

**Bills Committee on
Independent Police Complaints Council Bill**

**Response to outstanding issues raised at the Bills Committee
meetings held on 24 April, 13 May, 22 May, 3 June,
6 June, 10 June, 16 June and 17 June 2008**

Purpose

This note provides information in response to the outstanding issues raised by the Bills Committee at its meetings held on 24 April, 13 May, 22 May, 3 June, 6 June, 10 June, 16 June and 17 June 2008.

**The Independent Police Complaints Council (IPCC)'s proceedings
and other miscellaneous matters**

To consider requiring that the classification of reportable complaints falling within certain criteria (e.g. serious complaints) must be considered by the IPCC at meetings instead of by circulation of papers, and that the IPCC should meet more frequently to consider such classification; to consider requiring that a written resolution on such classification must be approved by a certain percentage of the total number of IPCC members; and to consider restricting the IPCC's power of delegation under clause 25 in Schedule 1 accordingly

2. As we have explained in LC Paper Nos. CB(2)243/07-08(01) and CB(2)321/07-08(01), IPCC members are divided into three sub-groups to share out the workload of examining the investigation reports on reportable complaints. Each sub-group comprises a vice-chairman and four to five members. The IPCC Secretariat circulates the investigation reports it has scrutinized to the vice-chairmen and members of the relevant sub-group for examination. After examination by the sub-groups, the IPCC Secretariat submits all the investigation reports, together with any comments from the sub-groups on the cases, to the IPCC chairman for endorsement.

3. For the more serious complaints that are handled by the Serious Complaints Committee, the IPCC Secretariat circulates the scrutinized investigation reports to members of the Serious Complaints Committee for examination and concurrently to all IPCC members for monitoring. After examination by the Serious Complaints Committee, the IPCC Secretariat submits the investigation reports, together with any comments from the Committee or IPCC members on the cases, to the IPCC chairman for further examination and endorsement.

4. If the IPCC chairman, the sub-groups or the Serious Complaints Committee consider it necessary for the investigation report on a particular complaint to be further discussed by the full IPCC, it will be discussed at the IPCC's bi-monthly in-house meetings. Such cases may be further discussed at the bi-monthly joint IPCC/CAPO meetings as necessary.

5. The above arrangements, which have been operating efficiently and effectively, have enabled the IPCC to closely monitor whether the Police handle and investigate reportable complaints in a fair and impartial manner. As such, we consider it appropriate to provide sufficient flexibility for the IPCC to consider whether a particular matter (including the classification of an allegation or an investigation report of a reportable complaint) should be considered at meetings or by circulation of papers.

6. The provision in clause 11(4) in Schedule 1 that a written resolution that is approved by a majority of all IPCC members is valid and effectual has taken reference from similar legislative provisions applicable to many existing statutory bodies (see section 3A(2) of the Radiation Ordinance (Cap. 303), section 4AA(2) of the Nurses Registration Ordinance (Cap. 164), section 2B(2) of the Town Planning Ordinance (Cap. 131), Section 5A(1) of the Security and Guarding Services Ordinance (Cap. 460) and section 8 of the Broadcasting Authority Ordinance (Cap. 391)).

To consider amending clauses 10, 11(6), 14 and 16(6) in Schedule 1 to the effect that if it appears to an IPCC member that he has an interest in a matter being discussed or to be discussed, he must state his interest

7. The test of “has an interest” in clauses 10, 11(6), 14 and 16(6) in Schedule 1 requires an IPCC member to disclose an interest in a matter under discussion when he has such an interest. It imposes an obligation on him to ascertain whether he actually has such an interest. Given that an IPCC member should have sufficient time to examine the details of the matters under discussion, it should be practicable for him to confirm whether he has an interest in the matters. Similar provisions apply to members of many existing statutory boards such as the Consumer Council (see section 9 of the Consumer Council Ordinance (Cap. 216)), the Hong Kong Examinations and Assessment Authority (see section 3(8) of the Hong Kong Examinations and Assessment Authority Ordinance (Cap. 261)), the Hong Kong Council on Smoking and Health (see section 7(4) of the Hong Kong Council on Smoking and Health Ordinance (Cap. 389)) and the Broadcasting Authority (see section 7 of the Broadcasting Authority Ordinance (Cap. 391)).

