

立法會
Legislative Council

LC Paper No. CMI/48/12-13

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Committee on Members' Interests

**Minutes of the Second Open Meeting
held on Monday, 28 January 2013, at 4:30 pm
in Conference Room 3 of the Legislative Council Complex**

Members present : Hon IP Kwok-him, GBS, JP (Chairman)
Hon Emily LAU Wai-hing, JP (Deputy Chairman)
Hon Jeffrey LAM Kin-fung, GBS, JP
Hon Frankie YICK Chi-ming
Hon Gary FAN Kwok-wai
Hon CHAN Yuen-han, SBS, JP
Hon Dennis KWOK

Clerk in attendance : Mr Arthur LEUNG
Chief Council Secretary (3)3

Staff in attendance : Mr Kenneth CHEN
Secretary General

Mr Jimmy MA, JP
Legal Adviser

Mrs Justina LAM
Deputy Secretary General

Miss Odelia LEUNG
Assistant Secretary General 3

Mr KAU Kin-wah
Senior Assistant Legal Adviser 3

Miss Wylie HO
Senior Council Secretary (3)6

Mr Ambrose LEUNG
Research Officer (3)

Action

I. Confirmation of minutes of the last meeting
(LC Paper No. CMI/25/12-13)

The minutes of the last meeting held on 26 November 2012 were confirmed.

II. Review of the procedure for handling complaints in relation to the registration or declaration of Members' interests or Members' claims for reimbursement of operating expenses
(LC Paper No. CMI/26/12-13)

2. The Chairman recapitulated that members agreed at the last meeting to issue "The Procedure of the Committee on Members' Interests for Handling Complaints Received in relation to the Registration or Declaration of Members' Interests or Members' Claims for Reimbursement of Operating Expenses" ("the Procedure") to all Members. Pursuant to that decision, the Clerk issued the Procedure to all Members on 27 November 2012. Members also agreed at the last meeting that the proposed amendments to the Procedure by the Committee on Members' Interests ("CMI") of the Legislative Council ("LegCo") of the last term i.e. the Fourth LegCo, be examined further.

Time limits

3. At the invitation of the Chairman, the Clerk briefed members on the background of the amendments to the Procedure proposed by CMI of the Fourth LegCo, as set out in LC Paper No. CMI/26/12-13. Paragraph 1 of the Procedure stipulated that the Clerk should, upon receipt of a complaint, ask the Chairman to decide within two working days ("Time Limit A") whether a meeting on the matter should be held. Paragraphs 3 and 4 of the Procedure stipulated that the first meeting should be held within seven working days ("Time Limit B") from the day on which the Chairman decided that a meeting should be held or from the date on which the Chairman's decision of not holding a meeting was overturned by a majority of members. Paragraph 4 also provided that members disagreeing with the Chairman's decision of not holding a meeting should reply to the Clerk within three working days.

4. The Clerk further said that having regard to the experience gained in handling five complaint cases, CMI of the Fourth LegCo considered that the

time limit for the Chairman to decide whether a meeting should be held should be extended to three working days, as two working days had been found to be inadequate for the Clerk to reach the Chairman when he or she was not in Hong Kong and obtain a response from him or her. Also, as there had been practical difficulties in scheduling a meeting with most members attending within seven working days after the Chairman had decided to hold a meeting, in particular towards the end of a term, CMI considered that such a time limit be extended to 10 working days.

5. Mr Frankie YICK sought clarification on the time limit specified for members to respond to the Chairman's decision of not holding a meeting. In reply, the Clerk said that if any member indicated disagreement with the Chairman's decision in writing, the Clerk should, by way of a circular, ask members to forward replies to him within three working days from the date of the circular as to whether a meeting should be held.

6. Members agreed to the proposal to extend Time Limit A from two to three working days.

7. The Chairman enquired how CMI of the Fourth LegCo had arrived at the proposal of extending Time Limit B to 10 and not 14 working days. He considered that a longer time limit would allow greater flexibility. In reply, the Clerk said that there was no record of how CMI had arrived at the proposal. The Clerk added that the time limit provided for the latest date on which a meeting should be held to consider a complaint.

8. Mr Frankie YICK said that while he was agreeable to the proposal of extending Time Limit B to 10 working days, he was not sure if the extended time limit would be sufficient for scheduling a meeting of CMI towards the end of the LegCo term when members would be very busy.

