

The Bill

IPCC's previous position on the Bill

4. The IPCC considers it useful to recap the IPCC's previous position on the Bill. In the context of the 1996 IPCC Bill and the Administration's proposal of re-introducing the Bill into the Legislative Council (LegCo) in 2002, the IPCC tendered the following views to LegCo -

(a) The 1996 Bill

The then Chairman, IPCC, at a meeting with the then Bills Committee on the 1996 IPCC Bill in January 1997, advised that the primary purpose of the Bill was to turn the IPCC into a statutory body, without putting forward too many radical proposals which might jeopardize the role of the IPCC as a monitoring and reviewing body. Through becoming a statutory body, the IPCC should become more accountable to the public and its operation more transparent and effective, with its functions and powers clearly defined in a statutory framework. When asked of his views on the proposal of giving the IPCC investigative powers, the then Chairman, IPCC said that the IPCC had not sought radically investigative powers that would affect fundamentally its existing functions. The proposal would require the mapping out of the possible consequences such as resource implications and the effect on the relationship between the IPCC and the Police.

(b) Proposal to re-introduce the Bill into LegCo in 2002

Following public consultation on the re-introduction of the Bill into LegCo in March 2002, the then Chairman, IPCC, in attending a meeting of the LegCo Panel on Security held in July 2002 in this connection, presented the IPCC's views as follows -

- (i) the credibility of the IPCC and the police complaints system would be enhanced if the IPCC was established as a statutory body;
- (ii) the IPCC should maintain its role as a monitoring and reviewing body in the police complaints system (majority view among

Members); and

- (iii) the IPCC monitored the manner the Complaints Against Police Office (CAPO) handled complaints through a range of powers, including gaining access to information, interviewing witnesses, ordering CAPO to re-investigate a complaint, raising queries, observing the statement-taking and scene visits, and making recommendations to the Commissioner of Police (CP) and the Chief Executive (CE).

Position of the Present IPCC

5. The present IPCC generally subscribes to the views of the previous IPCC expressed in paragraph 4 above. In addition, it has issued the following statement when the Administration re-introduced the latest Bill into the LegCo in June 2007 -

- (i) the IPCC believes that the Bill, which provides a legal basis for the IPCC's operation, will further enhance its status as an independent body to monitor and review investigations of complaints against the Police;
- (ii) the IPCC hopes that the Bill would not hamper the IPCC's access to information pertaining to any complaint, would allow the IPCC to give recommendations and opinions, and would require the CP to respond adequately to such recommendations and opinions;
- (iii) the IPCC looks forward to the Administration and the LegCo's full support in providing necessary resources and assistance for the setting up of an administrative structure, with the delinking of the Secretariat from the Government; and
- (iv) the IPCC looks forward to participating in the discussion with the public and the LegCo on the Bill.

Comments on the Bill

6. The IPCC understands that the Administration's current policy intention of the Bill is to provide a statutory basis for and to enhance public confidence in the present police complaints system, and that the Bill seeks to set out clearly the incorporated IPCC's functions and powers in law and impose a statutory duty on the Police to comply with the IPCC's requirements.

7. On the basis of this understanding and having examined the Administration's IPCC Bill presently before the LegCo, the IPCC would like to make the following comments on the Bill, with an aim to ensuring that the future statutory IPCC has clear powers to discharge its functions -

(a) Full access to information, including relevant legal advice obtained by the Police (Clause 20)

Clause 20 requires the CP to provide any information or material relating to a reportable complaint (RC) to the IPCC. The IPCC understands however that it is the Administration's and the Police's intention to withhold relevant legal advice which has been obtained by the Police and which may be part and parcel of a complaint investigation on grounds of legal professional privilege (LPP), and that the CP will consider waiving his right to LPP on a case by case basis.

In the matter of the relationship between the IPCC and CP on police complaint investigations, the IPCC does not accept that LPP should be invoked to allow the CP to withhold relevant information from the IPCC. As an oversight body whose role is to monitor the investigation work of CAPO, the IPCC firmly believes that it should be given full and unrestricted access to information pertaining to complaint investigations to enable it to be satisfied that CAPO has undertaken full and impartial investigations and considerations of complaint allegations. It would be undesirable for the integrity of the police complaints system for the CP to have discretion to waive his LPP and let the IPCC see the information as he deems fit. To do so would be perceived as conferring on the CP the advantage of being selective in disclosing to the IPCC legal advice to the advantage of the Police and would discredit the police complaints

system.

