

## **Chapter 4                    Establishing the facts and giving IC's views on whether the facts as established constitute grounds for the censure of Hon Holden CHOW Ho-ding**

4.1        IC is tasked with the responsibility under RoP 73A(2) to establish the facts stated in the motion, and give its views on whether or not the facts as established constitute grounds for the censure. In discharging the above responsibility, IC has, based on the particulars of Mr CHOW's alleged misbehaviour and breach of oath as detailed in the Schedule to the censure motion (paragraph 1.1 refers), identified four facts to be established, and considered whether each of the alleged facts can be established having regard to the relevant evidence and information set out in Chapters 2 and 3 and by applying the standard of proof adopted by IC as discussed in Chapter 1. IC has also, based on the fact(s) so established, given its views on whether or not the established fact(s) constitute(s) grounds for the censure of Mr CHOW.

### **The four facts to be established**

4.2        The four facts IC has identified to be established are:

- (a) **First Fact to be established** – whether Mr CHOW had discussed with Mr LEUNG the Proposed major areas of study of the Select Committee, and accepted Mr LEUNG's request to amend the major areas of study, and as a result submitted the Proposed Amendments to the Select Committee for discussion at its meeting on 25 April 2017; if so, whether the above alleged behaviour of Mr CHOW constitutes a failure on his part to fulfil the obligation of a member of the Select Committee, and whether the incident involves role conflicts and/or even conflicts of interests, and/or has led to suspicion of transfers of benefits (paragraph (1) of the Schedule to the censure motion under paragraph 1.1 of this Report);
  
- (b) **Second Fact to be established** – whether the Proposed Amendments would, if adopted by the Select Committee, obstruct and pervert the course of the inquiry proceedings of the Select Committee and create results advantageous to Mr LEUNG; if so, whether Mr CHOW has conspired with and assisted Mr LEUNG to improperly involve in and interfere with the investigation, obstruct the Select

Committee in the proper discharge of its duty, violated procedural justice, and damaged the independence, impartiality and legitimacy of the investigation of the Select Committee (paragraph (1) of the Schedule to the censure motion under paragraph 1.1 of this Report);

- (c) **Third Fact to be established** – whether the Proposed Amendments were made by or on behalf of Mr LEUNG or his office; whether Mr CHOW intentionally and repeatedly made false representations in relation to the origin of the Proposed Amendments at the meeting of the Select Committee on 25 April 2017 in order to mislead the Select Committee and the public into believing that the Proposed Amendments were genuinely raised by Mr CHOW himself; whether Mr CHOW refused to admit the truth until it was revealed; and whether the above alleged behaviours of Mr CHOW fail to meet the level of credibility, integrity and dutifulness of a LegCo Member (paragraph (3) of the Schedule to the censure motion under paragraph 1.1 of this Report); and
- (d) **Fourth Fact to be established** – whether the alleged behaviours of Mr CHOW as set out in paragraphs 4.2(a), (b) and (c) have damaged the dignity, autonomy and independence of LegCo, and whether any such damage amounts to contempt of the functions and powers of LegCo, has brought shame on LegCo and seriously undermined the public's confidence in LegCo and LegCo Members (paragraph (2) of the Schedule to the censure motion under paragraph 1.1 of this Report).

### **First Fact to be established**

#### IC to consider

- whether Mr CHOW had discussed with Mr LEUNG the Proposed major areas of study of the Select Committee; accepted Mr LEUNG's request to amend the major areas of study; and as a result submitted the Proposed Amendments to the Select Committee for discussion at its meeting on 25 April 2017; and
- if so, whether the above alleged behaviour of Mr CHOW constitutes a failure on his part to fulfil the obligation of a member of the Select

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Committee; and whether the incident involves role conflicts and/or even conflicts of interests, and/or has led to suspicion of transfers of benefits.

4.3 In considering the First Fact, IC finds it necessary to comprehend the circumstances in which the Proposed Amendments were submitted by Mr CHOW to the Select Committee for discussion at the meeting on 25 April 2017, including the information relating to Mr CHOW's discussion with Mr LEUNG on the Proposed Amendments and the submission of them to the Select Committee for discussion. As Mr CHOW<sup>122</sup> and Mr LEUNG<sup>123</sup> have chosen not to provide written statements nor to attend any closed hearing of IC to give evidence to assist IC's investigation, IC has referred to the remarks made by Mr CHOW and Mr LEUNG in relation to the incident at their respective meetings with the media on 15, 16, 17 and 19 May 2017.<sup>124</sup>

4.4 As set out in paragraphs 3.8(b) to (d) and 3.12(a), according to Mr CHOW's and Mr LEUNG's remarks made at their respective meetings with the media on 16 May 2017 that prior to the Select Committee's meeting on 25 April 2017, Mr LEUNG contacted Mr CHOW and gave views on the document prepared by the LegCo Secretariat on the Proposed major areas of study of the Select Committee, which had been uploaded onto the LegCo website for public access; during the discussion, while accepting Mr LEUNG's views on the parts of the document to be amended, Mr CHOW also expressed his own views on the Proposed areas of the study; Mr LEUNG then consolidated his views and the views of Mr CHOW into amendments to the Proposed major areas of study and then passed the document with such amendments in electronic form to Mr CHOW; Mr CHOW considered the amendments appropriate and submitted the document, i.e. the Proposed Amendments, to the Select Committee for discussion at its meeting on 25 April 2017.

