guilty of misbehavior. Under common law, misleading the house is a form of misbehavior and contempt, and various overseas legislatures have censured members for the offense.¹⁶ There is no justification for LegCo to deviate from this established precedent, particularly in light of the fact that neither the Basic Law nor prior LegCo committees have established a clear-cut standard or definition for "misbehavior." Although the analysis concerning whether Mr. Chow is guilty of misbehavior could stop here, it is worth evaluating the law and precedent relevant to Mr. Chow's conduct.
42. In 1999, the Committee on Rules of Procedure ("CRoP") of the First LegCo considered types of "misbehavior" that would be serious enough to warrant disqualifying a Member from office under BL79(7). The CRoP noted that in overseas legislatures, the major consideration was whether the act had brought about such serious disrepute to the House as to constitute contempt. The CRoP concluded that it

¹⁶ See: The Stephen Byers Case in the UK, the Craig Thomson case in Australia,

would be appropriate for the Council of the day to decide what misconduct would warrant taking-action under BL79(7).¹⁷

43. In general, the common law provides that “misbehavior” should be determined by reference to whether the conduct might affect: (i) directly the person’s ability to carry out the office; and (ii) the perceptions of others in relation to the office, so that any purported performance of the duties of the office will be perceived widely as corrupt, improper, or inimical to the interests of the persons or the organization for whose benefit the functions of the office are performed; and (iii) whether the office itself will be brought into disrepute as a result of the conduct.¹⁸
44. In British parliamentary procedure, contempt of parliament is defined as “any act or omission which obstructs or impedes House of Parliament in the performance of its functions, or which has a tendency, directly or indirectly, to produce such results.”¹⁹
45. Common law provides some illustrations of appropriate circumstances where a Member should be found guilty of contempt for misbehavior, including incidents relating to misleading the house, noncooperation with committees of the legislature, and acts of a kind likely to bring the legislature into disrepute.²⁰ For instance, the Western Australia Legislative Assembly censured a member for leaking a privileged draft of a parliamentary committee report to a third party for comments and then misleading the committee into believing that the proposed comments on the draft report were made by him.²¹ The legislative committee investigating the incident considered that the “proposed amendments would have been scrutinized more closely if the other members were aware of their source.” That committee concluded that the Member’s action led to an opportunity by an interested party to “use the draft in a manner prejudicial” to the committee or other stakeholders.” Accordingly, that committee censured the member.
46. In the United Kingdom, the House of Commons may treat the making of a deliberately misleading statement as a contempt. In 1963, the House of Commons resolved that in making a personal statement which contained words which he later admitted not to be true, a former Member had been guilty of grave contempt.²² It follows that “any act or omission which obstructs or impedes either House of Parliament in the performance of its functions or which obstructs or impedes any

¹⁷ See LC Paper No. CB(1) 1001/98-99 and LC Paper No. CB(3) 46/09-10.

¹⁸ *Clark v. Vanstone* [2004] FCA 1105 at [78] and [85], and *Lawrence v. Attorney General* [2007] 1 WLR 1474, [2007] UKPC 18 at [25], [26], and [49]

¹⁹ See *Erskine May in Parliamentary Practice*.

²⁰ For example, See Standing Order 410 of the House of Representatives of New Zealand and Report of the Joint Committee on Parliamentary Privilege of the UK Parliament (released 1999).

²¹ See the John Bowler case in Western Australia.

²² *Erskine May Parliamentary Practice*, 24th edition, at p. 254.

Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results, may be treated as a contempt even though there is no precedent of the offense.”²³ In the matter before this Investigation Committee, members of the Select Committee were, in fact, impeded from performing their function vis a vis carrying out the Select Committee’s investigation into Mr. Leung and LegCo’s oversight role over the executive.