8. If the less stringent test of “appears to” is adopted, it follows that if it does not appear to an IPCC member that he has an interest in the matter under discussion (even if he actually has such an interest), he will not be obliged to disclose such an interest. We do not consider this appropriate given the considerations set out in paragraph 7 above. On the other hand, the situation of an observer is different from that of an IPCC member. An observer may not know whether he has an interest in the reportable complaint concerned until for example, he meets the interviewee at an interview conducted by the Police. In this connection, Members have suggested that even when an observer meets the interviewee, he may not be able to ascertain whether he has an interest (e.g. he may not be certain whether the interviewee may be his relative). We share Members’ view and have therefore proposed to adopt the test of “appears to” in clause 34(3).

To consider requiring that an IPCC member having an interest in a complaint case should invariably be required to withdraw from the discussion on the case; to provide information on the circumstances under which members of existing statutory bodies (especially complaint handling bodies) having an interest in the matters to be discussed are required to withdraw from the discussion on such matters

9. We have no objection to Member's suggestion that an IPCC member having an interest in a complaint case should invariably be required to withdraw from the discussion on the case. We note that similar arrangements apply to many existing statutory bodies such as the Preliminary Investigation Committee under the Medical Practitioners (Registration and Disciplinary Procedures) (see section 7(3) of the Medical Practitioners (Registration and Disciplinary Procedures) (Cap. 161E)) and the Preliminary Investigation Committee under the Chiropractors (Registration and Disciplinary Procedure) Rules (see section 13(2) of the Chiropractors (Registration and Disciplinary Procedure) Rules (Cap. 428B)).

To consider specifying under clause 7 in Schedule 1 that in the absence of the IPCC Chairman, an IPCC Vice-chairman may appoint the time and place for the IPCC to meet

10. Having considered Members' suggestion, we propose to specify under clause 7 in Schedule 1 that the IPCC may provide for an IPCC Vice-chairman to appoint, in the absence of the IPCC Chairman, the time and place for the IPCC to meet.

To consider adding the element of "reasonableness" in allowing the IPCC to submit its annual reports later than 6 months after the end of a financial year in clause 23(1) in Schedule 1; to provide information on existing legislative provisions similar to clause 23(2) in Schedule 1

11. We have no objection to Members' suggestion of adding the element of "reasonableness" in allowing the IPCC to submit its annual reports later than 6 months after the end of a financial year in clause 23(1) in Schedule 1.

12. For many other statutory bodies, it is the Administration (instead of the statutory bodies) which will arrange the tabling of the annual reports, statements of accounts and auditors' reports of the statutory bodies in the Legislative Council. Examples are set out at the Annex. Under clause 23(2) of the Bill, the IPCC will arrange for its annual reports etc. to be tabled in the Legislative Council with the Chief Executive's approval. This is comparable to the normal procedure applicable to other statutory bodies as explained above.

Observers Scheme

To provide information on whether the IPCC will be consulted/notified prior to the appointment of IPCC observers; whether there are any criteria/guidelines on selecting candidates; whether the immediate family members of members of the police force will be excluded from appointment as a matter of policy

13. Under the existing practice and as agreed with the IPCC, candidates from a number of categories are considered for appointment as IPCC observers, including retired IPCC members, District Council Chairmen and Vice-chairmen and District Fight Crime Committee Chairmen. The IPCC may also nominate individuals outside the afore-mentioned categories for the Administration's consideration during the appointment exercise. Given this established practice, there is no need to further consult the IPCC on individual candidates before appointment. As stated in LC Paper No. CB(2)2313/07-08(01), in considering the appointment of IPCC observers, we shall have regard to the potential candidates' background to ensure that any persons who may have a real or perceived conflict of interest in carrying out the function of an observer will not be appointed as observers.

Handling of reportable complaints

To consider whether it is agreeable to amend clause 18 to provide that the IPCC shall consider an investigation report submitted under clause 16 and consider whether to endorse the investigation report

14. Taking account of Members' comments, we shall add a provision in the Bill on the IPCC's endorsement of the classification of reportable complaints.

Disciplinary actions of the Police

To consider deleting "in respect of a member of the police force" in clause 24; to consider adding a new provision to the effect that the IPCC may require the Police to provide an explanation in relation to any action taken or to be taken in connection with a reportable complaint

15. Clause 7(1)(b) empowers the IPCC to monitor disciplinary actions taken or to be taken by the Police and to provide opinions on such actions. The wording of clause 24 mirrors clause 7(1)(b) and empowers the IPCC to require the Police to provide an explanation on disciplinary actions, so as to facilitate the IPCC to discharge its function under clause 7(1)(b). The deletion of "in respect of a member of the police force" is not consistent with the policy intention of relating clause 24 to clause 7(1)(b).