9. Ms Emily LAU said that the handling of complaints had created a heavy workload on members of CMI of the Fourth LegCo. She hoped that the appointment of an independent person as a Commissioner to take over from CMI the work of receiving and investigating complaints, which would be discussed under the next agenda item of the meeting, might relieve some of its workload. She added that irrespective of the time limits specified, CMI had a duty to complete its consideration of complaints expeditiously as any unnecessary delay would be unfair to the Members under complaint. Ms CHAN Yuen-han said that while she had no strong view on the time limit, she considered that members should make their best effort to attend meetings of CMI so that complaints against fellow Members could be handled by CMI expeditiously.

10. Members agreed that Time Limit B be extended to 10 working days.

The two-stage approach in handling complaints and the circumstances for proceeding to the investigation stage

11. At the invitation of the Chairman, the Clerk said that CMI of the First LegCo first drew up the Procedure in 1999 and at that time no complaint had been received. The then CMI considered that the mere holding of a meeting to "investigate" a complaint against a Member might give members of the public the impression that the complaint had some grounds, and the reputation of the Member under complaint might have been tarnished even if the complaint turned out to be groundless. CMI therefore adopted a two-stage approach in handling complaints, namely the Preliminary Consideration Stage ("PC Stage") and the Investigation Stage. During the PC Stage, information relevant to the complaint and the allegations in questions would be gathered to assist CMI in determining whether the complaint was substantiated. If CMI was unable to make such determination in the PC Stage, it should proceed to the Investigation Stage.

12. The Clerk further said that all the complaint cases handled by CMI in the Fourth LegCo were concluded in the PC Stage and CMI had not proceeded to the Investigation Stage. However, it should be noted that in one complaint case, CMI held 20 meetings over a period of 18 months to consider a complaint but its consideration was still at the PC Stage. One of the causes for such an odd situation was the lack of an explicit trigger in the Procedure for proceeding to the Investigation Stage. The Clerk drew members' attention to Paragraph (11) of the Procedure, which read "[i]f the Member under complaint admits all the allegations at this stage, and the Committee is of the opinion that it is able to determine whether the complaint is substantiated and decides that an enquiry is not necessary, the Committee shall report to the Council and make a recommendation as to a sanction to be imposed on the Member under complaint". This Paragraph was unclear as to whether CMI ought to proceed to the Investigation Stage if it was able to form the opinion that the complaint was substantiated at the PC Stage, but the Member under complaint did not admit the allegations or agree to the CMI's opinion.

13. Ms Emily LAU said that she could not recall any complaint case considered by CMI of the Fourth LegCo in which the Member under complaint admitted to the facts of a complaint on the one hand, but did not agree to having breached the relevant rules on the other. In reply, the Clerk said that three Members had been alleged in a complaint to have breached Rule 83A of the Rules of Procedure ("RoP") for failing to disclose their pecuniary interests relating to their non-executive directorships in certain companies at committee meetings. While the three Members agreed to the facts of the allegations, i.e. they had not disclosed the interests in question at the relevant meetings, they did not admit that they had breached the rule as

they did not consider that their directorships were interests required to be disclosed.

14. The Chairman opined that a protracted PC Stage would be confusing to members of the public. He considered that some of the work undertaken by CMI of the Fourth LegCo in handling complaints during the PC Stage was actually investigatory in nature.

15. Mr Gary FAN said that while a Member under complaint might admit or deny the allegations made in the complaint, it was for CMI to decide whether a complaint was substantiated and such a decision should not be subject to the views of the Member. Concurring with Mr FAN, Mr Frankie YICK said that it should be for CMI to decide whether or not to proceed to the Investigation Stage and whether a Member under complaint had breached the relevant rule.

16. Mr Gary FAN suggested that to avoid the situation of a protracted PC Stage, it might be provided in the Procedure that CMI should conclude the PC Stage of a complaint within a certain period of time or after a certain number of meetings. Ms Emily LAU said that it was not feasible to set a time limit for the PC Stage as the time needed would depend on the complexity and particular circumstances of each case.

17. Senior Assistant Legal Adviser 3 ("SALA3") said that the Procedure might be revised to set out more clearly the circumstances under which CMI should proceed from the PC Stage to the Investigation Stage.

18. Ms Emily LAU considered that CMI should proceed to the Investigation Stage if the Member under complaint either disagreed with the facts in the allegations or denied any breach of the rule concerned. She enquired about the possible approach for revising the Procedure. In reply, the Clerk said that it might be set out in the Procedure that the purpose of the PC Stage was for CMI to decide whether there was a prima facie case on the basis of the information provided by the complainant and, if so, the Member under complaint's response to the complaint would be sought. If the Member admitted that he had breached the relevant rule and CMI was able to determine if the complaint was substantiated, there might be no need to proceed to the Investigation Stage.