47. In addition, the Code of Conduct of the UK House of Commons proscribes certain behavior to avoid the perception that outside individuals or organizations may reward members through payment or in other ways. In the subject matter, the perception that some sort of quid pro quo was established between Mr. Chow and Mr. Leung is entirely reasonable. Mr. Leung twice appointed Mr. Chow, who is a consummate opponent of equal rights for same-sex couples and who has a record of pursuing an anti-LGBT agenda, as a board member of the Equal Opportunities Commission (“EOC”). The second, or re-appointment, occurred just four days after the revelation of Mr. LEUNG’s authorship of the Proposed Amendments.
48. Another UK matter is helpful for understanding the contours of the law in this area. In the UK’s *Steven Byers*’ case, the Committee on Standards and Privileges considered whether Member Byers had misled the House when Byers gave evidence to a Select Committee, which Byers later admitted was “not a truthful statement,” and for which he apologized to the House and advised that he “did not intend deliberately to mislead,” and that he had done so “due to an inadvertent error.” The Committee on Standards and Privileges did not sustain the charge of contempt against Byers considering that Byers “*appears to have had no obvious motive for deliberately misleading the ... Subcommittee,*” and did not find that “the case has been made that Mr. Byers had a *political agenda* which he was anxious to conceal from the ... Subcommittee.” The Committee explained that in order for a charge of contempt to be sustained, it must be demonstrated that the statement or evidence was incorrect, and there was a deliberate intention to mislead.
49. The subject matter before this Investigation Committee is markedly different from the *Steven Byers*’ case. First, unlike Mr. Breyer’s inadvertent error, it has been established that Mr. Chow *intentionally* misled LegCo. Acting mistakenly versus intentionally is a material factual difference between the two matters. Further, there is evidence that Mr. Chow had a motive to intentionally mislead the Select Committee, i.e. to give Mr. Leung’s Proposed Amendments the best shot at clearing the Select Committee so that the scope of investigation tilted in favor of Mr. Leung. It is reasonable to conclude that Mr. Chow did so on the basis of political opportunism – he sought to carry out his anti-LGBT agenda vis a vis a promised, subsequent appointment to the EOC. The

²³ See *Erskine May Parliamentary Practice*, 24th edition, at p. 251. The House of Representative of New Zealand incorporates this definition in its Standing Orders.

private communications exchanged between Mr. Leung and Mr. Chow over the Proposed Amendments were a quid pro quo. Thus, unlike the *Steven Byers*' case, Mr. Chow had a clear motive to mislead.

50. The above precedent is precisely on point and analogous to Mr. Chow's behavior. The acts in question, including but not limited to privately communicating with Mr. Leung and intentionally misleading LegCo, have the cumulative effect of: (1) directly impacting Mr. Chow's ability to carry out his duties as a LegCo member; (2) diminishing the standing of LegCo; (3) reducing the public's confidence in the capacity of LegCo to undertake its oversight work in a fair and impartial manner; and (4) undermining the public's trust in LegCo to represent the interests of the public.
51. In light of the established facts and applicable common law, it is recommended that LegCo Members find Mr. Chow guilty of misbehavior, and therefore in contempt of LegCo.

VI. Breach of Oath

52. In addition to evaluating Mr. Chow's culpability for misbehavior, this Investigation Committee must separately determine whether Mr. Chow is guilty of breaching his LegCo Oath.
53. The LegCo Oath under BL 104 and prescribed in Section 16(d) of and Part IV of Schedule 2 to the Oaths and Declarations Ordinance (Cap. 11) ("LegCo Oath") requires Members to serve the HKSAR: "...conscientiously, dutifully, in full accordance with the law, honestly and with integrity."
54. The phrase "breach of oath" is not defined in Basic Law, the Oaths and Declarations Ordinance or in the LegCo Rules of Procedure. Likewise, the Standing Committee of the National People's Congress ("SCNPC") has not defined "breach of oath" and no judicial decisions have been identified on the types of conduct which amount to breach of oath in a context similar to that of the Censure Motion.²⁴ What behavior should be regarded as falling within the meaning of "breach of oath" was considered by the CRoP in 1999. The CRoP concluded that it would be more appropriate for the council of the day to decide on the kind of behavior which would be regarded as "breach of oath" leading to the disqualification of a Member from the office under Basic Law 79(7).

²⁴ There are a number of cases relating to the taking of the LegCo Oath by Members but such cases mainly concerned the validity of the oath taken by Members instead of breach of oath.

