

**Submission from the Independent Police Complaints Council
to the Legislative Council Bills Committee on
the Independent Police Complaints Council Bill –
Observations on the Administration’s Response of January 2008**

At the invitation of the Legislative Council (LegCo) Bills Committee, the Independent Police Complaints Council (IPCC) presented a submission on the IPCC Bill (LC Paper No. CB(2)563/07-08(01)) for the Bills Committee’s consideration and discussion at the meeting on 13 December 2007. The Administration later submitted its response to the issues raised by the IPCC (LC Paper No. CB(2)829/07-08(01)) on 14 January 2008. As the Bill will lay the foundation for the operation of the future IPCC, the IPCC feels obliged to draw the Bills Committee’s attention to its stance on the issues raised in its earlier submission to the Bills Committee, in the light of the Administration’s response (for ease of cross-reference, the IPCC’s views are set out in the same order of the Administration’s response) –

1	Clause 20 – the Commissioner of Police (CP) to provide information relating to reportable complaints (RCs); and Legal Professional Privilege (LPP)
	<p>With due respect to the common law position of LPP and the rights conferred by the Basic Law, the IPCC maintains that CP should not have the discretion to invoke his LPP and let (or not let) the IPCC see the information as he deems fit. The IPCC would be seriously constrained in discharging its function of monitoring the Police’s investigation without knowing whether and what information the Police has obtained arising out of or in the course of complaint investigation that may shed light on the determination of classification of an allegation.</p> <p>The Administration has previously produced, at the Bills Committee’s request, two cases involving out-of-court settlement in which the IPCC’s request for information had been declined (LC Paper No. CB(2)576/07-08(02)). The first case in particular demonstrates how legal advice affects the classification of an allegation, and how CP’s claim of LPP hampers the IPCC’s access to information pertinent to discharging its function of examining Complaints Against Police Office (CAPO)’s investigation and handling of a complaint. The IPCC sees the need to apprise the Bills Committee of the essence of the case to</p>

explain why the IPCC attaches great importance to having access to legal advice.

In the abovementioned case, the IPCC requested CAPO to consider changing the “Unsubstantiated” classification of an “Assault” allegation in view of the Magistrate and Forensic Pathologist’s unfavourable comments on the complainee (COMEE)’s version of the complainant (COM)’s injuries. Having noted that COM had sought damages in connection with his injuries and the civil claim was settled out of court, the IPCC also requested information of the relevant civil proceedings which would shed light on the reason for the settlement with COM to see if that would in turn impact on the classification. CAPO initially refused to change the “Unsubstantiated” classification of the “Assault” allegation and to provide CP’s communications with the Department of Justice (DoJ) on the case by claiming LPP. After protracted discussions with the IPCC, CAPO agreed to classify the “Assault” allegation as “Not Fully Substantiated”. IPCC still had reservations about the “Not Fully Substantiated” classification and requested to have sight of the content of the Consent Order. CAPO advised that the IPCC’s request could not be acceded to owing to a confidentiality clause in the Consent Order. Upon the IPCC’s insistence of seeing DoJ’s advice on the out-of-court settlement, CAPO finally agreed to classify the allegation as “Substantiated”, yet still refusing the IPCC sight of the Consent Order or the legal advice. If CP could claim LPP and if this is accepted, it is doubtful if cases like this could be properly dealt with.

The Bills Committee’s attention is also drawn to the fact that recently CAPO has departed from a standing practice of prior consultation with the IPCC on significant amendments to police procedures and unilaterally removed from the CAPO Manual the requirements to record in CAPO’s investigation reports (to the IPCC) the legal advice on complaint cases, including a statement by the legal adviser that he does not need to accept a case for advice, and CAPO’s decision not to seek legal advice on an assault allegation. In other words, following such amendments, IPCC would not even know whether or not CAPO has sought legal advice. The IPCC has raised strong objection to the amendments which would restrict the IPCC’s access to information pertaining to complaints investigation. Nevertheless, CAPO insisted on the amendments and argued that the amended versions were merely a

