

## **Chapter 4      Establishing the facts and whether the facts as established constitute grounds for the censure of Dr Hon CHENG Chung-tai**

4.1            In this Chapter, based on the information and evidence set out in previous Chapters and in accordance with RoP 73A(2), IC will consider whether the “facts” stated in the Schedule to the censure motion can be established, and give its views on whether or not the facts as established constitute grounds for the censure of Dr CHENG.

### **Facts to be established**

4.2            Under RoP 73A(2), IC shall be responsible for establishing the facts stated in the censure motion, and giving its views on whether or not the facts as established constitute grounds for the censure. Accordingly, the scope of IC’s investigation is confined to the particulars of Dr CHENG’s alleged misbehaviour as set out in the Schedule to the censure motion. Based on those particulars, IC has identified the following five facts to be established:

- (a)            whether the mock-ups of the national flag and regional flag placed on the desks of some Members<sup>73</sup> at the Council meeting of 19 October 2016 (“the said Council meeting”) are taken to be the national flag and regional flag for the purposes of NFO and RFO;
- (b)            whether the purpose and manner of placing the mock-ups by the Members concerned at the said Council meeting were to highlight the solemnity and pledge of taking oath to uphold BL and swear allegiance to HKSAR of PRC;
- (c)            whether Dr CHENG’s repeated acts of inverting those mock-ups placed on the desks of the Members concerned at the said Council meeting were deliberate acts;

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<sup>73</sup> IC notes that the wording of the censure motion only mentions that DAB Members placed the mock-ups of the national flag and regional flag at the said Council meeting, and the mock-ups were inverted by Dr CHENG. However, as mentioned in Chapter 3 of this Report, some other Members also displayed the mock-ups at that time and those mock-ups were also inverted by Dr CHENG.

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- (d) whether Dr CHENG, when ordered by the President to withdraw from the Council for leaving his seat at will and disturbing other Members displaying objects, and committing grossly disorderly conduct, persistently refused to leave the Chamber at the said Council meeting; and
- (e) whether Dr CHENG openly and deliberately humiliated the national flag and regional flag in the capacity of a LegCo Member at the said Council meeting.

**First fact to be established - Whether the mock-ups of the national flag and regional flag placed on the desks of some Members at the said Council meeting are taken to be the national flag and regional flag for the purposes of NFO and RFO**

4.3 To establish the first fact, IC needs to determine the extent to which the mock-ups closely resemble the national flag and regional flag prescribed by NFO and RFO in that they would be taken to be the national flag or regional flag under section 8 of the two Ordinances.

4.4 As pointed out in paragraphs 2.12 and 2.15, Schedule 1 to NFO and to RFO set out respectively the specifications for the national flag and regional flag, including their shape, colour, designs and standard sizes. Despite the specifications, sections 8 of NFO and of RFO provide that a copy of the national flag or regional flag that is not an exact copy but that so closely resembles the national flag or regional flag as to lead to the belief that the copy in question is the national flag or regional flag would be taken to be the national flag or regional flag. However, the terms “copy” and “closely resemble” are not defined in NFO or RFO.

4.5 IC notes that the mock-ups, which look like desk flags, did not fully conform to the respective specifications for the national flag and regional flag under Schedule 1 to NFO and to RFO. For instance, they were of non-standard size, and the mock-ups of the national flag, when displayed with those of the regional flag on Members’ desks at the said Council meeting, were not in a position of prominence. Nevertheless, IC notes that the mock-ups of those flags are in red and rectangular in shape.

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The upper left of the face of the mock-up of the national flag is studded with five yellow five-pointed stars, while at the centre of the mock-up of the regional flag is a white five-petal bauhinia in swaying motion.

4.6 IC considers that objectively viewed, the mock-ups closely resemble the national flag and regional flag in terms of colour, design and appearance, and such close resemblance has led to the belief that they are taken as the national flag and regional flag. Such close resemblance was not questioned by witnesses at IC's hearings, and not challenged by the Defence in the case of *HKSAR v CHENG Chung-tai*. IC also notes that the Magistrate Court came to the view that the flags in question bore a close resemblance to the national flag and regional flag as to lead to the belief that they were the national flag and regional flag for the purposes of NFO and RFO.<sup>74</sup>

4.7 Based on the above findings, IC is of the view that the first fact has been established: the mock-ups of the national flag and regional flag placed on the desks of some Members at the said Council meeting were taken to be the national flag and regional flag. Accordingly, the mock-ups inverted by Dr CHENG at that meeting were taken to be the national flag and regional flag (as the first fact has been established, the mock-ups will be referred to as the national flags and regional flags in the ensuing paragraphs).