55. In addition, the common law and SCNPC have provided some principals for consideration in determining whether a Member has breached his LegCo Oath. Under common law, taking an oath is a form of attestation by which a person signifies that he is bound in conscience to perform an act faithfully and truthfully. The Court of First Instance has held that the LegCo Oath must be taken solemnly and sincerely.
56. Further, The SCNPC pronounced that oath-taking under BL 104 “is legally binding...An oath taker who makes a false oath, or, who, after taking the oath, engages in conduct in breach of the oath, shall bear legal responsibility in accordance with law.” Although the SCNPC did not elaborate upon what “in accordance with law” entails, BL 79(7) requires that the President of LegCo declare a Member no longer qualified for LegCo office if the Member is censured for breach of oath by two-thirds vote of Members present.
57. To better understand that standard of conduct applicable to “breach of oath” matters, LegCo should look to the Advisory Guidelines on Matters of Ethics in relation to the Conduct of Members of the Legislative Council of the HKSAR (the “Guidelines”). Under the Guidelines, a Member’s conduct must not bring discredit upon LegCo and a Member must not conduct himself in such a way as to place himself in a position which may be contrary to the generally assumed standard of conduct expected of a Member of LegCo. Further, Members should adhere to the spirit and letter of any LegCo rules or regulations and a Member should not, in his capacity as a Member, seek to influence another person to further the Member’s private interest. Although the Guidelines are only advisory, they speak directly to the ethical questions raised by Mr. Chow’s conduct. Hence, the Guidelines should be used as a reference in assessing the conduct of a Member.
58. Considering the foregoing authorities and guidelines, as well as the established conclusion that Mr. Chow misled LegCo, it is clear that Mr. Chow *failed* to keep his promise to serve HKSAR “conscientiously, dutifully, in full accordance with the law, honestly and with integrity.” Mr. Chow’s conduct falls short of each of the Guidelines: (1) his actions have brought discredit upon LegCo; (2) he conducted himself in a manner contrary to what is expected of a LegCo Member; and (3) he used his position as a Member to influence another person (i.e. the Select Committee) to further his own private interest (i.e. political opportunism). In addition, Mr. Chow’s behavior failed to meet the public expectation that he dutifully perform his obligations as an impartial and independent member of the Select Committee and LegCo. As the Deputy Chairman of the Select Committee, Mr. Chow was tasked with ensuring the Select Committee’s oversight investigation was conducted fairly, justly, and on behalf of the public. In planning to privately fix the scope of the investigation, outside of the proper channels, Mr. Chow undermined LegCo’s independence and integrity. The credibility of LegCo is premised upon the public’s perception of the institution as fair and independent from the other branches of government. Mr. Chow’s actions, carried

out for the purpose of personal gain and political opportunism, undermined LegCo as an institution and in its oversight role over the executive branch.

59. At the very least, Mr. Chow *neglected* to serve HKSAR “conscientiously, dutifully, in full accordance with the law, honestly and with integrity.” This conclusion is drawn from at least three problematic acts committed by Mr. Chow: (1) privately discussing the scope of the investigation with the target of the investigation; (2) intentionally misleading the Select Committee; and (3) failing to correct his misleading Statements on his own volition. As the old adage goes, “A man who has committed a mistake and doesn't correct it is committing another mistake.” Here, Mr. Chow’s actions were not mistaken, but intentional, making his failure to rectify his misbehavior even more troublesome.
60. In view of the manner and circumstances in which Mr. Chow misled LegCo and the message conveyed to the public by his conduct in his capacity as a LegCo Member and Deputy Chairman of the Select Committee, Mr. Chow has brought serious discredit upon LegCo contrary to the generally assumed standard of conduct expected of a Member. Mr. Chow’s conduct was serious enough to amount of breach of oath under Basic Law 79(7).

VII. Defenses

61. Although Mr. Chow has not cooperated with this Investigation Committee or offered any evidence to the committee in his defense, Mr. Chow did issue some public statements in his own defense.
62. In his public statements made to the press on 16 May 2017, Mr. Chow blamed his behavior on a “lack of political sensitivity.” In addition, Mr. Chow offered that in privately discussing the Proposed Amendments with Mr. Leung he did nothing wrong, likening the collusion to a prosecutor speaking with a defense lawyer prior to trial. He said he shared Mr. Leung’s views on the amendments and he had not tried to conceal anything.
63. The defense that the Proposed Amendments were shared viewpoints of both Mr. Chow and Mr. Leung is not acceptable. The fact that Mr. Leung had any involvement and influence *at all* is problematic and material, full stop.
64. Mr. Chow’s explanations fail to address the central fact that he misled LegCo about a material fact. Mr. Chow made a copious amount of misleading Statements, in a formal setting, from a position of authority as Deputy Chairman, about a fact any reasonable person would find material. Again, multiple Select Committee members stated that they did find Mr. Chow’s Statements to be material and that knowledge of that fact would have significantly changed their understanding of the Proposed Amendments.