19. Mr Frankie YICK considered that CMI's decision on whether or not to proceed to the Investigation Stage should not be contingent on the response of the Member under complaint to the complaint. In his view, once CMI had found in the PC Stage that there was a prima facie case, it should forthwith proceed to the Investigation Stage. Concurring with Mr YICK, the Chairman said that once CMI could establish that the

complaint was within its purview and ascertain the relevant rules in relation to the complaint, it should proceed to the Investigation Stage. He did not think that the conduct of an investigation into a complaint against a Member should be taken as a grave matter nowadays.

20. Ms Emily LAU said that while she would not, in principle, oppose the views of Mr YICK and the Chairman, the views of all Members should be consulted before CMI made a decision on the subject. She considered that some Members might be concerned about the impact of "being investigated by CMI" on their reputation. The Chairman opined that the reputation of the Members under complaint should not be a concern provided that the investigation of the complaint was conducted in confidence. Mr Frankie YICK said that as meetings for considering complaints were held in camera, he did not consider that the reputation of a Member under complaint would be tarnished if CMI eventually found after investigation that the Member was innocent.

21. The Chairman concluded that the Procedure should be revised to provide clearer delineation between the PC Stage and the Investigation Stage, including the circumstances under which CMI should proceed from the PC Stage to the Investigation Stage, as well as to set out the procedural steps of the two stages more clearly. Members agreed.

Whether information other than that provided by the complainant should be considered at the first meeting

22. At the invitation of the Chairman, the Clerk said that in some of the complaint cases handled by CMI of the Fourth LegCo, it appeared that the complainants lodged complaints against Members on the basis of media reports but the media reports had not been attached to the complaint letters or emails or mentioned therein, and CMI had to decide if it should take into consideration such reports. One view was that it was not CMI's duty to "perfect" a complaint and CMI should consider the allegations in the complaint only on the basis of the information provided by the complainant. There was also concern about CMI being alleged to be embarking on a fishing expedition if CMI was to consider information other than that provided by the complainant.

23. Ms Emily LAU considered that CMI would fall short of the expectation of the public if it shunned widespread media reports related to a complaint. She sought clarification on any relevant rules relating to the conduct of investigations into allegations in media reports. In reply, the Clerk said that under Rules 73(1)(c) and (ca) of RoP, CMI might only act on complaints and under Paragraph (1) of the Procedure, CMI would not handle anonymous complaints.

24. Secretary General ("SG") clarified that the issue under consideration was not whether CMI should look into allegations in media reports but whether CMI should consider at the first meeting information other than that provided by the complainant such as information widely reported in media.

25. Ms CHAN Yuen-han said that with the continued development of party politics in Hong Kong, media reports aimed at smearing political opponents would be more and more common. She envisaged that CMI would be inundated with complaints if it was to consider allegations in media reports. In her view, it was unlikely for a complainant to lodge a complaint based on widespread media reports but without including such information in the complaint.

26. Mr Frankie YICK considered that CMI should take into consideration all relevant information in considering a complaint. Ms Emily LAU said that there was a possibility that a complaint was not pursuable as it did not contain sufficient information, but if CMI was to take into account relevant media reports, the complaint would become pursuable. However, if CMI was to adopt such an approach, it would take on the duty to "perfect" a complaint. While she was inclined to concur with Mr YICK, she stressed that the subject matter was highly controversial.

27. Mr Jeffrey LAM considered it premature to draw any relationship between the development of party politics in Hong Kong and media reports on allegations against Members. He expressed reservation about CMI taking up the role of a detective in searching for information related to a complaint against a Member.

28. Ms CHAN Yuen-han sought information on the practice of Select Committees ("SCs") in regard to media reports. She recalled that SCs had taken into account media reports in taking evidence. Her concern was that if CMI and SCs were to adopt different standards, this would draw criticism.

29. The Chairman said that the issue under discussion was whether information other than that provided by the complainant should be considered by CMI at the first meeting to determine if a complaint was pursuable. In his view, once CMI had decided that a complaint should be pursued, CMI might consider all relevant information (including media reports) at subsequent meetings.