4.5 In IC's view, the relevant remarks of Mr CHOW and Mr LEUNG referred to in paragraph 4.4 above are consistent with the First Fact particularized above, i.e. Mr CHOW had discussed with Mr LEUNG the Proposed major areas of study of the Select Committee; accepted Mr LEUNG's request to amend the major areas of study; and as a result submitted the Proposed Amendments to the Select Committee for discussion at its meeting on 25 April 2017.

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<sup>122</sup> See paragraphs 1.23 and 1.24 of this Report.

<sup>123</sup> See paragraph 1.15 of this Report.

<sup>124</sup> See Appendices 1.10 to 1.12 and 1.19 to 1.20 to this Report.

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4.6 With regard to the allegation that the above behaviour of Mr CHOW constitutes a failure to fulfil the obligation of a member of the Select Committee, and that the incident involves role conflicts and/or conflicts of interests, and/or has led to the suspicion of transfers of benefits, IC notes that the witnesses concerned<sup>125</sup> consider that being the Deputy Chairman of the Select Committee, Mr CHOW should act independently in that capacity, and therefore should have refrained from discussing with Mr LEUNG the work of the Select Committee and definitely should not have assisted Mr LEUNG in intervening in the Select Committee's investigation by submitting the Proposed Amendments, being amendments raised by Mr LEUNG, to the Select Committee. In their view, Mr CHOW has been in breach of his responsibility as a member of the Select Committee to act independently.<sup>126</sup>

4.7 The witnesses concerned<sup>127</sup> also consider that the incident involves serious role conflicts and conflicts of interests, with Mr LEUNG being the subject of inquiry attempting to secretly impact the deliberation of the Select Committee on its major areas of study through the assistance of Mr CHOW, and Mr CHOW being the Deputy Chairman of the Select Committee neglecting to act independently and to truthfully represent the origin of the Proposed Amendments during the Select Committee's discussion at its meeting on 25 April 2017.<sup>128</sup>

4.8 IC notes that at the media session on 16 May 2017, Mr CHOW stressed repeatedly that he did not hide anything and his way of handling the Proposed Amendments complied with all regulations and laws. He added that no conflict of interest of any kind was involved and there was no question about him receiving any benefits. He said that the Proposed major areas of study of the Select Committee had always been an open document for the public to view and make comment on. Yet, Mr CHOW admitted that he should have reminded Mr LEUNG that perhaps it would be more appropriate for Mr LEUNG himself to channel his views to the Select Committee. On this, Mr CHOW admitted that he had not been attentive to the matter in question enough.<sup>129</sup>

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<sup>125</sup> The witnesses referred to are Hon Kenneth LEUNG and Hon LAM Cheuk-ting.

<sup>126</sup> See paragraphs 3.17 and 3.18 of this Report.

<sup>127</sup> The witnesses referred to are Hon Andrew WAN Siu-kin and Hon LAM Cheuk-ting.

<sup>128</sup> See paragraphs 3.19 to 3.23 of this Report.

<sup>129</sup> See paragraph 3.8 of this Report.

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4.9 As detailed in paragraph 2.13, IC notes that RoP do not contain any provisions governing Members' communications with witnesses, nor does the Select Committee's practice and procedure set out any specific prohibition against communications between members and witnesses outside the proceedings of the Select Committee.

4.10 IC considers that although there are no specific rules and regulations prohibiting private communications between members of the Select Committee and witnesses, members of the Select Committee are still required to comply with the Advisory Guidelines<sup>130</sup> which include the requirements that a Member "should ensure that his conduct must not be such as to bring discredit upon the Legislative Council", and that a Member "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".

4.11 In this connection, IC is aware that the Standing Orders of the selected Houses of Parliament also do not prescribe any protocol governing Members' communications with witnesses. However, their Members may well be bound by other rules. For example, in the case of the UK House of Commons, under the requirements of its Code of Conduct, Members should always behave with probity and integrity, should always act in the public interest, and should be open about their decisions and actions. Such requirements might preclude any unacknowledged collusion between a committee member and a witness being inquired.<sup>131</sup>

4.12 Having regard to these overseas parliamentary practices and the Advisory Guidelines of LegCo, IC considers that it is reasonable to expect a member of the Select Committee to live up to a standard of obligation generally accepted as just and proper by members of the society as a whole, which should include, without limitation, avoiding engaging in private communication with witnesses, including the subject of inquiry, involving disclosure of confidential deliberations of the Select Committee. On the other hand, IC acknowledges that the subject of inquiry should be entitled to comment and make suggestions regarding the scope of inquiry to the Select Committee either directly or through its Chairman or Deputy Chairman. In IC's view, it would have been considered as a failure to fulfil the obligation as a member of the Select Committee if the subject matter involved in such private communication

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<sup>130</sup> See Appendix 2.2 and paragraph 2.6 of this Report.