65. Mr. Chow's explanations lack credibility. At the time the statements were made, Mr. Chow was a public official who could not feign ignorance regarding the importance of the authorship of the Proposed Amendments. Mr. Chow was a 38-year-old "rising star" in one of Hong Kong's largest political parties and who previously served on a District Council. Mr. Chow is a long-time and consummate supporter of Mr. Leung. He is an educated solicitor with a BSc in Economics and a Postgraduate Certificate in Laws. He is vice-chairman of his political party and a former chairman of the party's youth wing. He has served as an observer on the Independent Police Complaints Council and was twice appointed (by Mr. Leung), to the Equal Opportunities Commission, one prior to the Proposed Amendment incident and once thereafter. The subsequent appointment to the EOC is probative regarding Mr. Chow's motivation for his misbehavior and breach of oath. Mr. Chow's excuse that he has a "lack of political sensitivity" is insincere at best. Clearly, Mr. Chow is a skilled politician who either knew or should have known that his behavior was wrongful. The fact that certain norms of behavior are not specifically proscribed by law does not make them any less wrongful. Mr. Chow's excuse mirrors that of the thief who is very sorry that he was caught but is not the least bit sorry that he stole.
66. Taking into consideration Mr. Chow's public statements, it is evident that Mr. Chow has not raised an adequate defense to rebut the conclusions that he is guilty of misbehavior and breach of oath.

VIII. The Proposed Amendments Would Create Advantages for Mr. Leung

67. This Investigation Committee must also determine whether the Proposed Amendments, if adopted, would alter the scope of the Select Committee's investigation in a manner advantageous to Mr. Leung.
68. Mr. Leung has refused to cooperate with this Investigation Committee but has issued public statements in his own defense.
69. After being forced to admit he was the author of the Proposed Amendments, Mr. Leung contended that his amendments were intended to broaden the scope of the Select Committee's investigation to leave no stone unturned.²⁵ Mr. Leung's excuse is insincere and unacceptable. Self-interest is a cardinal norm of human behavior. People pursue their self-interest and Mr. Leung is no exception to the rule. Through

²⁵ Mr. Leung said: "If the committee does not cover what it should cover, a year later people will say they have 'let Leung Chun-ying off the hook,'"

the Proposed Amendments, Mr. Leung sought to gain every strategic advantage possible to thwart the Select Committee's inquiry into his actions.

70. Indeed, Mr. Leung's Proposed Amendments would have misdirected the focus of the Select Committee's investigation and increased the probability that the Select Committee reached findings favorable to him. For example, one change by Mr. Leung asked the committee to examine the "original intention" of the UGL agreement. This change would have unnecessarily expanded the scope of the investigation to include Mr. Leung's desire for the Select Committee to construe the deal as a non-compete agreement, an outcome advantageous to Mr. Leung.
71. In addition, in the Proposed Amendments, Mr. Leung asks the committee to verify the authenticity of the UGL agreement disclosed by the media, which is an attempt to undermine its legitimacy. Mr. Leung also asks the committee to look at which clauses in the agreement remained valid after he became chief executive, treating the document as genuine. The two suggestions are contradictory but indicate Mr. Leung tried to exhaust all possibilities to clear his name.
72. Further, Mr. Leung deleted the original proposal that said the committee should check whether Mr. Leung had, during "his term as the chief executive," declared his receipt of the payment. Mr. Leung's changed version would narrow the scope and ask the committee to find out whether he declared the interests "when he assumed office." By narrowing the scope, it would be less likely that the committee would Mr. Leung committed a violation.
73. Several Select Committee members have stated that, had they known about Mr. Leung's authorship of the Proposed Amendments, they would never have entertained the possibility of the Proposed Amendments based upon conflict of interest and self-dealing concerns.
74. On the aggregate, Mr. Leung's Proposed Amendments, if adopted, would result in changes to the Scope of the Select Committee's "Proposed major areas of study" that are advantageous to Mr. Leung.