	<p>true reflection of the spirit of LPP vested with CP whereas the original provisions were wrong in the common law principle.</p> <p>To enable the IPCC to properly discharge its function of monitoring the investigation of police complaints, the IPCC maintains that an express provision allowing the IPCC full and unrestricted access to information pertaining to complaints investigation, including <i>legal advice</i>, is definitely necessary.</p>
<p>2</p>	<p>Clauses 8(3) and 15(3) – CP to provide brief descriptions of non-reportable complaints (NRCs) and explanations to support the NRC categorization</p>
	<p>The IPCC does not agree with the Administration that the general provision under clause 7(2) should sufficiently enable the IPCC to require the Police to provide additional information about NRCs as and when necessary. Clause 7(2) merely empowers the IPCC to do all such things that are reasonably necessary for the performance of its functions under the Ordinance. It does not impose an obligation upon CP for compliance. The IPCC also considers that if the general provision is sufficiently clear, many of the existing provisions in the Bill would not be needed, including clause 20(1) which expressly requires CP to provide any information or material relating to a RC.</p> <p>As the Administration states that the Police stand ready to provide additional information about NRCs, it should not be objectionable to stipulate in the Bill the requirement for the Police to provide additional information about NRCs as and when required by the IPCC. It is always preferable to have express provisions to cater for arrangements agreed upon. The Administration and the Police can rest assured that the IPCC will make a request for such additional information only when necessary.</p>
<p>3</p>	<p>Clause 27 – CP to comply with the requirements of the IPCC</p>
	<p>“Any requirement made by the IPCC” as referred to in clause 27 refers to any requirement <i>made under the Ordinance</i>, thus covering a range of matters binding on CP <i>before and after / irrespective of</i> the completion of investigation of complaints, such as to provide information relating to a RC (clause 20(1)), to investigate a RC (clause 21(1)), to inform the complainant of the classification of a RC (clause 22), to compile and submit to the Council statistics of the types of conduct of members of the Police that have led to RCs (clause 25(a)), and to consult the Council on</p>

	<p>orders and manuals relating to handling or investigation of RCs (clause 26(1)). The exceptions for CP not to comply with such requirements have therefore to be carefully worded to ensure that the IPCC's requirements would not be lightly abrogated.</p> <p>The IPCC has previously proposed amendments to narrow the exceptional circumstances under which CP could be exempted from compliance with the IPCC's requirements under clause 27, namely to qualify "any crime" by "an indictable offence", and to impose a time limit. The Administration has raised a number of arguments against the amendments. The IPCC however considers that the Administration's concerns can be resolved in practice. As soon as a non-indictable offence turns to be an indictable one and compliance with the IPCC's requirements would prejudice the investigation of the crime, the Police could notify the IPCC and refrain from complying with the IPCC's requests at that turning point. Vice versa, the Police could resume complying with the IPCC's requirements upon an indictable offence having become a non-indictable one. Setting a time limit for CP's non-compliance is also not impractical because the time limit can be subject to review as and when necessary. The Administration has referred to CP's "supreme direction and administration of the police force" under section 4 of the Police Force Ordinance, but clause 27 specifically provides that "notwithstanding section 4 of the Police Force Ordinance (Cap. 232), the Commissioner must comply with any requirement made by the Council..." This argument is thus irrelevant and untenable.</p> <p>The suggestion of replacing "any crime" with "an indictable offence" and/or setting a time limit for CP not to comply with the IPCC's requirements subject to reviews is pursuable and reasonable.</p>
4	Clauses 7(1)(b) and 24 – the IPCC to advise CP or the Chief Executive (CE) of its opinion on CP's actions taken on a member of the Force; and CP to provide explanation for actions taken on a member of the Force
	In respect of the IPCC's view that clause 7(1)(b) should be amended to allow the IPCC to give <i>recommendations</i> ¹ on CP's actions taken or to be

¹ The difference between a "recommendation" and an "opinion" in the Bill is that CP is obliged to report on any action taken or to be taken by him in respect of a "recommendation" under clause 25(b).