<sup>131</sup> See paragraph 2.14 of this Report.

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had been related to confidential proceedings of the committee, as in the John BOWLER case involving the leakage of a privileged and confidential draft parliamentary committee report to a third party who had a commercial interest in the direct outcome of the inquiry for comments (paragraphs 2.28 and 2.29 refer). Notwithstanding the above considerations, IC notes that the document Mr CHOW and Mr LEUNG so discussed contained no confidential observations or deliberations made by the Select Committee and was openly available on the LegCo website for public viewing. Hence, while IC considers that Mr CHOW, as a member/Deputy Chairman of the Select Committee, should have been more attentive to the public expectation of a member of the Select Committee by referring Mr LEUNG to the Select Committee for making his comment and suggestions directly or informing the Select Committee during its deliberations of the same that some of the Proposed Amendments originated from Mr LEUNG which he had himself adopted, IC does not find the present case of Mr CHOW warranting a finding that he has failed to fulfil the obligation of a member of the Select Committee.

4.13 The dictionary meaning of "conflict of interest" is "a conflict between the private interests and the official responsibilities of a person in a position of trust".<sup>132</sup> In considering whether the incident involves conflicts of interests, i.e. whether the alleged cooperation between Mr CHOW and Mr LEUNG involves a conflict between Mr CHOW's private interests and his official responsibilities, and has led to suspicion of transfers of benefits, IC considers that there is no sufficient evidence to discharge the evidential burden to the required standard of proof adopted by IC, i.e. *the more serious the allegation or criticism, the more compelling the evidence is required to establish the allegation or criticism*, in view of the seriousness of the allegation. In particular, no evidence is available to IC in relation to any tangible or intangible benefits which may have been transferred to and received by Mr CHOW in connection with the incident. Given the above considerations and circumstances, IC does not find that the allegation in question can be sustained.

4.14 As to the allegation that the incident involves role conflicts, IC considers that a conflict of roles would have arisen if Mr CHOW, in presenting the Proposed Amendments as a member of the Select Committee at the meeting of the Select Committee on 25 April 2017, had also acted as the Presiding Member in his capacity as Deputy Chairman,

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<sup>132</sup> "Conflict of interest", *Merriam-Webster.com Dictionary*  
(<https://www.merriam-webster.com/dictionary/conflict%20of%20interest>).

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thereby placing himself in a position that might have compromised his independent performance of duties as the Presiding Member/Deputy Chairman of the Select Committee. The evidence available to IC, however, suggests that Mr CHOW did not in fact act as the Presiding Member at the meeting in question (or any other meetings of the Select Committee). In addition, IC notes that according to Mr CHOW (paragraph 4.4 refers), Mr CHOW submitted the Proposed Amendments to the Select Committee for consideration because his own views had been incorporated into the Proposed Amendments and after perusing the Proposed Amendments he found them appropriate. IC considers that as a member/Deputy Chairman of the Select Committee, Mr CHOW was entitled to have his own views about the matter being inquired into, which could coincidentally align with those of the subject of inquiry. Hence, IC does not find the allegation regarding role conflicts substantiated.

4.15 Based on the above findings and considerations, IC is satisfied that the First Fact is partially established. In other words, IC is able to establish to the requisite standard of proof as a matter of fact that Mr CHOW had discussed with Mr LEUNG the Proposed major areas of study of the Select Committee; accepted Mr LEUNG's request to amend the major areas of study; and submitted the Proposed Amendments to the Select Committee for discussion at its meeting on 25 April 2017. IC however does not find the allegations that the above alleged behaviour of Mr CHOW constitutes a failure on his part to fulfill the obligation of a member of the Select Committee; and that the incident involves role conflicts and/or even conflicts of interests, and/or has led to suspicion of transfers of benefits, under the First Fact substantiated.

## **Second Fact to be established**

### IC to consider

- whether the Proposed Amendments would, if adopted by the Select Committee, obstruct and pervert the course of the inquiry proceedings of the Select Committee and create results advantageous to Mr LEUNG; and
- if so, whether Mr CHOW has conspired with and assisted Mr LEUNG to improperly involve in and interfere with the investigation, obstruct the Select Committee in the proper discharge of its duty, violated procedural justice, and damaged the independence, impartiality and legitimacy of the investigation of the Select Committee.

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4.16 In considering the Second Fact, IC has, as mentioned in paragraphs 3.3 and 3.4, referred to the contents of the Proposed Amendments to facilitate IC's consideration.