**Second fact to be established - Whether the purpose and manner of placing the national flags and regional flags by the Members concerned at the said Council meeting were to highlight the solemnity and pledge of taking oath to uphold BL and swear allegiance to HKSAR of PRC**

4.8 To establish the second fact, IC needs to ascertain why the Members concerned placed the national flags and regional flags at the said Council meeting, and whether the manner of such placing served the said purpose.

4.9 IC notes that at the Council meeting of 12 October 2016, the manner of the oath-taking by Mr Sixtus LEUNG and Ms YAU Wai-ching

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<sup>74</sup> Paragraph 2.30 of Chapter 2.

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(namely the display of a banner bearing the words “HONG KONG IS NOT CHINA”, the use of a derogatory term for China as well as the use of expletives) aroused public discontent about their disrespect for China as Hong Kong’s sovereign state. The oaths taken by them, among others, were ruled invalid by the President on the grounds that they could not be serious about their oaths and were unwilling to be bound by them. At their request, the President allowed them to take oath afresh at the Council meeting of 19 October 2016.<sup>75</sup>

4.10 It was against this background that Hon LAU Kwok-fan distributed the national flags and regional flags to some Members seated near to him for display at the said Council meeting where arrangements had been made for Mr LEUNG and Ms YAU, among others, to re-take oath.

4.11 IC notes that Mr LAU’s distribution and display of those flags sought to: (a) express his discontent with the above-mentioned conduct of Mr LEUNG and Ms YAU; (b) highlight the need for Members taking the LegCo Oath to respect BL; and (c) emphasize Hong Kong as part of China.<sup>76</sup> According to Mr LAU, he had not communicated with other Members about his idea above or how those flags should be displayed until he distributed them to some Members shortly before the said Council meeting.<sup>77</sup> IC also notes that Dr CHIANG understood why those flags should be displayed, although she, when given those flags by Mr LAU, did not clearly hear what Mr LAU said to her.<sup>78</sup> As only two Members, Mr LAU and Dr CHIANG, agreed to be witnesses and attend IC’s hearing, IC is unable to ascertain the purpose of the other Members displaying those flags.

4.12 Nevertheless, given the background against which Mr LAU distributed those flags and in particular the grave concern of some Members and the public about the oath-taking by Mr LEUNG and Ms YAU, IC considers it reasonable to conclude that the Members displaying those flags shared the same concern, i.e. the solemnity of oath-taking by Members. Further, the oath under BL 104 is to swear to uphold BL and swear allegiance to HKSAR of PRC, which includes, among others, recognizing HKSAR as an inalienable part of PRC. These are pledges of utmost constitutional importance in which the solemnity of

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<sup>75</sup> Paragraphs 3.6 and 3.9 of Chapter 3.

<sup>76</sup> Paragraphs 3.9 and 3.10 of Chapter 3.

<sup>77</sup> Paragraph 3.11 of Chapter 3.

<sup>78</sup> Paragraph 3.12 of Chapter 3.

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oath-taking lies. In IC's view, such solemnity and pledges were clearly manifested by the display of those flags by those Members.

4.13 Based on the above findings, IC is of the view that the second fact has been established: the purpose and manner of placing the national flags and regional flags by the Members concerned at the said Council meeting were to highlight the solemnity and pledge of taking oath to uphold BL and swear allegiance to HKSAR of PRC.

**Third fact to be established - Whether Dr CHENG's repeated acts of inverting the national flags and regional flags placed on the desks of the Members concerned at the said Council meeting were deliberate acts**

4.14 To establish the third fact, IC needs to ascertain that Dr CHENG's repeated acts of inverting the national flags and regional flags at the said Council meeting were deliberate. According to the New Shorter Oxford English Dictionary (Thumb Index Edition), "deliberate" means, among others, "intentional", "purposeful" and "not rash or hasty". The Contemporary Chinese Dictionary (Xiandai Hanyu Cidian) (現代漢語詞典) also says that "故意" means "有意識地(那樣做)" (intentionally (to do that)).