	<p>taken in connection with any RC (except disciplinary actions which are CP’s prerogative on which the IPCC will give its <i>opinions</i> only) which may not be covered by clause 7(1)(a) or (c), the Administration considers that training needs of officers, service improvement suggestions and terms of a reply to a complainant quoted by the IPCC as examples of CP’s actions taken in connection with a RC have already been covered by clause 7(1)(a) or (c).</p> <p>The IPCC observes that advice on service quality improvements may not necessarily arise from a fault or deficiency in police practices or procedures as captured by clause 7(1)(c). The advice may merely serve to enhance the Police’s professionalism with a view to avoiding possible complaints and earning the public’s recognition. There the IPCC maintains that clause 7(1)(b) should be amended.</p>
<p>5</p>	<p>Clauses 16 and 17 – CP to submit investigation reports and interim investigation reports</p>
	<p>The IPCC has no strong views on the Administration’s contention that clause 25(b) already covers “amended investigation reports” (amended in response to the IPCC’s recommendations); and “supplementary reports” are covered by clauses 12(1) and 16, in response to the IPCC’s request for a specific provision to cater for these reports. The request for a separate provision arose from the Administration’s removal of a sub-clause under the present clause 20 requiring CP to submit a report to the Council on any RC in the draft Bill. The IPCC sees merit in reinstating this general provision so that it would cover other reports on RCs, e.g. CAPO’s Criminal and Disciplinary Checklist which includes summaries of follow-up actions taken against officers in RCs and is a regular agenda item for the Joint IPCC/CAPO Meeting.</p>
<p>6</p>	<p>Clause 37 – the IPCC’s duty to keep confidence</p>
	<p>The IPCC considers it essential that its power of disclosure is clearly provided for in the Bill. In response to the IPCC’s request for express provisions in this regard, the Administration has repeatedly explained that the IPCC may disclose matters if it considers that the disclosure is necessary for the performance of its functions of the Ordinance, which is largely the position of clause 37(2)(a). The IPCC is concerned with this as this places the onus of proof on the IPCC when the IPCC is challenged on making unauthorized disclosure.</p> <p>The IPCC is concerned that it may not be able to rely on clause 37(2)(a)</p>

	<p>to make public the Police’s explanations for not accepting the IPCC’s advice and the reasons for any disagreement with the Police on the disciplinary action to be taken, as such disclosure may not fall within <i>any</i> of the IPCC’s functions under clause 7(1). Given that IPCC has no power to determine the results of the investigation, disclosure is a means for IPCC to invite the public’s comments and scrutiny on matters which it cannot agree with CAPO and such a means is of paramount importance to the IPCC.</p> <p>The IPCC considers that its power to appeal to the public on unresolved matters with CP should not be subject to unnecessary restrictions or hurdles, or civil or criminal liability, and insists on having abundantly clear provisions to allow the IPCC to make such disclosure.</p> <p>The Bills Committee’s attention is also drawn to the Administration’s undertaking in its letter dated 26 February 2002 (at Appendix) that the IPCC will be provided with such powers of disclosure in the Bill on the clear understanding that data privacy will be given full protection. The undertaking does not seem to have been reflected in the current Bill.</p>
7	Clause 28 – the IPCC may make a report to CE
	<p>The IPCC notes the Administration’s argument that it is an established practice that CE or his authorized officer will respond to the statutory body submitting a report to him, rendering it not necessary to make an express provision in the Bill. It remains however the IPCC’s stance that stipulation of the requirement would be in the interest of its discharging of the Council’s functions under the Ordinance.</p>
8	Clauses 2, 12 and 16 – provisions in relation to RCs classified as for “Informal Resolution” or “Withdrawn”
	<p>This is largely a drafting matter. The difference between the IPCC and the Administration’s views on the status of “Informal Resolution” cases lies in the definition of “investigation” in the provisions. Unless “investigation” is extended to cover the preliminary steps taken prior to informally resolving a complaint, it would not be valid to consider “Informal Resolution” a classification (i.e. result of investigation) in clause 2. In fact, “Informal Resolution” is not regarded as a result of investigation in the CAPO Manual, and only represents a way of handling minor complaints. Reports on such cases are not termed as “investigation reports”.</p>

	To provide a statutory basis for “Informal Resolution” cases, clause 16(3) can be rephrased to stipulate that CP must submit a report to the IPCC on such cases, which are distinguished from investigation reports in clause 16(1) and (2).
9	Clause 17(3) and (4) – the IPCC may advise CP of its opinion on interim investigation reports
	NRC lists are compiled at intervals and contain only brief descriptions of the cases. On the other hand, NRCs reported in interim reports are more informative and allow the IPCC to give its opinion <i>instantly</i> . That said, the IPCC does not insist on amending clause 17(3) and (4) to cover the NRC categorization of an allegation as it will examine the NRC categorization, among other things, as reported in the final investigation reports.
10	Clause 22 – the IPCC may require CP to inform a complainant of classification of RCs
	The IPCC comments that CP should be obliged to inform a complainant of any other matters relating to police operation raised by the complainant, as there were occasions that the Police asked the IPCC to convey their reply to the complainant’s query on operational matters given that the IPCC is under the duty to reply complainants on review results. Whilst the Administration responds that these other enquiries and suggestions do not relate to matters within the purview of the IPCC, and CAPO will address them, the IPCC would need the Police’s assurance that this is their understanding to avoid disputes in future.
11	Clause 37(4) – disclosure of identity of parties involved in a complaint
	The IPCC understands from the Administration’s response that it will further examine the IPCC’s comments in respect of the need to disclose the identity of parties involved to <i>potential witnesses</i> who may decline to attend an interview with the IPCC in the end, <i>legal representatives, friends or relatives</i> who accompany a witness to be interviewed by the IPCC (provided that their presence is approved under clause 19), and <i>CE</i> . As regards the Administration’s contention that the IPCC may make recommendations to CAPO for referral of a case to other relevant Government departments or statutory/advisory bodies for necessary actions, the IPCC does not have strong views provided that CAPO shares the same understanding. It follows that if the IPCC <i>directly</i> receives a