4.17 The witnesses concerned<sup>133</sup> (who include members of the Select Committee) consider that the Proposed Amendments, if adopted by the Select Committee, would affect the work of the Select Committee by impacting the course of the inquiry proceedings of the Select Committee. For instance, these witnesses consider that the amendments relating to the authenticity and completeness of the UGL Agreement and the authenticity and reliability of the relevant press release issued by UGL Limited would cause the Select Committee to spend a lot more time to study additional details which could not be dealt with easily, thereby diverting the Select Committee's resources away from the core issues of the inquiry, and consequently prolonging, obstructing and perverting the course of the inquiry proceedings of the Select Committee.<sup>134</sup>

4.18 IC also notes a witness's remark<sup>135</sup> that the Proposed Amendments sought to create results advantageous to Mr LEUNG. Judging from the wording of the Proposed Amendments, the witness considers that the Proposed Amendments were clearly drafted in line with Mr LEUNG's explanation on issues relating to the UGL incident.<sup>136</sup>

4.19 When taking note of the views of the witnesses concerned, IC is mindful that these are only views of individual members of the Select Committee, and do not represent the collective view of the Select Committee.

4.20 At his respective media sessions on 15 to 17 May 2017, Mr LEUNG said that his amendments to the Proposed major areas of study sought to cover those areas which Mr CHOW considered should not be subject to investigation during the discussions at previous meetings of the Select Committee. As agreed by Mr CHOW, Mr LEUNG had consolidated such views in a holistic and comprehensive manner and passed them to Mr CHOW. In Mr LEUNG's remark, the reason why he did not submit his amendments to the Select Committee was that Mr CHOW was the one who spoke actively on the Proposed major areas

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<sup>133</sup> The witnesses referred to are Hon CHU Hoi-dick, Hon Kenneth LEUNG and Hon Alvin YEUNG.

<sup>134</sup> See paragraphs 3.24 to 3.27 of this Report.

<sup>135</sup> Hon LAM Cheuk-ting.

<sup>136</sup> See paragraph 3.28 of this Report.



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of study and the one from whom Mr LEUNG could seek agreement on his views about the Proposed areas of study. By doing so, Mr LEUNG considered that it would facilitate the Select Committee in finalizing its major areas of study and to proceed forward.<sup>137</sup>

4.21 As set out in paragraph 3.43, IC notes that in the statement issued by DoJ on 12 December 2018 in relation to ICAC's investigation into the allegations of corruption and MIPO against Mr LEUNG and Mr CHOW, DoJ stated that regarding the submission of the Proposed Amendments by Mr CHOW which originated from Mr LEUNG, the Proposed Amendments would not affect the proper functioning of the Select Committee, which serves merely as a reference and is not determinative of the issue to be established by IC.

4.22 IC considers that the major areas of study of the Select Committee, once confirmed, would give a clear direction for its inquiry proceedings. In IC's view, an inference could reasonably be drawn in the circumstances of this case that the Proposed Amendments, which were discussed and agreed between Mr CHOW and Mr LEUNG, were intended to lead the Select Committee to conduct studies on the areas they suggested.

4.23 Yet, IC is aware that the Select Committee did not in fact decide to adopt the Proposed Amendments or otherwise at its meeting on 25 April 2017, and when the incident was made public in mid May 2017, the major areas of study of the Select Committee had yet to be confirmed. Given the above circumstances and IC's entrusted responsibility of fact finding, IC considers that it is not in a position to speculate on a hypothetical scenario of whether or not the Proposed Amendments, if adopted by the Select Committee, would have obstructed and perverted the course of the inquiry proceedings of the Select Committee, and would have created results advantageous to Mr LEUNG. In other words, such hypothetical proposition is a matter for conjecture and is not a "fact" that can be established by IC under RoP 73A(2). In this regard, IC has copies of the Proposed Amendments. Looking at them, IC notes that it does not seem to it that the Proposed Amendments sought to cut down the scope of inquiry. In many instances, where the parts were deleted, they were found elsewhere in the Proposed Amendments, often in the exact wording of the original. In other words, what would have been inquired into in the text of the major areas of study published by the Select Committee originally would also have been inquired into under the

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<sup>137</sup> See paragraphs 3.11 to 3.13 of this Report.

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Proposed Amendments. The Proposed Amendments essentially sought to expand, rather than reduce, the major areas of study.

4.24 Since the above allegation has not been established, IC does not find it necessary to go on to consider the second part of the allegation, i.e. whether Mr CHOW has conspired with and assisted Mr LEUNG to improperly involve in and interfere with the Select Committee's investigation, obstruct the Select Committee in the proper discharge of duty, violate procedural justice, and damage the independence, impartiality and legitimacy of the Select Committee's investigation.

