

Chapter 1 Introduction

Background

1.1 Under Article 79(7) of the Basic Law (“BL”), the President of the Legislative Council (“LegCo”) of the Hong Kong Special Administrative Region (“HKSAR”) shall declare that a Member of LegCo is no longer qualified for the office when he or she is censured for misbehaviour or breach of oath by a vote of two-thirds of the Members of LegCo present. BL 79(7) is implemented in LegCo through Rule 49B of the Rules of Procedure (“RoP”). Under RoP 49B(2A), upon moving of a motion under subrule (1A), debate shall be adjourned and the matter stated in the motion shall be referred to an investigation committee unless the Council, on a motion which may be moved without notice by any Member, otherwise orders.

1.2 The Investigation Committee established under RoP 49B(2A) in respect of the motion to censure Dr Hon CHENG Chung-tai (“IC”) is the second investigation committee established in accordance with a motion moved under RoP 49B(1A) since the First LegCo.¹ RoP 73A(2) provides that IC is responsible for establishing the facts stated in the motion moved under RoP 49B(1A), and giving its views on whether or not the facts as established constitute grounds for the censure.

1.3 At the Council meeting of 14 December 2016, Hon Paul TSE moved a motion under RoP 49B(1A) to censure Dr Hon CHENG Chung-tai (“Dr CHENG”) under BL 79(7) (“the censure motion”) as set out below:

“That this Council, in accordance with Article 79(7) of the Basic Law, censures Dr Hon CHENG Chung-tai for misbehaviour (details as particularized in the Schedule to this motion).”

Schedule

Details of Dr Hon CHENG Chung-tai’s misbehaviour are particularized as follows:

¹ The first one was the Investigation Committee established under Rule 49B(2A) of the Rules of Procedure in respect of the Motion to censure Honourable KAM Nai-wai, which was formed in January 2010 and completed its work in March 2012.

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- (1) *Sixtus LEUNG Chung-hang and YAU Wai-ching requested to take their oath/affirmation afresh at the Council meeting of 19 October 2016 as their so-called oath/affirmation taken for the first time at the Council meeting of 12 October 2016 had been ruled invalid by the President of the Legislative Council (“LegCo”) on the grounds that both of them could not be serious about their oath and were unwilling to be bound by it. At the Council meeting of 19 October, some 10 Members of the Democratic Alliance for the Betterment and Progress of Hong Kong (“DAB”) placed the mock-ups of the national flags of the People’s Republic of China (“national flags”) and the regional flags of the Hong Kong Special Administrative Region of the People’s Republic of China (“regional flags”) on their desks in the Chamber, so as to highlight the solemnity and pledge of taking oath to uphold the Basic Law and swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China.*
- (2) *At the Council meeting of 19 October 2016, when the President directed Members to be summoned for a quorum and all DAB Members were not present, Dr Hon CHENG Chung-tai deliberately inverted the mock-ups of the national flags and the regional flags placed on the desks of DAB Members. After Dr Hon CHIANG Lai-wan found out what happened and returned to the Chamber to rearrange the mock-ups of the national flags and the regional flags and place them in the same position and manner as before, Dr CHENG again deliberately inverted the mock-ups of the national flags and the regional flags. Eventually, the President reprimanded him for leaving his seat at will and disturbing other Members displaying objects, and ordered him to withdraw*

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immediately from the Council as his conduct was grossly disorderly, but he refused to leave all along. What was happening in the Chamber was broadcast live on the television throughout that period of time.

- (3) *The aforesaid conduct of Dr Hon CHENG Chung-tai:*
- (i) was in breach of the LegCo Oath taken by him at the Council meeting of 12 October 2016 under Article 104 of the Basic Law and the Oaths and Declarations Ordinance (Cap. 11) to “uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China”;*
 - (ii) constitutes misbehaviour as he openly and deliberately humiliated the national flags and the regional flags in his capacity as a Member of LegCo.*

1.4 At the above meeting, upon the moving of the censure motion, Hon CHAN Chi-chuen moved without notice the motion under RoP 49B(2A) that no further action should be taken on the censure motion. Mr CHAN’s motion was negatived (**Appendix 1.1**). In accordance with RoP 49B(2A), the debate on the censure motion was adjourned and the matter stated in the censure motion was referred to IC.