The IPCC insists on full and unrestricted access to information pertaining to any complaint investigation which is made available to CAPO in its investigation. Such complete access to information should be provided for by an explicit provision in the Bill.

(b) Access to information relating to non-reportable complaints (Clauses 8(3) and 15(3))

In line with the principle stated in (a) above, the IPCC also considers that it should be given full and unrestricted access to information or material relating to a non-reportable complaint (NRC) for the purposes of determining if the complaint should be re-categorized as a RC where necessary, in line with current practice. Complete access to such information should be provided for by an explicit provision in the Bill (similar to Clause 20(1) which requires the CP to provide any information or material relating to a RC).

(c) Adequate response from the CP to the IPCC's recommendations and opinions

The IPCC's effectiveness and the public's trust in the police complaints system rests to a considerable extent on whether the CP gives adequate response to the IPCC's recommendations and opinions. The IPCC considers that there are uncertainties or unclarity in some provisions of the Bill which may give latitude to the CP in not complying with the IPCC's requirements. The relevant provisions are set out below -

(i) Exceptions to the CP's compliance with the IPCC's requirements (Clause 27)

Clause 27 provides that the CP must comply with any requirement made by the IPCC unless he is satisfied that compliance would likely prejudice the security of Hong Kong or the investigation of any crime. The IPCC is concerned that the term "any crime" is unnecessarily wide, such that the CP may choose to decline to comply with the IPCC's requirement

by the mere reason that compliance would likely prejudice the investigation of a crime of a minor nature. The term “any crime” should therefore be qualified.

- (ii) *The IPCC may give opinion on CP’s action taken on a member of the Force (Clause 7(1)(b)) and CP’s explanation for action taken (Clause 24)*

The two operative clauses setting out the IPCC’s functions and the requirement for CP to report back to the IPCC on the IPCC’s recommendations are Clauses 7 and 25(b). Whereas the IPCC accepts that it is the CP’s prerogative to discipline or administer other administrative actions on a member of the police force, the IPCC is more concerned with the CP’s overall response to its recommendations arising from the monitoring of a RC. In this connection, the IPCC considers that the current Clause 7(1)(b) should be amended to allow the IPCC to give recommendations on the CP’s action taken or to be taken in connection with any RC which may not be covered by Clause 7(1)(a) or (c) (for example, the training needs of officers, service improvement suggestions, the terms of a reply to a complainant, but excluding disciplinary action on which the IPCC will give its opinion).

Consequently, Clause 24, which allows the IPCC to require CP’s explanation for his action taken or to be taken in respect of a member of the Force should also be amended to cover CP’s other action in connection with any RC.

- (iii) *Amended and supplementary investigation reports*

Clauses 16 and 17 set out the submission of investigation and interim investigation reports. They are silent on the submission of amended and supplementary reports, which is a current practice. The IPCC considers that a provision requiring the CP to submit amended investigation reports (amended in response to the IPCC’s recommendations) and supplementary investigation reports (to cover review results and/or new allegations) should be added.

(d) IPCC's ability to disclose protected information in case of disagreement with the CP (Clause 37)

In case of any disagreement between the IPCC and CP over the handling and classification of a RC, the IPCC could only advance its case by making a report to the CE under Clause 28, or to make public the unresolved issue for public scrutiny. An express provision is thus of paramount importance to ensure that the IPCC may disclose the CP's explanations for not accepting the IPCC's advice regarding the findings and classifications of CAPO's investigations, and the reason for any IPCC disagreement with the Police on the disciplinary action to be taken. The general provision under Clause 37 which provides that the IPCC is not prevented from disclosing protected information if the disclosure is necessary for the performance of its functions under the Ordinance may not be sufficiently specific for the purpose.

(e) Report to CE (Clause 28)

Clause 28 provides that the IPCC may make reports to the CE as it thinks necessary. It is silent on any response from the CE. Instead of relying on the normal practice that the CE would respond to the statutory body submitting a report to him, it is considered that Clause 28 should be amended to provide for a response from the CE to the IPCC's report made to him.