4.25 In view of the above findings and considerations, IC is of the view that the Second Fact is not established.

### **Third Fact to be established**

#### IC to consider

- whether the Proposed Amendments were made by or on behalf of Mr LEUNG or his office;
- whether Mr CHOW intentionally and repeatedly made false representations in relation to the origin of the Proposed Amendments at the meeting of the Select Committee on 25 April 2017 in order to mislead the Select Committee and the public into believing that the Proposed Amendments were genuinely raised by Mr CHOW himself; and
- whether Mr CHOW refused to admit the truth until it was revealed; and whether the above alleged behaviours of Mr CHOW fail to meet the level of credibility, integrity and dutifulness of a LegCo Member.

4.26 In considering the Third Fact, IC first needs to be satisfied that the Proposed Amendments were made by or on behalf of Mr LEUNG or his office. IC has little doubt that this part of the fact is established having regard to IC's findings in paragraph 4.4 including Mr LEUNG's admission at the media session on 16 May 2017 (paragraph 3.12(a) refers) that the Proposed Amendments were made by himself. IC also notes that Mr CHOW has admitted to the media that his views on the matter had been incorporated in the Proposed Amendments and that he had found the Proposed Amendments appropriate before he submitted the same.

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4.27 IC notes that the witnesses concerned<sup>138</sup> consider that Mr CHOW repeatedly made false representations to the Select Committee as to the origin of the Proposed Amendments at the meeting on 25 April 2017 by repeatedly asserting ownership of the Proposed Amendments. In their view, it is clear that Mr CHOW's false representations were intended to mislead the Select Committee and the public into believing that such amendments were made by himself.<sup>139</sup>

4.28 At the media session on 16 May 2017, Mr CHOW explained that he did not lie or hide anything. He said he had expressed his views during the discussion with Mr LEUNG on the Proposed major areas of study. Mr LEUNG then incorporated the views into the Proposed Amendments, which contained both Mr LEUNG's and his views, and passed the relevant document in electronic form to him. He considered the Proposed Amendments appropriate and then submitted the electronic document the way it was directly to the Select Committee. Mr CHOW also made it clear that when asked by the Chairman of the Select Committee about the origin of the Proposed Amendments,<sup>140</sup> he did not hide the fact but admitted the involvement of Mr LEUNG in the making of the Proposed Amendments. Mr CHOW had stressed repeatedly that his way of handling the Proposed Amendments was in compliance with all regulations and laws.<sup>141</sup>

4.29 As set out in paragraph 3.6, IC notes that during his presentation of the Proposed Amendments at the meeting of the Select Committee on 25 April 2017, Mr CHOW repeatedly stated that the Proposed Amendments were his and that he was their drafter.

4.30 Taking into consideration the witnesses' remarks and Mr CHOW's remarks referred to in paragraphs 4.27 and 4.28 above, IC finds it reasonable to consider that members of the Select Committee should not be restricted from accessing/receiving information from a broad range of sources which they consider useful for them to form the basis of their amendments to the Proposed major areas of study of the Select Committee. As noted by the Procedure and Privileges Committee

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<sup>138</sup> The witnesses concerned referred to are Hon Claudia MO, Hon CHU Hoi-dick, Hon Kenneth LEUNG, Hon Alvin YEUNG, Hon Andrew WAN Siu-kin and Hon LAM Cheuk-ting.

<sup>139</sup> See Appendices 1.5 to 1.9 and paragraphs 3.36 to 3.38 of this Report.

<sup>140</sup> Mr CHOW did not reveal at the media session on 16 May 2017 the timing of when he was asked by the Select Committee Chairman about the origin of the Proposed Amendments.

<sup>141</sup> See paragraph 3.8 of this Report.

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of the Western Australia Legislative Assembly in the John BOWLER case (paragraphs 2.28 and 2.29 refer), "Members source information for debates and amendments in the House and in committee from a broad range of areas. They are not required to say who has drafted those amendments or helped them form their views." In IC's view, members of the Select Committee are not obliged to make representations as to who have helped them form their views or prepare amendments to the document. That said, IC is aware of the witnesses' view that in the present case where the Proposed Amendments contained views of the subject of inquiry, the Select Committee should have been informed of this fact. IC considers this view understandable since it is highly likely that the Proposed Amendments would have been more critically considered if other members of the Select Committee had been made aware of their origin. On the other hand, IC considers that Mr CHOW, as a member/Deputy Chairman of the Select Committee, should have the right to propose amendments to the Proposed major areas of study, and in the course of formulating his amendments, he should have the right to consider views from any persons, including the views of the subject of inquiry, and should have the right to agree with or adopt the views of such persons. In IC's view, the crux of the consideration is that the Proposed Amendments, as revealed by Mr CHOW, contained his own views and the views of Mr LEUNG and as a whole were considered appropriate by Mr CHOW. Further, having regard to their contents, IC considers that, objectively speaking, the Proposed Amendments were not so drastic as to bring fundamental and material changes to the Proposed major areas of study of the Select Committee. In light of the above considerations and observations, IC considers it plausible that Mr CHOW genuinely subscribed to Mr LEUNG's views and thus had already adopted the Proposed Amendments as his own views when he submitted them to the Select Committee for discussion and presented them at the said open meeting.