4.15 As set out in paragraphs 3.14 to 3.24, Dr CHENG inverted those flags twice when the Members displaying them were not present in the Chamber. In the first round, he inverted a total of 21 flags (11 national flags and 10 regional flags) displayed by 11 Members (including Mr LAU who distributed those flags).<sup>79</sup> Some of those flags were inverted by Dr CHENG when Mr Alfred LEE, steward of the LegCo Secretariat, stood beside him or when he was being scolded by Dr CHIANG. His first round of inverting those flags lasted about one and a half minute, according to the video footage of the said Council meeting.

4.16 IC notes from the video footage of the said Council meeting that about three minutes later, despite Dr CHIANG's scolding and her

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<sup>79</sup> In addition to Mr LAU, those Members included Hon CHAN Han-pan, Hon Wilson OR, Dr Hon Elizabeth QUAT, Hon LEUNG Che-cheung, Hon Holden CHOW, Hon WONG Ting-kwong, Hon Steven HO, Hon Starry LEE, Hon Jeffrey LAM and Hon Christopher CHEUNG.

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effort to put the inverted national flags and regional flags back to their original positions, Dr CHENG again inverted a total of 16 flags (eight national flags and eight regional flags) displayed by eight Members<sup>80</sup> after Dr CHIANG had left the Chamber. He continued to do so in defiance of the President's requests and order.<sup>81</sup> His second round of inverting the flags lasted about one minute.

4.17 IC considers that objectively viewed, given Dr CHENG's repeated acts of inverting the national flags and regional flags, his ignorance of Dr CHIANG's rebukes concerning his acts of inverting those flags and his disregard for the President's requests and order, any reasonable person would not take his acts as merely a prank or an accidental or unintentional act. IC further considers that if Dr CHENG had merely committed the acts unintentionally, he would have stopped doing so immediately after being reminded or warned by Dr CHIANG and the President at the said Council meeting. However, he did not stop at that time. As such, IC is satisfied that Dr CHENG was well aware of his acts of inverting those flags, and did so deliberately at the material time.

4.18 Based on the above findings, IC is of the view that the third fact has been established: Dr CHENG's repeated acts of inverting the national flags and regional flags placed on the desks of the Members concerned at the said Council meeting were deliberate acts.

**Fourth fact to be established - Whether Dr CHENG, when ordered by the President to withdraw from the Council for leaving his seat at will and disturbing other Members displaying objects, and committing grossly disorderly conduct, persistently refused to leave the Chamber at the said Council meeting**

4.19 As described in paragraphs 3.22 to 3.25, when Dr CHENG went to the vacant seats of other Members to invert the national flags and regional flags for the second time, the President did request him to return to his seat three times but he disregarded such requests and continued to invert those flags. The President finally ruled Dr CHENG's disregard for

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<sup>80</sup> Those Members were Dr Hon Elizabeth QUAT, Hon LEUNG Che-cheung, Hon Holden CHOW, Hon WONG Ting-kwong, Hon Steven HO, Hon Wilson OR, Hon CHAN Han-pan and Hon LAU Kwok-fan.

<sup>81</sup> Paragraph 3.23 of Chapter 3.

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his requests as a grossly disorderly conduct and ordered him to withdraw from the Council. Nevertheless, Dr CHENG defied the President's withdrawal order, and returned to his seat instead of leaving the Chamber. While the President directed the Secretariat staff to enforce his withdrawal order, Dr CHENG continued to refuse to withdraw from the Council. Dr CHENG stayed in his seat shouting loudly at the President until the adjournment of the said Council meeting.

4.20 IC notes that the above requests or order made by the President concerned Dr CHENG's conduct of leaving his seat at will and going to the seats of other Members to cause a disturbance and his non-compliance with the President's order.<sup>82</sup>

4.21 Based on the above findings, IC is of the view that the fourth fact has been established: Dr CHENG, when ordered by the President to withdraw from the Council for leaving his seat at will and going to the seats of other Members to cause a disturbance, persistently refused to leave the Chamber at the said Council meeting.

**Fifth fact to be established - Whether Dr CHENG openly and deliberately humiliated the national flag and regional flag in the capacity of a LegCo Member at the said Council meeting**

4.22 On top of the above established facts, the remaining question for IC to consider, in establishing the fifth fact, is whether such acts amount to humiliation of the national flag and regional flag openly and deliberately.