Establishment and membership of IC

1.5 Under RoP 73A(1), IC shall consist of a chairman, a deputy chairman and five members who shall be Members appointed by the President of LegCo (“the President”) in accordance with an election procedure determined by the House Committee (“HC”). The mover of the censure motion (i.e. Hon Paul TSE), the three Members jointly signing the notice of the motion (i.e. Dr Hon CHIANG Lai-wan, Hon Martin LIAO and Hon CHUNG Kwok-pan) and the Member who is the subject of the motion (i.e. Dr CHENG) shall not be appointed to IC.

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1.6 At its meeting on 6 January 2017, HC endorsed the election procedure for IC (**Appendix 1.2**), which is substantially the same as the election procedure endorsed by HC for the first investigation committee. All Members were invited to make nominations for the membership of IC. Five valid nominations were received by the LegCo Secretariat by the deadline of 16 January 2017, and two more valid nominations were made at the HC meeting on 20 January 2017 at which members of IC were elected. As the total number of valid nominations received was equal to the number of places available, all the seven nominees were declared elected for appointment to IC by the President. These seven Members then elected among themselves two Members to be nominated respectively for appointment by the President as the Chairman and Deputy Chairman of IC.

1.7 In accordance with RoP 73A(1), the President appointed on 20 January 2017 the Chairman, Deputy Chairman and members of IC as follows:

Dr Hon Priscilla LEUNG Mei-fun, SBS, JP (Chairman)
Dr Hon Junius HO Kwan-yiu, JP (Deputy Chairman)
Dr Hon Elizabeth QUAT, BBS, JP
Hon SHIU Ka-fai
Hon CHAN Chun-ying
Hon CHEUNG Kwok-kwan, JP
Hon LUK Chung-hung

Practice and Procedure

1.8 Under RoP 73A(13), subject to RoP, the practice and procedure of an investigation committee shall be determined by the committee. At its first meeting on 20 February 2017, IC endorsed its Practice and Procedure in **Appendix 1.3**. The Practice and Procedure is modelled on the first investigation committee's practice and procedure which was drawn up with reference to the practices and procedures of select committees of LegCo as well as the experience of overseas legislatures in the investigation of alleged misbehaviour of their members. The Practice and Procedure has been uploaded onto the LegCo website. It has also been provided for Dr CHENG and all the witnesses to facilitate their understanding of how IC operates and their rights and obligations.

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Guiding principles for determining the Practice and Procedure

1.9 IC's Practice and Procedure is underpinned by the following guiding principles which were adopted by the first investigation committee when determining its practice and procedure:

- (a) IC should be fair, and seen to be fair, to the Member under investigation, to the Members making the allegations, and to the other parties involved in the investigation, and it should observe the principles of following due process in its investigation;
- (b) IC should adopt a fair and impartial attitude and act independently in obtaining, examining and analyzing evidence and information, and it should not have any regard to political, party or personal considerations;
- (c) IC is accountable to not only LegCo but also the public. Subject to RoP 73A(4) which provides that all its meetings must be held in camera (except in circumstances specified in RoP 73A(5)), IC should be as transparent as possible in its operation; and
- (d) IC should work in a conscientious and efficient manner as public resources are involved.

1.10 Given the serious consequence if the censure motion is passed, IC considers it important to observe the above principles in seeking to establish the facts stated in the censure motion and give its views on whether or not the facts as established constitute grounds for the censure of Dr CHENG.

Criminal proceedings against Dr CHENG

1.11 During its investigation, IC was aware that criminal proceedings had been brought against Dr CHENG by the Department of Justice on the offences of desecration of the national flag and desecration of the regional flag respectively under section 7 of the National Flag and

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National Emblem Ordinance (116 of 1997) (“NFO”) and of the Regional Flag and Regional Emblem Ordinance (117 of 1997) (“RFO”) in the case of *HKSAR v CHENG Chung-tai* (ESCC 1139/2017). IC was mindful that the court was responsible for adjudicating on the criminal liability of Dr CHENG, whereas IC’s investigation needed to ascertain whether Dr CHENG’s relevant conduct was in breach of the LegCo Oath and constitutes misbehaviour under BL 79(7). IC considered it not necessary to put on hold its work of obtaining evidence from witnesses in camera in view of the above legal proceedings. That said, IC respected the requests of individual witnesses (i.e. Dr Hon CHIANG Lai-wan and Hon LAU Kwok-fan mentioned in paragraph 1.19) for appearing before IC to give evidence after they had testified in court on the above case. IC also did not reach any conclusion on the matter stated in the censure motion until after the court had handed down its judgment on the case.