4.31 In view of above considerations, IC does not consider that Mr CHOW intentionally and repeatedly made false representations in relation to the origin of the Proposed Amendments at the meeting of the Select Committee on 25 April 2017 in order to mislead the Select Committee and the public into believing that the Proposed Amendments were genuinely raised by Mr CHOW. Since the above allegation is not substantiated, IC finds it not necessary to go on to consider the other part of the allegation, i.e. whether Mr CHOW's behaviours fail to meet the level of credibility, integrity and dutifulness of a Member.

4.32 With regard to the allegation that Mr CHOW refused to admit the truth until the fact that the Proposed Amendments were made by Mr LEUNG was revealed, IC considers that to assess this allegation, IC needs to know when Mr CHOW first acknowledged Mr LEUNG's involvement in the Proposed Amendments, and whether such acknowledgement happened before or after the matter had come to light, and also whether the subject had been inquired into and Mr CHOW had refused to admit before the matter came to light. Since there is no evidence or other relevant information for IC to ascertain the relevant facts, IC is unable to find this allegation substantiated.

4.33 Based on the above findings and considerations, IC is of the view that the Third Fact is partially established. In other words, IC is able to establish to the requisite standard of proof that the Proposed Amendments were made by Mr LEUNG. Save as aforesaid, IC is unable to establish the remainder of the Third Fact.

#### **Fourth Fact to be established**

##### IC to consider

- whether Mr CHOW's behaviours as set out in paragraphs 4.2(a), (b) and (c) have damaged the dignity, autonomy and independence of LegCo; and
- whether any such damage amounts to contempt of the functions and powers of LegCo, has brought shame on LegCo and seriously undermined the public's confidence in LegCo and LegCo Members.

4.34 To establish the Fourth Fact, IC considers it appropriate to refer to Mr CHOW's behaviours as set out in the First and Third partially-established Facts,<sup>142</sup> i.e. Mr CHOW had discussed with Mr LEUNG the Proposed major areas of study of the Select Committee; accepted Mr LEUNG's request to amend the major areas of study; and submitted the Proposed Amendments to the Select Committee for discussion at its meeting on 25 April 2017; and the Proposed Amendments were made by Mr LEUNG.

4.35 IC notes that the Advisory Guidelines,<sup>143</sup> which are issued by the Committee on Members' Interests under RoP 73(1)(d) to all Members and

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<sup>142</sup> See paragraphs 4.3 to 4.15 and 4.26 to 4.33 of this Report.

<sup>143</sup> See Appendix 2.2 to this Report.

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published on the LegCo website at the beginning of each LegCo term since 2009, aim to lay down the guiding principles for the matters of ethics in relation to the Conduct of Members in their capacity as such. IC is aware that as a first point to note, a Member "should ensure that his conduct must not be such as to bring discredit upon the Legislative Council". IC is also aware that a Member "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".

4.36 IC has also made reference to the John BOWLER case to facilitate its consideration of the Fourth Fact. As described in paragraph 2.28, the case was related to an inquiry involving Mr BOWLER, as Member of the Western Australia Legislative Assembly, who leaked a privileged and confidential draft parliamentary committee report to a third party for comments and then misled the committee into believing that the proposed comments on the draft report were made by Mr BOWLER himself. The "track changes" function of the electronic copy of the amended draft report revealed that some of the amendments appeared to have been made by a third party who had a commercial interest in the direct outcome of the inquiry. Mr BOWLER was found guilty of contempt of the Legislative Assembly in the unauthorized disclosure of confidential proceedings and censured for his actions which had diminished public trusts in parliamentary institutions and process. IC has the following observations in the John BOWLER case, which include:

- (a) Mr BOWLER was found guilty of contempt of the House based on the unauthorized disclosure of confidential proceedings only;
- (b) the contempt was aggravated because Mr BOWLER knew that the premature release would directly advantage his personal friend and significantly affect the commercial interests of two companies;
- (c) in that case, the House did not impose any other penalties on Mr BOWLER's attempts (i) to pass off the proposed amendments as his own; (ii) to conceal the true source of those proposed amendments; or (iii) otherwise to mislead the Committee/House; and
- (d) in other words, the John BOWLER case did not turn on Mr BOWLER's failure to disclose the source of the

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comments or his attempt to mislead the House about the origin of those comments. Indeed, it was noted by PPC in that case that "Members source information for debates and amendments in the House and in committee from a broad range of areas. They are not required to say who has drafted those amendments or helped them form their views."

4.37 Although Mr CHOW's handling of the Proposed Amendments might, to a certain extent, resemble the John BOWLER case, IC considers that the circumstances involved in the John BOWLER case were much more serious than Mr CHOW's case. In particular, the document involved in the John BOWLER case was a confidential draft committee report comprising the observations and outcome of the subject inquiry while the Select Committee's draft major areas of study to which Mr CHOW's Proposed Amendments were made was openly available for public viewing on the Internet; nor did it contain any confidential observations or deliberations made by the Select Committee at its meetings or hearings held behind closed doors.