(f) Classification of a RC (Clauses 2, 12 and 16)

Under Clause 2 of the Bill, "Informal Resolution" is cited as an example of a "classification" of a RC after investigation. The IPCC considers that in the present framework, "Informal Resolution" should not be regarded as a category of "classification" as cases resolved by "Informal Resolution" have not been fully investigated, and are not subject to review. It is therefore misleading to include this under Clause 2. As reference to "Informal Resolution" has also been made in Clause 16 (which obliges the CP to submit an investigation report as soon as practicable after "completing the investigation of a reportable

complaint”), whilst the “classification” of a RC is subject to a request for review under Clause 12(1), it would be appropriate to exclude “Informal Resolution” from Clause 2.

Apart from “Informal Resolution”, cases classified as “Withdrawn”, currently also included under Clause 2, are not subject to review pragmatically, though unlike “Informal Resolution” cases, some investigation may have been conducted before such findings are reached. If a complainant decides to pursue the complaint, or new evidence that enables the continuation of an investigation comes to light, the investigation would normally be “re-opened”.

To avoid confusion, like “Informal Resolution”, “Withdrawn” should be removed from the definition of “classification” under Clause 2. Reference to “Informal Resolution” should also be removed from Clause 16.

(g) IPCC’s opinion on interim reports (Clause 17(3) and (4))

By virtue of Clause 17(4), the IPCC may advise the CP of its opinion on the explanation for the progress of the investigation, and the reasons for not being able to complete the investigation within six months as set out in CAPO’s interim investigation reports. In practice, there are matters other than the progress and reasons for the prolonged investigation that the IPCC may wish to give its observations, e.g. the NRC categorization of an allegation. The provision should be amended to cover these other matters.

(h) IPCC may require the Police to reply to the complainant (Clause 22)

Clause 22 which requires the CP to inform the complainant of the classification of a RC and the reasons for the classification should be amended to oblige the CP to inform the complainant of any other matters relating to the police operation raised by the complainant in a complaint, in addition to the classification and the reasons for the classification, to reflect the current practice.

(i) Disclosure of identity of persons involved in a complaint (Clause 37(4))

Clause 37(4), which lists the persons to whom the IPCC may disclose the identity of parties involved in a complaint for the performance of its functions under the Bill, should cover also potential witnesses who may decline to attend an interview with the IPCC in the end, the CE, other relevant Government departments or statutory/advisory bodies (where referral of a case is necessary if the matter is subject to other jurisdictions), and legal representatives, friends or relatives who accompany a witness to be interviewed by the IPCC (provided that their presence is approved under Clause 19).

(j) Commencement of the Ordinance (Clause 1)

Before the Ordinance is brought into operation, the IPCC considers it important for the transitional arrangements to be clearly settled with the Administration, in particular those relating to the Secretariat to be hived off from the Government.

Structure and Mode of Operation of the Proposed Statutory IPCC

8. In considering the possible structure and mode of operation of the proposed statutory IPCC, Members have made reference to the existing mode of operation. In discharging its work, the IPCC is currently supported by a full-time Secretariat, headed by a Secretary (Administrative Officer Staff Grade C), with 22 general grades staff and a Senior Government Counsel seconded from the Department of Justice serving as legal adviser to the IPCC. In addition, two contract staff are employed to undertake information technology-related duties, and public relations and publicity matters for the IPCC respectively. The main function of the Secretariat is to examine all complaint investigation reports submitted by CAPO in detail to ensure that each case has been investigated in a thorough and impartial manner before recommending them to Members for endorsement. The present Secretariat is an independent Government department run according to prevailing government rules and regulations.

9. Looking to the future, the IPCC notes that the Bill has given few hints on the future structure -

- (i) the Council consists of a Chairman, 3 Vice-Chairmen and not less than 8 other members appointed by the CE (Clause 4(1));
- (ii) the Council must appoint a Secretary and a Legal Adviser on terms approved by the Chief Executive on the advice of the Council (Clause 5(1));
- (iii) the Council may appoint, on terms determined by the Council, such other employees as the Council requires to assist in performing its functions (Clause 5(2)); and
- (iv) the Council may engage any person for his technical and professional services in such manner and on such terms as it thinks fit (Clause 5(3)).

The IPCC surmises from the above that the statutory IPCC would directly employ the Secretary, the Legal Adviser and other staff of the future Secretariat.