16. Clause 20 provides that the IPCC may require the Police to provide any information or material relating to a reportable complaint, or to clarify any fact, discrepancy and findings^{Note}. This clause will adequately enable the IPCC to require the Police to provide an explanation in relation to any action taken or to be taken in connection with a reportable complaint.

^{Note} In paragraph 8 of LC Paper No. CB(2)2313/07-08(01), in response to Members' suggestion we propose inserting "findings" in clause 20(1)(b).

To consider amending clause 24 to cover a decision not to take any action

17. Having considered Members' comments, we shall add a provision under clause 2 to make it clear that the term "action" in the Bill includes a decision not to take any action.

Clause 26 – the IPCC may require the Police to consult the IPCC on orders and manuals relating to handling or investigation of reportable complaints

To delete "To enable the Council to make such recommendations as the Council sees fit to the Commissioner" in clause 26(1)

18. We have no objection to deleting "To enable the Council to make such recommendations as the Council sees fit to the Commissioner" in clause 26(1).

Clause 37 – Duty to keep confidence

To clarify whether an IPCC vice-chairman (being a Legislative Council Member) would be allowed to make disclosure under clause 37(2), if he is approached by a complainant; to reconsider the IPCC's suggestion of incorporating an express provision in the Bill to the effect that IPCC might disclose to the public its disagreement with the Police to consider revising clause 37 to the effect that disclosure of disagreement between the IPCC and the Police is permitted for the avoidance of doubt if this is for the IPCC's performance of its functions under the Bill, and/or that the disclosure is permitted if the IPCC thinks it is necessary for the performance of its functions under the Bill; to consider allowing the IPCC to disclose information on the grounds of public interest or revealing abuse of power, serious neglect of duty or other serious misconduct as provided in section 30 of the Prevention of Bribery Ordinance (Cap. 201); to consider amending "if the disclosure is necessary" in clause 37(2) along the lines of "if the Council thinks that the disclosure is necessary"; to consider permitting disclosure under

clause 37(4) to a person who assists or has assisted the complainant in the handling or investigation of a complaint

19. Having considered the IPCC's and Members' comments, we propose adding a provision under clause 37 to provide, for the avoidance of doubt, that in making disclosure under clause 37(2)(a) (which permits the IPCC to disclose, for performing its statutory functions, matters relating to any reportable complaint that come to its knowledge in the performance of its statutory functions), the IPCC may disclose to the public the facts of any disagreement between the IPCC and the Police on the findings or classification of a reportable complaint, or its opinion on the disciplinary actions taken or to be taken by the Police in connection with a reportable complaint.

20. We also propose to widen the scope of clause 37(4) by adding a provision thereunder to permit the disclosure of the identity of a complainant, a complaine, or a person who assists or has assisted the Police in the handling or investigation of a complaint (as covered by clause 37(3)) to a person who is the authorized representative of the complainant under clause 14, or a person who has written authorization from the complainant to handle the complaint in the complainant's stead.

21. Members have suggested that disclosure should be permitted if the IPCC thinks it is necessary for the performance of its functions under the Bill. In this respect, we consider the existing objective test provided by "if the disclosure is necessary" in clause 37(2) appropriate. It is consistent with our proposed deletion of "in the opinion of the Commissioner" in clauses 10(b) and 11(b), and of "the Commissioner is of the opinion" in clause 12(1), thus replacing the subjective test with an objective one.

22. Members have also suggested that the IPCC be allowed to disclose information on the grounds of public interest or revealing abuse of power, serious neglect of duty or other serious misconduct as provided in section 30 of the Prevention of Bribery Ordinance (Cap. 201). We would like to emphasize that the IPCC's function is to monitor the Police's handling and investigation of reportable complaints, so as to ensure that such investigation is conducted fairly and impartially.

Clause 37(2)(a) of the Bill already adequately enables the IPCC to disclose matters relating to any reportable complaints if the disclosure is necessary for the performance of the IPCC's monitoring function. This clause covers disclosure of any unlawful activity, abuse of power, serious neglect of duty or other serious misconduct of any members of the police force involved in reportable complaints. Meanwhile, the Police are responsible for safeguarding public order, public security and public safety. Specifically, section 10 of the Police Force Ordinance (Cap. 232) sets out the duties of the police force, including preserving the public peace, preventing and detecting crimes and offences, and preventing injury to life and property. In the event that the IPCC considers that any reportable complaint unveils a serious threat to public order, the security of Hong Kong or public safety, it may relay such observation to the Police for follow-up actions.