4.38 As pointed out in paragraph 4.12, IC considers that Mr CHOW should have been more attentive to the public expectation of members of the Select Committee. IC also considers that all Members including Mr CHOW should strictly observe the Advisory Guidelines to ensure that a Member's conduct must not be such as to bring discredit upon LegCo. That said, IC is of view that the dignity, autonomy and independence of LegCo would not be damaged by one standalone incident, and that Mr CHOW's behaviours as set out in the First and Third partially-established Facts are not sufficiently grave as to amount to contempt of the functions and powers of LegCo nor to bring shame on LegCo. As mentioned in paragraph 3.8(a), IC notes that when speaking of his way of handling the Proposed Amendments at the media session on 16 May 2017, Mr CHOW apologized and admitted that he was politically insensitive, and that it had led the public to have a negative perception of the incident. In IC's view, whilst Mr CHOW's behaviours as described above might have impacted on the public perception of Members, his behaviours were not of such a degree as to have undermined the public's confidence in LegCo and its Members as a whole.

4.39 Based on the above considerations, IC is of the view that the Fourth Fact is not established.

## **IC's views on whether the facts as established constitute grounds for the censure of Mr CHOW**

4.40 In order to give views on whether the First and Third partially-established Facts constitute grounds for the censure of Mr CHOW in accordance with RoP 73A(2), IC should first consider whether the following two allegations made in the Schedule to the censure motion are substantiated, i.e. whether Mr CHOW's behaviours as set out in the First and Third partially-established Facts (i.e. Mr CHOW had discussed with Mr LEUNG the Proposed major areas of study of the Select Committee; accepted Mr LEUNG's request to amend the major areas of study; and submitted the Proposed Amendments to the Select Committee for discussion at its meeting on 25 April 2017; and the Proposed Amendments were made by Mr LEUNG):

- (a) are in breach of the LegCo Oath taken by him at the Council meeting of 12 October 2016 under BL 104 and Cap. 11 that he will "serve [HKSAR] conscientiously, dutifully, in full accordance with the law, honestly and with integrity"; and
- (b) constitute "misbehaviour" under BL 79(7).

In considering whether the above two allegations are substantiated, IC finds it necessary to form its view on what constitutes "misbehaviour" and "breach of oath" under BL 79(7).

### "Misbehaviour" and "breach of oath" under BL 79(7)

4.41 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 misbehaviour or breach of oath by a vote of two-thirds of LegCo Members present. IC is aware that neither the word "misbehaviour" nor the term "breach of oath" is defined in BL 79(7), or anywhere else in BL or RoP.

4.42 IC makes reference to the discussions of previous committees on the meaning of "misbehaviour" under BL 79(7). CRoP was of the view that it would be more appropriate for LegCo of the day to decide what misconduct would warrant taking action under BL 79(7). The first IC considered that while "misbehaviour" should cover the conduct of Members in the discharge of their duties as Members, it was not easy to formulate clear and explicit criteria for defining "misbehaviour". The



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second IC was of the view that bringing serious discredit upon LegCo and acting contrary to the generally assumed standard of conduct expected of a LegCo Member as described in the Advisory Guidelines should be elements for considering whether the conduct in question constitutes a Member's "misbehaviour" under BL 79(7).<sup>144</sup>

4.43 IC also notes the principles laid down in relevant court cases on the removal of a person from public office that are made in accordance with the specific provisions in the constitution of other common law jurisdictions. IC notes that as far as the conduct of an office-holder is concerned, the meaning of "misbehaviour" is to be determined by reference to whether the conduct might affect: (a) directly the person's ability to carry out the office and (b) 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, in either case, (c) whether the office itself will be brought into disrepute as a result of the conduct.<sup>145</sup>

4.44 As for the meaning of the term "breach of oath", IC notes that the oath in question refers to the one to be sworn under BL 104 as prescribed in Cap. 11, i.e. the LegCo Oath, which is a promissory oath by a LegCo Member-elect to undertake to "uphold [BL] of [HKSAR] of [PRC], bear allegiance to [HKSAR] of [PRC] and serve [HKSAR] conscientiously, dutifully, in full accordance with the law, honestly and with integrity".

4.45 According to the Court, the LegCo Oath must be taken solemnly and sincerely. 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 purpose is to ensure a member of legislature makes a commitment to live by the constitutional process; he has to owe allegiance to the constitution, and has to uphold the sovereignty and integrity for the country. According to the interpretation of BL 104 by the Standing Committee of the National People's Congress dated 7 November 2016, 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 the law.<sup>146</sup>

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<sup>144</sup> See paragraphs 2.4 to 2.6 of this Report.