4.23 According to the Oxford Dictionary Thesaurus, "humiliation" means, among others, "disgrace", "dishonour" and "degradation". The Oxford Advanced Learner's English-Chinese Dictionary says that the meaning of "humiliate" includes "使(某人)感到羞耻或不光彩; 使丧失尊严或自尊" (make (sb) feel ashamed or disgraced; lower the dignity or self-respect of). The Contemporary Chinese Dictionary (Xiandai Hanyu Cidian) (现代汉语词典) says that "羞辱" means, among others, "耻辱" (shame) or "使受耻辱" (put to shame). In Chinese-English or English-Chinese Dictionaries, both "羞辱" and

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<sup>82</sup> Paragraph 3.25 of Chapter 3.

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“侮辱” can mean “humiliate”.<sup>83</sup> IC notes that the word “humiliation” is not used in the English version of NFO and of RFO where the word “desecration” is used. However, the Chinese expression of “humiliation” (羞辱 or 侮辱) is similar or identical to that of “desecration”, and “侮辱” is used in the Chinese version of the two Ordinances. As such, “humiliation” of the national flag and regional flag may be construed with reference to the meaning of “desecration” of those flags under the two Ordinances.

4.24 Section 7 of NFO and of RFO set out five forms of desecration of those flags, which include “defiling” (玷污). In its judgment on the case of *HKSAR v NG Kung Siu & LEE Kin Yun*, CFA held that the ordinary meaning of “defiling” plainly included “dishonouring” (玷辱).<sup>84</sup> In the case of *HKSAR v CHENG Chung-tai*, the Magistrate Court ruled that “defiling” encompassed “dishonouring”, and acts of physical dishonour of flags were not limited to soiling or damaging materials. It further ruled that Dr CHENG’s acts of inverting those flags were desecration of those flags by defiling them.<sup>85</sup>

4.25 Based on what paragraphs 4.23 and 4.24 set out, the meaning of “humiliation” clearly encompasses “dishonouring”, humiliation of the national flag and regional flag as an act of physical dishonour of those flags should not be limited to soiling or inflicting physical damage on them but should include bringing disgrace to them or inflicting damage on their dignity.

4.26 As pointed out by the Magistrate Court in *HKSAR v CHENG Chung-tai*, as long as the pole of each flag was placed by Members in a glass holder, the design of the flag could be displayed in accordance with the specifications set out in Schedule 1 to NFO and to RFO, i.e. the design of five stars was displayed on the upper left of the national flag, and the bauhinia design was displayed on the front of the regional flag.<sup>86</sup> IC considers that objectively viewed, when Dr CHENG inverted those flags resulting in them being stuffed inside the glass holders

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<sup>83</sup> For example, The Concise English-Chinese Dictionary (1995 Edition published by The Commercial Press) says that “humiliate” includes the meaning of “羞辱”, while The Pinyin Chinese-English Dictionary (1995 Edition published by The Commercial Press) says that “侮辱” means, among others, “humiliate”.

<sup>84</sup> Paragraph 2.22 of Chapter 2.

<sup>85</sup> Paragraphs 2.28 to 2.32 of Chapter 2.

<sup>86</sup> From line T on page 3 to line A on page 4 of the transcript of the Reasons for Verdict and Sentence in respect of the case of *HKSAR v CHENG Chung-tai* (ESCC 1139/2017) (Appendix 1.4), and paragraph 2.29 of Chapter 2.



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and their poles stretching out of such holders, any reasonable person should understand that he did not want to see those flags (including the five-star design and the bauhinia design) to be displayed or he attempted to degrade the display of those flags. IC further considers that the way he inverted those flags, which are the unique symbols of PRC and its HKSAR, did tarnish the dignity of those flags or smear the reputation of PRC and its HKSAR.

4.27 In IC's view, Dr CHENG's humiliation of those flags was further manifested by the facts that: (a) he inverted those flags not only once but twice, with the first round involving 11 Members and 21 flags and the second round eight Members and 16 flags;<sup>87</sup> and (b) he did so deliberately amid the concern of some Members and the public about the solemnity and validity of the oath-taking by certain Members.