23. On whether an IPCC vice-chairman (being a Legislative Council Member), if approached by a complainant, would be allowed to make disclosure under clause 37(2), he should consider whether such disclosure is necessary for the performance of his statutory functions as an IPCC vice-chairman, having regard to the specific circumstances of the reportable complaint concerned.

Clause 44 – Consequential amendment to The Ombudsman Ordinance

To provide information on the Administration's policy on encouraging statutory bodies to comply with the Code on Access to Information published by the Government

24. The Code on Access to Information (the Code) serves as a framework for the provision of information by Government departments, defined to include any department, bureau, force, service, unit, secretariat, or other agency of the Government, however styled. Indeed, the present scope of Part II of Schedule 1 to The Ombudsman Ordinance (Cap. 397) covers only government agencies, including the IPCC Secretariat in its capacity as a government department. Subject to the passage of the IPCC Bill, the statutory IPCC will have its own secretariat and there will

no longer be a Government department in the name of the IPCC Secretariat. We therefore do not consider it appropriate for the Government to mandate the application of the Code to the statutory IPCC. Instead, we should allow the statutory IPCC to decide on the procedure and practice for handling requests for access to information as it sees fit. We have, therefore, included a consequential amendment under clause 44 of the Bill to remove the IPCC Secretariat from Part II of Schedule 1 to Cap. 397. While statutory bodies are encouraged to adopt the Code, it is entirely up to individual statutory bodies to consider whether the Code should apply to their handling of public requests for information, having regard to their own operations and practices.

To consider adding the statutory IPCC to Part I of Schedule 1 to The Ombudsman Ordinance

25. Clause 44 presents a consequential amendment to Cap. 397 to reflect the establishment of the IPCC as a statutory body, and as a corollary the cessation of the IPCC Secretariat as a Government department. The Bill will make no change to the status of the IPCC under Cap. 397, as the Council itself is not covered by Cap. 397 now. We note The Ombudsman's view that whether the statutory IPCC should be brought under her purview is a matter of policy (see LC Paper No. CB(2)2329/07-08(01)). In view of the purpose of the Bill, which is to codify the current two-tier system for the handling and investigation of police complaints, we consider that issues concerning the ambit of The Ombudsman should be examined separately outside the context of the Bill.

Security Bureau
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Examples of legislative provisions on tabling of statutory bodies' annual reports, statements of accounts and auditors' reports in the Legislative Council

(A) Consumer Council Ordinance (Cap. 216)

Section 16(5) provides that -

“The Council shall within 3 months after the receipt by it of the auditor's report in respect of its accounts for a financial year, or within such further period as the Secretary for Commerce and Economic Development may allow, furnish-

- (a) a report on the affairs of the Council for that year;
- (b) a copy of its accounts therefor; and
- (c) the auditor's report on the accounts,

to the Chief Executive who shall cause the same to be tabled in the Legislative Council.”

(B) The Ombudsman Ordinance (Cap. 397)

Section 3(4) in Schedule 1A provides that -

“The Ombudsman shall, as soon as practicable and in any case within 6 months after the end of a financial year, furnish-

- (a) a report on his activities including a general survey of developments, during that year, in respect of matters falling within the scope of his functions;
- (b) a copy of the statement of accounts required under subsection (2); and
- (c) the auditor's report on the statement,

to the Chief Executive who shall cause them to be tabled in the Legislative Council.”

(C) Sex Discrimination Ordinance (Cap. 480)

Section 18(4) in Schedule 6 provides that -

“The Commission shall, as soon as practicable and in any case not later than 9 months after the expiry of a financial year (or such further period as the Chief Secretary for Administration allows), furnish-

(a) a report on the activities of the Commission during that year including a general survey of developments, during that year, in respect of matters falling within the scope of the Commission's functions;

(b) a copy of the statement of accounts required under subsection (2); and

(c) the auditor's report on the statement,
to the Chief Secretary for Administration who shall cause the same to be tabled in the Legislative Council.”

(D) Personal Data (Privacy) Ordinance (Cap. 486)

Section 4(4) in Schedule 2 provides that -

“The Commissioner shall, as soon as practicable and in any case not later than 9 months after the expiry of a financial year (or such further period as the Chief Secretary for Administration allows), furnish-

(a) a report on the activities of the Commissioner during that year including a general survey of developments, during that year, in respect of matters falling within the scope of the Commissioner's functions;

(b) a copy of the statement of accounts required under subsection (2); and

(c) the auditor's report on the statement,
to the Chief Secretary for Administration who shall cause the same to be tabled in the Legislative Council.”