1.12 IC noted that there were precedents in which a select committee of LegCo conducted an inquiry in parallel with pending legal proceedings arising from matters which were related to the subject of the select committee’s inquiry.² IC also noted that the first investigation committee had not put in place measures for avoiding prejudice to a person’s interest in pending legal proceedings as the matters under its investigation then had not involved any pending legal proceeding. Unlike the first investigation committee, IC, having regard to the criminal proceedings against Dr CHENG by the Department of Justice, decided to include measures in its Practice and Procedure to avoid prejudice to Dr CHENG’s interest in those pending legal proceedings.³ IC also decided that: (a) hearings be held in camera under RoP 73A(4) so as not to prejudice the legal proceedings relating to Dr CHENG (in fact, as mentioned in paragraph 1.21, Dr CHENG did not elect for hearings to be held in public and had indicated that he would not attend the hearings of IC); (b) the two witnesses mentioned in paragraph 1.11 might give evidence before IC until after they had testified in court on the case relating to Dr CHENG; and (c) IC would not reach any conclusion on the matter stated in the censure motion until after the court had handed down its judgment on the above case.

² While the Select Committee on Building Problems of Public Housing Units was conducting an inquiry, there were a number of relevant criminal cases pending in court. To avoid prejudice to a person’s interest in pending legal proceedings, the Select Committee held closed hearings to obtain evidence, and deferred the publication of its report until after the completion of the relevant criminal proceedings.

³ Paragraphs 18 to 20 of IC’s Practice and Procedure (Appendix 1.3).

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1.13 IC was subsequently aware that the Eastern Magistrates' Court ("the Magistrate Court") convicted Dr CHENG as charged in respect of the case referred to in paragraph 1.11 on 29 September 2017. At IC's request, the Magistrate Court provided IC with a transcript which set out its reasons for verdict and sentence ("Reasons for Verdict and Sentence") (**Appendix 1.4**) (Chinese version only) on 20 October 2017. IC also noted that Dr CHENG did not appeal against the conviction and the sentence. IC therefore decided to continue to obtain evidence from individual witnesses, deliberate on the censure motion and submit its Report to LegCo.

Standard of proof

1.14 IC notes that RoP do not prescribe any standard of proof that an investigation committee should adopt or how the evidence obtained should be assessed and weighed. IC is mindful that it is not a court and therefore not subject to the standards of proof applied by courts in criminal proceedings (i.e. "proof beyond reasonable doubt") and civil proceedings (i.e. "proof on a balance of probabilities"). As IC's investigation may lead to the Member under investigation being disqualified from the office, in determining its standard of proof, IC has considered the standard of proof adopted in disciplinary proceedings in Hong Kong as well as the practice adopted by the first investigation committee. IC eventually decided that the standard of proof in line with that of the first investigation committee be adopted: the more serious the allegation, the more compelling the evidence is required to establish the allegation.⁴

1.15 Further, as IC is not a court, it is not subject to the normal rules of evidence in civil or criminal proceedings. Nevertheless, IC will consider the relevance and reliability of the evidence given by witnesses and evaluate the weight of such evidence when forming its views.

⁴ Please refer to paragraphs 113 and 116, *A Solicitor v The Law Society of Hong Kong* (2008), page 117, 11 HKCFAR, the Court of Final Appeal. Paragraph 116 of the judgment stated that "...The more serious the act or omission alleged, the more inherently improbable must it be regarded. And the more inherently improbable it is regarded, the more compelling will be the evidence needed to prove it on a preponderance of probability. If that is properly appreciated and applied in a fair-minded manner, it will provide an appropriate approach to proof in disciplinary proceedings. Such an approach will be duly conducive to serving the public interest by maintaining standards within the professions and the services while, at the same time, protecting their members from unjust condemnation".