<sup>145</sup> See paragraphs 2.7 and 2.8 of this Report.

<sup>146</sup> See paragraphs 2.9 to 2.11 of this Report.

**First allegation - whether Mr CHOW's behaviours as set out in the First and Third partially-established Facts are in breach of the LegCo Oath**

4.46 On the question of whether Mr CHOW's behaviours as set out in the First and Third partially-established Facts were in breach of the LegCo Oath taken by him at the Council meeting of 12 October 2016, IC finds it necessary to consider whether such behaviours constitute a failure or neglect by Mr CHOW to keep his promise to serve HKSAR conscientiously, dutifully, in full accordance with the law, honestly and with integrity. IC further notes that the term "breach of oath" is not defined in BL, RoP or Cap. 11.

4.47 As set out in paragraph 4.45, IC understands that the LegCo Oath must be taken solemnly and sincerely, and that oath-taking under BL 104 is legally binding, and an oath taker shall bear legal responsibility if he/she makes a false oath, or, after taking the oath, engages in conduct in breach of the oath. In IC's view, it is likely that Mr CHOW's behaviours as set out in the First and Third partially-established Facts would have led the public to cast doubt on his ability as a member of the Select Committee to make independent and objective judgment as a result of his communications with the subject of inquiry, leaving the public with a negative perception of the incident. Yet, the behaviours of Mr CHOW as found as facts by IC have no or no meaningful impact one way or another on his promise to uphold BL of HKSAR of PRC, or to bear allegiance to HKSAR or to serve HKSAR conscientiously, dutifully, in full accordance with the law, honestly and with integrity. Quite apart from this, IC also bears in mind that the Proposed Amendments, which according to Mr CHOW also contained his own views and were considered appropriate by him as a whole, were proposals to amend an open document and their adoption or otherwise was for the Select Committee to decide after deliberations at open meetings. For these reasons, IC does not consider that Mr CHOW's behaviours as described above constituted a failure or neglect by him to keep his promise made under oath in accordance with BL 104 and Cap. 11.

4.48 In view of the above considerations, IC is not satisfied that the first allegation is substantiated.

**Second allegation - whether Mr CHOW's behaviours as set out in the First and Third partially-established Facts constitute "misbehaviour" under BL 79(7)**

4.49 As pointed out in paragraphs 4.41 to 4.43, IC understands that the meaning of "misbehaviour" set out in paragraph 4.43 solely relates to the conduct of a public office-holder other than members of parliament, and that in the absence of a definition of the word "misbehaviour" in BL or RoP, IC needs to form its view on whether Mr CHOW's behaviours as set out in the First and Third partially-established Facts amount to "misbehaviour" under BL 79(7).

4.50 Whilst IC acknowledges that what constitutes "misbehaviour" depends on the facts and circumstances in each case and is a matter for IC to inquire into, IC shares the view of the first IC that the sanction of disqualification should only apply when a Member was found to have committed extremely serious misconduct, and that a Member's misconduct should have seriously affected the reputation of LegCo as a whole. IC also takes the view that bringing serious discredit upon LegCo and acting contrary to the generally assumed standard of conduct expected of a LegCo Member as described in the Advisory Guidelines should be elements in considering whether a particular conduct should constitute a Member's "misbehaviour" under BL 79(7). IC also bears in mind that since the current censure mechanism under BL 79(7) does not provide any alternative option of penalty for Member's misbehaviour other than disqualification, IC considers it necessary to exercise the highest level of prudence in forming its view on the second allegation.

4.51 As explained in paragraphs 4.38 and 4.47, IC considers that Mr CHOW's behaviours as established above have impacted on the public perception of Members to a certain extent. IC notes that Mr CHOW had admitted that he had not been attentive enough to the handling of the Proposed Amendments, and that he should have reminded Mr LEUNG that perhaps it would be more appropriate for Mr LEUNG to channel his views to the Select Committee. That said, given that only part of the allegations under the First and Third Facts have been established by IC, IC considers that there is no sufficient basis to conclude that Mr CHOW's behaviours are serious enough to affect the reputation of LegCo as a whole. Nor is IC satisfied based on its findings that Mr CHOW's behaviours have brought serious discredit upon LegCo and that he acted contrary to the generally assumed standard of conduct expected of a LegCo Member as described in the Advisory Guidelines. As such, IC considers that Mr CHOW's behaviours as set out in the First and Third

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partially-established Facts do not warrant a finding of "misbehaviour" under BL 79(7).

4.52 Based on the above considerations, IC is not satisfied that the second allegation is substantiated.

**Whether the facts as established constitute grounds for the censure of Mr CHOW**

4.53 By reason of the foregoing, IC is not satisfied that Mr CHOW's behaviours as set out in the First and Third partially-established Facts constitute "misbehaviour" and/or "breach of oath" under BL 79(7). IC has come to the conclusion that the facts as established are not sufficient to constitute grounds for the censure of Mr CHOW.