	complaint against the Police that may involve matters of other jurisdictions, the IPCC will simply refer the case to CAPO for necessary action.
12	Commencement of the Ordinance
	The IPCC considers that a commencement clause, the insertion of which is now under consideration by the Administration, should allow the coming into operation of the Ordinance <i>after</i> the transitional arrangements have been put in place.
13 & 14	Establishment of and Financial Provision for the Proposed Statutory IPCC
	These issues relate to the administrative arrangements for the proposed statutory body, and will be further examined and discussed between the IPCC and the Administration before a proposal is forwarded to the Bills Committee.

Independent Police Complaints Council Secretariat
March 2008

Ref.: IPCC 7/05/02 XXIII

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Dear Mr Tang,

Independent Police Complaints Council (IPCC) Bill

Thank you for your letter of 14 January conveying to me the Council's views on the proposed IPCC Bill.

It is most encouraging that the Council and the Administration are fully agreed that by turning the IPCC into a statutory body, public confidence in the credibility and transparency of the police complaints system will be enhanced. There is also a high level of agreement that investigation into individual public complaints and monitoring work should remain separate, and that the Police are best placed to conduct investigations. This points to the crucial importance of the separate monitoring role performed by the IPCC, whose independence and impartiality should be clearly underpinned by law.

As regards the powers of the IPCC, the Administration accepts the Council's two specific suggestions to the effect that the new Bill should also provide for:

- the IPCC to make public the explanations given by the Police for not accepting the IPCC's advice regarding the findings and classifications of CAPO's investigations; and

- the IPCC to make public the reasons for its disagreement with the Police on the disciplinary action to be taken against complainers.

On the clear understanding that the personal data privacy must be given full protection, and that fairness to all parties involved will be ensured e.g. no premature divulgence of views or information while disciplinary action is still under consideration, we will suitably accommodate the Council's suggestions in the new Bill.

We strongly support the Council's initiative to improve the effectiveness of the Observers Scheme. The feasibility and implementation of the various measures proposed in your letter will be carefully considered by the Joint Working Group set up between the Council and Security Bureau. In essence, we will aim to enlarge the pool of Observers; to offer them dedicated briefings; to collect from them more detailed feedback for deliberations by the Council; and to streamline procedures and provide better logistics, including arrangements to facilitate the same observer to see through a case.

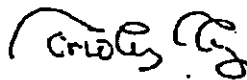
We are keen to take forward the Council's suggestion to launch an in-depth study to identify further ways and means to improve the Observer Scheme. Although funds cannot be secured now to hire outside consultants, we are able to enlist the assistance of the Government's Management Services Agency which has a wealth of experience in the management field. If agreeable to the Council, the Management Services Agency will embark upon a comprehensive study this June/July in accordance with terms of reference to be assigned them by the Joint Working Group. Regular progress reports will be made, and findings and recommendations will be submitted to the Council through the Joint Working Group.

We have taken careful note of the Council's concerns about the resource implications of establishing an independent Secretariat. We will make detailed assessment of these implications in the Joint Working Group, and hold necessary consultations with the Finance Bureau with a view to finding mutually satisfactory solutions. Meanwhile, we will ensure that the Bill will provide adequate flexibility for phased implementation, so that the smooth operation of the Secretariat will not be impeded by resource considerations.

Now that the Council and the Administration have reached a consensus on the way forward, we will proceed to launch a six-week public consultation on 1 March 2002. An advance copy of the consultation document is enclosed herewith for your information and reference. May I request that you restrict circulation of the document to Members only until the consultation exercise starts. As promised earlier, we will brief the Council with initial feedback hopefully some four weeks after public consultation has commenced.

Once again, I thank you and through you all Members warmly for the extra time and efforts the Council has spent on our legislative proposals, and for all the invaluable advice and support given us.

Yours sincerely,



(Timothy Tong)
for Secretary for Security

c.c. Secretary, IPCC