Investigation process

1.16 At its first meeting on 20 February 2017, IC decided to conduct its investigation in three stages:

- (a) Stage 1 for undertaking preparatory work including inviting the Members who initiated the censure motion to provide information in support of the particulars of misbehaviour set out in the Schedule to the censure motion; gathering information relevant to the censure motion and analyzing such information; and deciding whether to conduct hearings and, if yes, the witnesses to be invited to attend its hearings to give evidence;
- (b) Stage 2 for conducting hearings to obtain evidence from witnesses and deliberating on the evidence obtained; and
- (c) Stage 3 for holding internal deliberations for preparing and discussing the draft report of IC.

Invitation of witnesses

1.17 In accordance with paragraph 5 of its Practice and Procedure and on the basis of the information and responses provided for IC under paragraphs 2 and 3 of its Practice and Procedure, IC considered it necessary to conduct hearings for the purpose of establishing the facts stated in the censure motion. Upon identifying a total of 43 potential witnesses in the following three groups, IC invited them to be witnesses and attend a hearing for its examination:

- (a) the Member under investigation (i.e. Dr CHENG) and the four Members who initiated the censure motion;
- (b) 11 Members who were distributed with and/or placed the mock-ups of the national flag and regional flag on their desks in the Chamber at the Council meeting of 19 October 2016 (“the said Council meeting”) and two stewards of the LegCo Secretariat; and

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- (c) 25 Members who did not place the mock-ups on their desks in the Chamber but were present at the relevant part of the said Council meeting.

Witnesses attending hearings

1.18 Of the above 43 potential witnesses, the following seven agreed to be witnesses and give evidence before IC, while the other responded that they neither agreed to be witnesses nor would submit written statements to IC (**Appendix 1.5**):

- (a) Hon Paul TSE, mover of the censure motion;
- (b) Dr Hon CHIANG Lai-wan and Hon Martin LIAO who were two of the three Members jointly signing the notice of the censure motion;
- (c) Hon LAU Kwok-fan who distributed the mock-ups of the national flag and regional flag to a number of Members in the Chamber shortly before the start of the said Council meeting;
- (d) Hon HUI Chi-fung who did not place the mock-ups on his desk but was present at the relevant part of the said Council meeting;
- (e) Mr Alfred LEE, steward of the LegCo Secretariat who talked to Dr CHENG when the latter was inverting the mock-ups at the said Council meeting; and
- (f) Mr Tommy LEE, steward of the LegCo Secretariat who restored some of the inverted mock-ups to their original positions at the said Council meeting.

1.19 Except Hon HUI Chi-fung, all the above six witnesses submitted their written statements (**Appendices 1.6 to 1.11**) (Chinese version only) to IC.⁵ Meanwhile, IC acceded to the requests of

⁵ IC also invited a security assistant of the LegCo Secretariat to provide a written statement for IC's consideration. Based on the information provided in that written statement, IC considered it not necessary to invite the security assistant to attend a hearing for its examination.

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Dr Hon CHIANG Lai-wan and Hon LAU Kwok-fan that they would not attend IC's hearing until after they had testified in the criminal proceedings in *HKSAR v CHENG Chung-tai*.

1.20 IC considered that the seven witnesses referred to in paragraph 1.18 were important witnesses and the evidence they provided was sufficient for the purpose of assisting IC in considering whether the facts stated in the censure motion could be established.

Dr CHENG's responses to IC's invitation

1.21 IC considers that it must be fair to Dr CHENG and observe the due process, including the principles of natural justice. It therefore wrote to Dr CHENG three times inviting him to attend hearings or assist its investigation. In response to the invitations, Dr CHENG stated in **Appendices 1.12, 1.13 and 1.14** (Chinese version only) that he: (a) would not attend the hearings of IC; (b) would not propose witnesses for IC's consideration; and (c) would not elect for hearings to be held in public as allowed under RoP 73A(5)(a). Dr CHENG also indicated that he did not wish to comment on IC's investigation and the censure motion, and he had no comments on the witnesses' written statements received by IC. Nor did he intend to submit any written statement to IC (**Appendices 1.15 and 1.16**) (Chinese version only).