30. At the invitation of the Chairman, Legal Adviser ("LA") said that both CMI and SC had to work within their own terms of reference. The terms of reference of a SC was set out in the relevant motion passed by the Council, whereas the power of CMI to consider and investigate complaints

against Members was laid down in Rules 73(1)(c) and (ca) of the RoP. Rules 73(1)(c) and (ca) of RoP provided that CMI should first consider a complaint, and "if it thinks fit" after consideration, then investigate the complaint. Hence, CMI would proceed to investigation only "if it thinks fit". The aforesaid rules empowered CMI to act on specific complaints but not to conduct a general inquiry on whether a particular Member had breached the relevant rule, which might be regarded as fishing expedition. He said that it was the view of some members of CMI of the Fourth LegCo that CMI had no obligation to "perfect" a complaint. CMI of the Fourth LegCo held the view that the Procedure should allow CMI to make its own judgment on each case on whether or not to proceed to investigation while being held accountable for its decision. LA added that it was undesirable from the natural justice point of view if CMI was perceived to be assuming the dual role of a complainant and an adjudicator.

31. Ms CHAN Yuen-han said that it would be a heavy burden on members to decide whether or not to consider information in media reports at the first meeting on a case-by-case basis. CMI would draw criticism from certain sectors of the public should it decide one way or the other.

32. Mr Frankie YICK said that after listening to the views of LA, he considered that there was no need for CMI to consider information other than that provided by the complainant at its first meeting. Should the complainant be dissatisfied with the findings of CMI, he or she might lodge a complaint afresh with CMI and substantiate his/her case by incorporating further information, e.g. media reports.

33. Mr Jeffrey LAM said that there was no need to formulate hard and fast rule and CMI should consider and decide on a case-by-case basis whether media reports should be taken into account at its first meeting to consider a complaint.

34. Mr Dennis KWOK drew members' attention to the practice of disciplinary proceedings of professional bodies that a framework was in place to determine the subject of inquiry. He opined that the conduct of investigation by CMI should be "tunnel vision" in the sense that it should only focus on the complaint as lodged and consider the information provided by the complainant. The consideration by CMI of relevant media reports at its first meeting might blur the focus of the inquiry.

35. Ms Emily LAU said that CMI was accountable to the public and there should be an open and fair procedure for handling complaints against Members. She proposed that the Secretariat should be asked to provide media reports relevant to a complaint for members' reference at the first CMI meeting to consider the complaint. Since such media reports would

serve only as background information for members' reference, she did not consider that such a practice could be regarded as CMI attempting to "perfect" a complaint or embarking on a fishing expedition.

36. SG sought affirmation on whether the Secretariat was requested to provide CMI with no more than readily available information, e.g. media reports, at the first meeting of CMI to consider a complaint. The Chairman answered in the affirmative. Members agreed that readily available information relevant to a complaint should be provided for CMI's reference at its first meeting to consider the complaint.

Whether the Member under complaint ought to be informed if CMI decides not to consider the complaint after the first meeting

37. The Chairman sought members' views on whether the Member under complaint should be informed if CMI had decided not to consider the complaint after the first meeting.

38. Mr Frankie YICK considered that CMI should inform the Member under complaint if CMI decided not to consider the complaint. Ms Emily LAU agreed with Mr YICK. In reply to Ms LAU, the Clerk said that CMI of the Fourth LegCo noted the views of some Members that they did not wish to be informed if CMI decided not to consider the complaint against them.

39. SALA3 invited members to consider if informing Members of the complaints against them which CMI decided not to consider would serve any useful purpose.

40. The Chairman proposed that the Procedure might be revised to allow Members to give advance instructions on whether they would like to be informed of complaints against them which CMI decided not to consider. Members agreed.

Secretariat

41. The Chairman asked the Secretariat to revise the Procedure for members' consideration on the basis of the views expressed by members at the meeting.

III. Proposal of appointing a Commissioner to handle complaints against Members (LC Paper No. CMI/27/12-13)

42. At the invitation of the Chairman, the Clerk briefed members on the proposal of CMI of the Fourth LegCo of appointing an independent person as a Commissioner to receive and investigate complaints against Members,

as set out in the discussion paper. He highlighted that in the House of Commons of the United Kingdom ("UK") Parliament, the UK Commissioner's role was to report to the Committee on Standards and Privileges the facts as found under the investigation and offer his conclusion on whether the Code of Conduct had been breached. That Committee would then consider the findings of the UK Commissioner and make its own conclusion on the matter, including recommendations on any sanctions. Besides, the UK Commissioner had no power to compel witnesses to give evidence.