IX. Conclusion

75. The facts and applicable law establish the Censure Motion's allegations that Mr. Chow is guilty of misbehavior and breach of his LegCo Oath. The next step is for LegCo to vote on censuring, and expelling, Mr. Chow from LegCo pursuant to Basic Law Article 79(7) and LegCo Rule of Procedure 49B(1A).

76. Although expulsion of a member is the most serious form of punishment that LegCo can impose upon a member, doing so is not punitive in nature. Instead LegCo's exercise of its expulsion power as a form of self-protection, best understood as a means available to LegCo to rid itself of individuals who are unfit for membership. More, there is precedent for expulsion of members from overseas legislatures for engaging in corrupt and dishonest behavior similar to Mr. Chow's.²⁶
77. Mr. Chow's actions have diminished LegCo's legitimacy, credibility and perceived independence. LegCo must mend this reputational damage through a proportionate and appropriate response. Given the level of damage to LegCo, censure and expulsion are appropriate outcomes here. Mr. Chow's actions call into question LegCo's ability to provide meaningful oversight over the executive branch of government, a fundamental responsibility of the legislature. If LegCo is incapable of fulfilling an oversight role on behalf of the people of Hong Kong, then who will act as a check on the executive? From an institutional perspective, Mr. Chow's misbehavior demonstrates that LegCo's oversight muscles have atrophied and that LegCo must now act to reinvigorate them. To do so, a first step is to protect the integrity of LegCo by censuring and expelling Mr. Chow. Through censure and expulsion, LegCo can send a clear message that public officials are not above the law and must abide by established ethical Guidelines.
78. It should be noted that in a number of cases in overseas legislatures, members facing formal expulsion inquiries have voluntarily resigned. Mr. Chow, defiant in the face of irrefutable evidence of his guilt, has refused to do so. Because Mr. Chow refuses to humble himself and accept responsibility for his misbehavior, LegCo has been forced to expend additional resources to conduct this investigation and review.
79. In voting on the Censure Motion, Members should consider that Hong Kong's rule of law will suffer if powerful individuals are allowed to shape the outcomes of LegCo oversight processes. Democracy is a process, not an endpoint, and Mr. Chow and Mr. Leung's behavior is an indicator that our government is backsliding away from a fair and transparent democracy. In voting on the Censure Motion, Members have the opportunity to restore public trust and confidence in our institution. Any outcome short of censure would send to the public, i.e. that LegCo allows political elites to abide by one set of rules, while holding the general public to another. Would Members find it acceptable if an ordinary Hong Konger attempted to influence the scope of a police investigation? In reality, an ordinary Hong Konger would never

²⁶ May, *Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (London, 16th ed., 1957) at 105; See Also *The expulsion of Thomas McGreevy from the Canadian House of Commons in 1892*. See Ward, *The Canadian House of Commons: Representation* (Toronto, 2nd ed., 1963).

have the privileged access that Mr. Leung and Mr. Chow were afforded as public officials. With access comes influence, and Mr. Chow gave Mr. Leung a seat at the table of the very LegCo committee investigating Mr. Leung. On its face, such an arrangement is outrageous. More, Mr. Chow's special position of authority as a Member and Deputy Chairman of the Select Committee should weigh in favor of his censure and expulsion. It is precisely because public officials wield special power and access that they should be held to *higher* standards than ordinary citizens. An outcome short of censure and expulsion will communicate to the public that Mr. Chow is above the law and would tacitly condone the deceptive and unethical pattern of conduct displayed by Mr. Chow. These are not the messages that LegCo should be sending to the public. Instead, LegCo should respond to the disrepute Mr. Chow has brought upon this institution by utilizing the self-protective mechanism of censure and expulsion.



Dennis KWOK



James TO

**Members of the Investigation Committee established
under Rule 49B(2A) of the Rules of Procedure in respect of
the motion to censure Hon Holden CHOW Ho-ding**