10. The IPCC further understands that it is the Administration's intention that the future statutory IPCC should comprise part-time Members and a full-time Secretariat, similar to the present set-up, except that the statutory IPCC shall be responsible for the operation of the Secretariat.

11. On the basis of this understanding, the IPCC would like to make the following observations on the proposed statutory IPCC for the Bills Committee's consideration -

- (i) despite the addition of administrative responsibilities, the statutory IPCC should remain focused on the core business of monitoring and reviewing police complaint investigations. The full-time Secretariat should continue to help Members to examine all complaint investigation reports in detail;
- (ii) to shoulder the additional responsibilities in administration, the number and spread of expertise of Members may have to increase;

- (iii) the relationship between the future Chairman, IPCC and the future Secretary, IPCC will have to be clearly defined; and
- (iv) the future ranking of the Secretary, IPCC and the future staffing level of the Secretariat will have to be examined further given that the future Secretariat will have added responsibilities in recruitment, personnel management, accounting and payroll, stores and procurement, etc, in that it ceases to enjoy the administrative support services of a Government department.

12. The above represents only some broad-brush observations. Further discussions with the Administration would be necessary. As the Administration has agreed to provide resources to the IPCC to set up a transitional team to examine these issues in more detail, and to put in place the transitional arrangements leading to the establishment of the IPCC as a statutory body, the IPCC would be in a better position to advise the Bills Committee on this aspect when the transitional team has deliberated and further discussions are held with the Administration.

Financial Provision

13. The 2007-08 allocation for the present IPCC Secretariat is \$13,557,000, comprising \$10,152,000 for the personal emoluments of civil service staff and \$3,405,000 for other departmental expenses, including the salary provision for non-civil service contract staff. In establishing the statutory IPCC with a Secretariat delinked from the Government, the IPCC considers that the annual allocation for the future IPCC would have to be adjusted upwards to take into account those costs which are not presently included for the IPCC Secretariat as a Government department, such as staff on-costs (i.e. costs covering the retirement and fringe benefits for civil servants) and hidden costs (i.e. the costs of support services provided by other Government departments, including the rents and management fees for the office premises). The IPCC would also need clarification from the Administration as to whether the salaries, terms and conditions of the employees of the future Secretariat would be subject to the principle of “no better than the civil service”.

14. Apart from the need to augment the annual allocation to reflect staff on-costs and hidden costs, the statutory IPCC may also require an additional

allocation to cover one-off requirements to meet specific expenses in the delinking exercise, such as the costs for the procurement of an accounting system, a leave record system as well as the purchase of a permanent office premises and related fitting-out work, if this is considered necessary by the statutory IPCC.

15. Subject to the examination by the transitional team into the transitional issues as mentioned in paragraph 12 above, it cannot be ruled out that some improvement in the existing structure of the Secretariat may be necessary to improve identified deficiency ahead of the setting up of the statutory IPCC.

16. The IPCC is aware that some statutory bodies have Memoranda of Administrative Arrangements with the Administration, setting out understandings on administrative arrangements. The IPCC looks forward to advice from the Administration as to whether the same would be done for the statutory IPCC.

Honorarium for IPCC Members

17. IPCC members now spend considerable time and effort in examining police complaint investigation reports. They will in future also have to spend time and effort in overseeing the administration of the Secretariat as well. Many Members are highly qualified professionals and busy community leaders whose time spent on IPCC business cannot be meaningfully measured in monetary terms. While Members' efforts and contribution ought to be recognized, the IPCC considers that such recognition needs not come in the form of a high level of honorarium which may in fact act against the independence of the IPCC. Members are generally content with a symbolic honorarium at the present level.

Conclusion

18. The IPCC offers the above views to help the Bills Committee's examination of the Bill and related matters. The IPCC wishes to emphasize that the effectiveness and accountability of the statutory IPCC rest, to a considerable extent, on its powers and functions being clearly expressed in the Bill. This view echoes the views of previous IPCC. In this connection, the IPCC would urge the Bills Committee to take into account the views expressed

in this submission, and to pass a IPCC Bill which best serves the interest of the public in Hong Kong.

19. The IPCC looks forward to a fruitful discussion with the Bills Committee on the Bill and related matters.

Independent Police Complaints Council
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