43. The Clerk further said that CMI of the Fourth LegCo had sought the advice of Sir Malcolm Jack, a retired Clerk of the UK House of Commons, on whether the introduction of a formal code of conduct for Members was a prerequisite for the appointment of a Commissioner to deal complaints against Members in their capacity as such. His advice was that the absence of a code of conduct would make the job of the Commissioner very difficult. One of the reasons was that there would be an expectation from the public that the Commissioner would deal with wider matters relating to the conduct of Members as well. CMI of the Fourth LegCo considered that as a practical first step, appointing an independent person as a Commissioner to receive and investigate complaints against Members within the current remit of CMI, i.e. complaints relating to registration and declaration of Members' interests, claims for reimbursement of operating expenses ("OER claims") and applications for advance of operating funds ("AOF applications"), was worth pursuing. CMI of the Fourth LegCo considered that the appointment of a Commissioner would help address the public concern about Members conducting investigation into complaints made against their fellow legislators and the investigation could be conducted more efficiently.

44. Ms Emily LAU said that she was highly supportive of the proposal to appoint a Commissioner to receive and investigate complaints, as it would allay the public concern about Members conducting investigation into complaints made against their fellow legislators, and the complaint handling process would be expedited by entrusting the investigatory work with the Commissioner. Although CMI would still need to hold meetings to consider the report submitted by the Commissioner, CMI would need to come up with strong justifications for not endorsing the report. Ms LAU further said that as investigations would be conducted by a Commissioner, it would significantly relieve the workload of members in handling complaints.

45. Referring to Appendix III to the discussion paper, Ms Emily LAU drew members' attention to the view expressed by Members belonging to the Democratic Party that the Commissioner should be appointed by the passage of a motion in the Council by a four-fifths majority of the Members.

She considered that such a high threshold of consent by Members would ensure that the Commissioner appointed would be a person who could command the respect of Members from different political parties.

46. Mr Dennis KWOK said that as there were 650 Members in the UK Parliament, the appointment of a Commissioner to receive and investigate complaints against them might be necessary. On the other hand, the LegCo of Hong Kong had only 70 Members. While he agreed that the appointment of a Commissioner would address the public concern about Members conducting investigation into complaints made against their fellow legislators, he doubted if the workload involved would justify the appointment of a Commissioner, at least for the time being. Mr Frankie YICK agreed to Mr KWOK's views.

47. The Chairman said that as currently LegCo did not have a code of conduct for Members, the complaints to be handled by a Commissioner, even if appointed, would be restricted to those within the current remit of CMI, i.e. complaints relating to registration and declaration of Members' interests, OER claims and AOF applications. At present, OER claims and AOF applications were handled by the Secretariat. He enquired about the handling of such claims.

48. In reply, SG said that the Secretariat had deployed necessary manpower resources to handle OER claims and AOF applications. There were also designated staff members to deal with matters relating to the registration of Members' interests.

49. Mr Jeffrey LAM expressed doubt about the necessity of appointing a Commissioner. He said that if the Commissioner was to work on a part-time basis, he or she might not handle complaints promptly as he or she might have other engagements. He was also concerned that the setting up of an Office of the Commissioner might provide a ready channel for lodging frivolous complaints against Members. He suggested that the proposal be shelved for the time being as the workload of CMI was still manageable.

50. Mr Frankie YICK said that CMI members should be in a better position to decide whether, and if so what, sanctions should be recommended if it was involved in the investigation process. He supported the view that the proposal be shelved for the time being.

51. The Chairman said that the appointment of a Commissioner would not absolve CMI from its role in handling complaints against Members as CMI still had to decide whether or not to accept the findings of the Commissioner and to recommend sanctions against the Member under complaint. Given such roles of CMI, he therefore had doubts if the

appointment of a Commissioner could really address the public concern about Members conducting investigation into complaints made against their fellow legislators. Besides, the Secretariat had the expertise and manpower resources in handling matters relating to OER claims and AOF applications as well as providing services to CMI in conducting investigations into complaints against Members.

Secretariat

52. Ms Emily LAU reiterated that she was supportive of the proposal to appoint a Commissioner. She suggested that the views of all Members be sought before CMI considered the matter further. She also suggested that the views expressed by members at the meeting, the outcome of consultation with Members of the Fourth LegCo on the proposal, as well as the high threshold for appointment of the Commissioner proposed by the Democratic Party (paragraph 45 above), should be set out for Members' reference. Members agreed that all Members be consulted on the proposal by way of a questionnaire.

V. Any other business

53. There being no other business, the meeting ended at 5:50 pm.

Council Business Division 3
Legislative Council Secretariat
5 April 2013