4.28 In addition, IC notes that the said Council meeting at which Dr CHENG inverted those flags was an open meeting, which was observed by members of the public in the public gallery of LegCo, broadcast live on both television and the LegCo website, and widely reported by the media. In IC's view, at the material time, Dr CHENG was certainly aware that what he did in the capacity of a LegCo Member at the meeting was widely seen by the public and the relevant proceedings would become permanent records in LegCo.

4.29 Based on the above findings, IC is of the view that the fifth fact has been established: Dr CHENG openly and deliberately humiliated the national flags and regional flags in the capacity of a LegCo Member at the said Council meeting.

**Whether the facts as established constitute grounds for the censure of Dr CHENG**

4.30 Based on the facts established above and in accordance with RoP 73A(2), IC needs to give its views on whether or not the facts as established constitute grounds for the censure of Dr CHENG. In doing so, IC needs to consider whether the following two allegations made in the censure motion are substantiated:

- (a) Dr CHENG's relevant conduct was in breach of the LegCo Oath taken by him at the Council meeting of

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<sup>87</sup> Paragraphs 3.15 and 3.23 of Chapter 3.

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12 October 2016 under BL 104 and the Oaths and Declarations Ordinance to uphold BL and swear allegiance to HKSAR of PRC; and

- (b) the aforesaid conduct constitutes “misbehaviour” under BL 79(7) as Dr CHENG openly and deliberately humiliated the national flags and regional flags in the capacity of a LegCo Member.

“Breach of oath” and “misbehaviour” under BL 79(7)

4.31 BL 79(7) provides that the President shall declare that a member of LegCo is no longer qualified for the office when he or she is censured for breach of oath or misbehaviour by a vote of two-thirds of the members of LegCo present.

4.32 IC notes that neither “breach of oath” nor “misbehaviour” under BL 79(7) is defined in BL, the relevant legislation or RoP. IC considers that the disqualification on account of “breach of oath” or “misbehaviour” under this Article should be distinguished from the disqualification under BL 79(6)<sup>88</sup> in that these two terms should not include the criminal offence under BL 79(6) committed by a Member. Meanwhile, the term “misbehaviour” under BL 79(7) should also be distinguished from the misconduct under RoP 81(2), 85 and 45(2).<sup>89</sup>

4.33 As explained in paragraph 2.8, the issue of what behaviours should be regarded as falling within the meaning of “breach of oath” and/or “misbehaviour” under BL 79(7) was considered by CRoP in 1999 and the first investigation committee. CRoP’s view then was that it would be more appropriate for the Council of the day to make a decision on the kinds of behaviour which would be regarded as “breach of oath” or “misbehaviour”. The first investigation committee considered that it was by no means easy to formulate clear and explicit criteria for defining “misbehaviour”.

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<sup>88</sup> In accordance with BL 79(6), when a member of LegCo is convicted and sentenced to imprisonment for one month or more for a criminal offence and is relieved of his or her duties by a motion passed by two-thirds of the members of LegCo present, he or she is no longer qualified for the office.

<sup>89</sup> The misconduct under RoP 81(2), 85 and 45(2) refers to Members’ premature publication of evidence, improper handling of their interests and grossly disorderly conduct committed at Council or committee meetings; and such improper handling of interests includes failure to comply with RoP 83 (Registration of Interests), 83A (Personal Pecuniary Interests to be Disclosed), 83AA (Claims for Reimbursement of Operating Expenses or Applications for Advance of Operating Funds) or 84(1) or (1A) (Voting or Withdrawal in case of Direct Pecuniary Interest).

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Relevant considerations

4.34 In considering whether the two allegations in the censure motion are substantiated, IC needs to form its view on what constitutes “breach of oath” and/or “misbehaviour” under BL 79(7). IC considers it necessary for Members to act properly to set a good example to the public, and to ensure that their standard of conduct be commensurate with the importance of their constitutional role as Members of LegCo.

4.35 IC has made reference to the Reasons for Verdict and Sentence handed down by the Magistrate Court, and understands that the court had applied the standard of proof in criminal proceedings (i.e. “proof beyond reasonable doubt”) in convicting Dr CHENG on two counts of desecrating the national flag and regional flag by publicly and wilfully defiling them at the said Council meeting, contrary to section 7 of NFO and of RFO. However, IC is not a court and is established under RoP. According to RoP 73A(2), IC shall be responsible for establishing the facts stated in the censure motion, and giving its views on whether or not the facts as established constitute grounds for the censure of Dr CHENG. As such, in determining whether the conduct of Dr CHENG constitutes “breach of oath” and/or “misbehaviour”, IC cannot merely rely on the court judgment relating to NFO and RFO.