Meetings and hearings

1.22 Under paragraphs 7 and 8 of the Practice and Procedure, which are modelled on RoP 73A(4) and (5), all IC meetings, including hearings at which the Member under investigation or a witness or witnesses appear, will be held in camera. Only the Member under investigation may elect for hearings to be held in public, and the election must be made before the first hearing. Where the Member under investigation makes such an election, all hearings shall be held in public throughout the entire investigation unless, upon an application by a witness or a request from an IC member, IC on sufficient reason decides otherwise. On behalf of IC, the Clerk to IC wrote to Dr CHENG on 2 March 2017 drawing his attention to the above provisions. In view of Dr CHENG's decision mentioned in paragraph 1.21, all hearings of IC were held in camera in accordance with

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RoP 73A(4). IC considered that holding its hearings in camera helped avoid prejudice to the criminal proceedings against Dr CHENG.

1.23 Nevertheless, to enhance the transparency of IC's work, the Chairman of IC briefed the media on the progress of IC's work after each meeting.

1.24 IC conducted a total of eight closed meetings, including two hearings in camera. A schedule of the hearings is in **Appendix 1.17**.

Examination of witnesses under oath

1.25 IC decided that witnesses who would attend a hearing to give evidence to IC would be invited to choose to be examined under oath pursuant to section 11 of the Legislative Council (Powers and Privileges) Ordinance (Cap. 382). IC considers that witnesses examined on oath would be conducive to IC's assessment of their credibility and the weight of their evidence. Except Mr Alfred LEE mentioned in paragraph 1.18(e), all the witnesses attending IC's hearings elected to give evidence under oath, which was administered by the Chairman of IC.

Draft findings

1.26 IC strives to ensure that its investigation and relevant procedure are fair and seen to be fair to parties whose interests or reputation may be affected by its proceedings. In accordance with paragraph 25 of the Practice and Procedure, those parts of IC's Report which set out the evidence, on the basis of which IC has established the facts stated in the censure motion ("the relevant parts of evidence"), were forwarded to the Member under investigation (i.e. Dr CHENG) and the witnesses concerned for comment.⁶ Dr CHENG indicated in **Appendix 1.18** (Chinese version only) that he would not respond to and had no comments on the relevant parts of evidence. Other witnesses who were provided with the relevant parts of evidence indicated that they had no comments on the relevant parts of evidence.⁷

⁶ As this Report does not cite the evidence given by Hon Paul TSE and Hon Martin LIAO at the hearing held in camera and their written statements to establish the facts stated in the censure motion, IC considers it not necessary to forward the relevant parts of evidence in this Report to them for comment.

⁷ The witnesses concerned are Dr Hon CHIANG Lai-wan, Hon LAU Kwok-fan and the two stewards of the LegCo Secretariat, namely Mr Alfred LEE and Mr Tommy LEE. IC was prepared to forward the relevant parts of evidence in this Report to Hon HUI Chi-fung for comment. However, as Mr HUI indicated that he would not sign the confidentiality undertaking, IC has decided that the relevant parts of evidence would not be forwarded to Mr HUI for comment. For details, please see footnote 66 in Chapter 3 of this Report.

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Report

1.27 Under RoP 73A(12), IC shall, as soon as it has completed investigation of the matter referred to it, report to the Council thereon and IC shall be dissolved accordingly. IC has completed its investigation and submits this Report to the Council.

1.28 This Report comprises four chapters. This Chapter provides an introduction to the background of the censure motion and sets out important matters relating to the work of IC. Chapter 2 highlights the constitutional and statutory requirements for oath-taking by Members as well as the use and protection of the national flag and regional flag, which are relevant to IC's investigation. Chapter 3 sets out the information and evidence relevant to the particulars of Dr CHENG's misbehaviour stated in the Schedule to the censure motion. Chapter 4 reports on IC's consideration as to whether the facts as stated in the censure motion can be established and, if yes, gives IC's views on whether or not the facts as established constitute grounds for the censure of Dr CHENG.

1.29 In addition to the above Chapters, this Report has incorporated a number of documents in its appendices, including witnesses' written statements, the minutes of evidence in the form of verbatim transcripts in the original language used at IC's hearings, other relevant documents and the minutes of IC's meetings which record the proceedings on the consideration of this Report (**Appendix 1.19**). The whole Report will be accessible on the LegCo website at www.legco.gov.hk after it has been tabled in LegCo.