4.36 IC also understands that the mechanism under BL 79(7) entails potentially the most serious consequence to a Member in that the Member will be disqualified from the office if he or she is censured by a vote of two-thirds of the Members present. BL 79(7) does not provide for any lesser penalty if the seriousness of the Member’s misbehaviour is not considered by LegCo as reaching the level as to warrant disqualification. In IC’s view, this “all or nothing” dichotomy is not the most desirable way of handling Members’ misbehaviour of varying degrees of severity (which is a subject worthwhile to be examined by CRoP). However, it is precisely because of the “all or nothing” outcome that IC has to exercise great prudence in forming its views on whether Dr CHENG’s conduct constitutes “breach of oath” and/or “misbehaviour” under BL 79(7).

4.37 Having regard to the serious consequence of the two allegations in the censure motion, IC has adopted the following standard of proof: the more serious the allegation, the more compelling the evidence is required to establish the allegation.<sup>90</sup> In considering whether

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<sup>90</sup> Paragraph 1.14 of Chapter 1, i.e. 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.

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the allegations are substantiated, IC has taken into account the established facts, the relevant constitutional and statutory requirements, and the degree of severity of Dr CHENG's conduct.

Whether Dr CHENG's conduct was in breach of the LegCo Oath

4.38 On the first allegation in the censure motion, the key question for IC's consideration is whether Dr CHENG's conduct as particularized in the Schedule to the censure motion was in breach of the LegCo Oath taken by him at the Council meeting of 12 October 2016.

4.39 IC notes that according to the Interpretation on BL 104,<sup>91</sup> the oath taken under BL 104 is a legal pledge made by the specified public officers to PRC and HKSAR. The oath taker must sincerely believe in and strictly abide by the relevant oath prescribed by law. 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.<sup>92</sup> As such, in considering whether Dr CHENG's conduct constitutes a breach of oath, IC may consider whether his conduct was consistent with his pledges made under the LegCo Oath to PRC and HKSAR.

4.40 At the Council meeting of 12 October 2016, Dr CHENG took the LegCo Oath by which he pledged to: (a) uphold BL; and (b) bear allegiance to HKSAR of PRC.<sup>93</sup>

4.41 IC notes CFA's observations that the national flag represents PRC with her dignity, unity and territorial integrity, while the regional flag is the symbol of HKSAR as an inalienable part of PRC under the principle of "one country, two systems".<sup>94</sup> IC considers that the symbolic meanings represented by those flags are fundamental to the enactment of BL and the relationship between the Central Authorities and HKSAR under "one country, two systems". Such meanings are clearly reflected in BL and in the pledges enshrined in the LegCo Oath taken by Dr CHENG.

4.42 In IC's view, Dr CHENG's repeated, open and deliberate humiliation of those flags, despite repeated warnings by Dr CHIANG and the President, would lead a reasonable person to come to the view that Dr CHENG was not willing or at least had no intention to recognize or

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<sup>91</sup> Paragraph 2.3 of Chapter 2.

<sup>92</sup> Paragraph 2.3 of Chapter 2.

<sup>93</sup> Paragraph 3.3 of Chapter 3.

<sup>94</sup> Paragraph 2.21 of Chapter 2.

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respect the meanings represented by those flags. IC considers that Dr CHENG's humiliation of those flags indicated that he did not manifest an intention to genuinely and faithfully accept and commit himself to honour the pledges of upholding BL and bearing allegiance to HKSAR of PRC.

4.43 Given Dr CHENG's failure to meet the above two pledges, IC is of the view that Dr CHENG did not and could not sincerely believe in and strictly abide by the LegCo Oath. As such, IC considers that the first allegation in the censure motion is substantiated, i.e. Dr CHENG's conduct was in breach of the LegCo Oath taken by him at the Council meeting of 12 October 2016.

Whether Dr CHENG's conduct constitutes "misbehaviour" under BL 79(7)

4.44 In the absence of the definition of "misbehaviour" under BL 79(7), IC, when determining whether the second allegation in the censure motion is established, needs to form its views on whether Dr CHENG's humiliation of the national flag and regional flag in the capacity of a LegCo Member amounts to "misbehaviour" under BL 79(7).

4.45 In this connection, IC considers it very useful to make reference to the "Advisory Guidelines on Matters of Ethics in relation to the Conduct of Members of the Legislative Council of the Hong Kong Special Administrative Region in their capacity as such" ("Advisory Guidelines")<sup>95</sup>, which have been issued to all Members at the beginning of each term since 2009. The Guidelines clearly state that "a Member should ensure that his conduct must not be such as to bring discredit upon the Council", and "should conduct himself in such a way as not to place himself in a position which may be contrary to the generally assumed standard of conduct expected of a Member of the Council".<sup>96</sup> In addition, IC notes the view of the first investigation committee that the censure mechanism under BL 79(7) should be applicable to a Member's conduct seriously affecting the reputation of LegCo as a whole.<sup>97</sup>

4.46 On the above basis, IC considers that bringing serious discredit upon LegCo and acting contrary to the generally assumed standard of

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<sup>95</sup> The Advisory Guidelines are issued by the Committee on Members' Interests under RoP 73(1)(d) to all Members (and published on the LegCo website). The Guidelines concern how Members should handle their interests and the standard of behaviour expected of Members.

<sup>96</sup> Paragraphs 1 and 2 of the Advisory Guidelines (**Appendix 4.1**).

<sup>97</sup> Paragraph 2.8 of Chapter 2.

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conduct expected of a LegCo Member should be the key elements constituting a Member's "misbehaviour" under BL 79(7). In considering whether Dr CHENG's acts of inverting the national flags and regional flags entail the above key elements, IC notes that:

- (a) Dr CHENG inverted those flags not only once but twice, with the first round involving 21 flags displayed by 11 Members and the second round 16 flags displayed by eight Members;
- (b) he did so at an open meeting broadcast live on television and online amid the concern of some Members and the public about the solemnity and validity of the oath-taking by certain Members;
- (c) he continued to do so despite repeated advices and warnings by Dr CHIANG and the President;
- (d) up to the publication of this Report, he has not made a public apology for his conduct; and
- (e) he was convicted by the Magistrate Court on two counts of desecrating the national flag and regional flag by publicly and wilfully defiling them at the said Council meeting, contrary to section 7 of NFO and of RFO, and was fined \$5,000 in total for the two charges.

4.47 IC considers that when compared to the offence of desecrating the national flag and regional flag by publicly and wilfully burning them<sup>98</sup>, Dr CHENG's act of defiling by inverting those flags was less serious in nature and the sentence imposed by the Magistrate Court against him was relatively lenient. Nevertheless, in view of the manner and circumstances in which he humiliated those flags, the message conveyed to the public by his conduct in his capacity as a LegCo Member as well as his criminal conviction for desecration of those flags, IC considers that such humiliation has undoubtedly indicated that he was disrespectful to PRC and its HKSAR and has thereby brought serious discredit on LegCo, contrary to the generally assumed standard of conduct expected of a LegCo Member.

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<sup>98</sup> "Summary of facts and sentences of certain judicial decisions concerning desecrating the national flag and regional flag" prepared by the LegCo Secretariat (Appendix 2.2).

**Report of the Legislative Council Investigation Committee established under  
Rule 49B(2A) of the Rules of Procedure in respect of the motion  
to censure Dr Hon CHENG Chung-tai**

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Dr CHENG's conduct of humiliating those flags was serious enough to amount to "misbehaviour" under BL 79(7). IC therefore finds the second allegation in the censure motion substantiated.

Whether the facts as established constitute grounds for the censure

4.48 By virtue of BL 79(7), a Member may be censured for either misbehaviour or breach of oath. IC has found that both allegations in the censure motion are substantiated, i.e. Dr CHENG's conduct constitutes both "breach of oath" and "misbehavior" under BL 79(7). In IC's view, Dr CHENG's conduct has not only brought serious discredit on LegCo but also tarnished the dignity of PRC and its HKSAR. He conducted himself in such a way as to place himself in a position which is contrary to the generally assumed standard of conduct expected of a LegCo Member. IC condemns Dr CHENG's conduct, and comes to the unanimous view that the facts as established constitute grounds for the censure of Dr CHENG.