

立法會
Legislative Council

LC Paper No. CB(1)806/06-07
(These minutes have been seen
by the Administration)

Ref: CB1/BC/4/05/2

Bills Committee on Unsolicited Electronic Messages Bill

**Minutes of the twelfth meeting on
Tuesday, 16 January 2007, at 4:30 pm
in Conference Room B of the Legislative Council Building**

- Members present** : Hon Howard YOUNG, SBS, JP (Chairman)
Hon SIN Chung-kai, JP
Hon Jasper TSANG Yok-sing, GBS, JP
Hon Emily LAU Wai-hing, JP
Hon Andrew LEUNG Kwan-yuen, SBS, JP
Hon WONG Ting-kwong, BBS
- Members absent** : Hon James TO Kun-sun
Hon Ronny TONG Ka-wah, SC
- Public officers attending** : Mrs Marion LAI, JP
Deputy Secretary for Commerce, Industry and Technology
(Communications and Technology)
- Mr Tony LI
Principal Assistant Secretary for Commerce, Industry and
Technology (Communications and Technology) B
- Mr SO Tat-foon
Assistant Director of Telecommunications (Support)
- Ms Katherine WONG
Legal Adviser 4
Office of the Telecommunications Authority
- Mr Jeffrey GUNTER
Senior Assistant Law Draftsman
Department of Justice

Miss Leonora IP
Senior Government Counsel
Department of Justice

Clerk in attendance : Ms Anita SIT
Chief Council Secretary (1)4

Staff in attendance : Ms Connie FUNG
Assistant Legal Adviser 3

Mr WONG Siu-yee
Senior Council Secretary (1)7

Action

I Confirmation of minutes

(LC Paper No. CB(1)707/06-07	-- Minutes of meeting on
	12 December 2006
LC Paper No. CB(1)720/06-07	-- Minutes of meeting on
	19 December 2006)

The minutes of the meetings held on 12 and 19 December 2006 were confirmed.

II Papers issued since last meeting

(LC Paper No. CB(1)719/06-07(01)	-- Outstanding issues requiring follow-up actions by the Administration (Position as at 15 January 2007)
LC Paper No. CB(1)601/06-07(01)	-- Submission dated 27 December 2006 from CIGNA Worldwide Life Insurance Company Limited and CIGNA Worldwide General Insurance Company Limited)

2. Members noted the papers issued since last meeting.

III Meeting with the Administration

(LC Paper No. CB(3)735/05-06	-- The Bill
LC Paper No. CB(1)2306/05-06(03)	-- Marked-up copy of the relevant statutory provisions to be amended by the Bill

Action

- | | |
|----------------------------------|--|
| LC Paper No. CB(1)202/06-07(01) | -- Extracts of relevant statutory provisions |
| LC Paper No. CB(1)2306/05-06(01) | -- Letter dated 1 September 2006 from Legal Service Division to the Administration |
| LC Paper No. CB(1)2306/05-06(02) | -- Reply letter dated 22 September 2006 from the Administration to Legal Service Division |
| LC Paper No. CB(1)168/06-07(03) | -- Letter dated 13 October 2006 from Legal Service Division to the Administration |
| LC Paper No. CB(1)168/06-07(04) | -- Reply letter dated 25 October 2006 from the Administration to Legal Service Division |
| LC Paper No. CB(1)175/06-07(02) | -- Summary of views submitted to the Bills Committee and the Administration's response (Position as at 27 October 2006)) |
3. The Bills Committee deliberated (index of proceedings attached at **Annex**).
4. The Administration was requested to –
- (a) consider amending the wording "unless he proves that he did not authorize the act" in clauses 54(1) and 54(2) to make it clear that the statutory presumption only imposed an evidential burden, rather than a legal burden, on the accused; and to ensure consistency with similar proposed provisions in the Copyright (Amendment) Bill 2006; and
 - (b) confirm whether the legislative intent was to also exclude those television services which were currently not subject to regulation under the Broadcasting Ordinance but were offered in response to the request of the service recipient, such as "broadband TV", and if so, to report on the necessary amendments to the Bill.

IV Any other business

5. Members agreed that the meeting originally scheduled for Tuesday, 23 January 2007 would be cancelled and the next meeting would be held on Tuesday, 30 January 2007, at 4:30 pm if, three clear days before the meeting, the Administration could provide papers or Mr WONG Ting-kwong could provide his proposed amendments, if any, to the Bill. Otherwise, the meeting scheduled for Tuesday, 30 January 2007 would also be cancelled. The Chairman said that he would identify possible meeting dates of further meetings with the Clerk after the meeting and members would be notified of those meeting dates accordingly.

Action

6. There being no other business, the meeting ended at 6:35 pm.

Council Business Division 1
Legislative Council Secretariat
26 January 2007

**Proceedings of the twelfth meeting of the
Bills Committee on Unsolicited Electronic Messages Bill
on Tuesday, 16 January 2007, at 4:30 pm
in Conference Room B of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000000 - 000239	Chairman	Confirmation of minutes of the meetings held on 12 and 19 December 2006 (LC Paper Nos. CB(1)707/06-07 and CB(1)720/06-07 respectively)	
000240 - 000610	Administration Chairman Ms Emily LAU ALA3	Clause 44 Reference to some deputations' concern that TA would commence criminal proceedings against a sender of unsolicited electronic messages for non-compliance with an enforcement notice before the 14-day appeal period expired The Administration's clarification that this would not be the case as clause 35(3) provided that, subject to special circumstances under clause 35(4), the period specified in an enforcement notice for taking the steps specified shall not expire before the end of the 14-day appeal period ALA3 agreed to the Administration's clarification	
000611 - 001543	Administration Ms Emily LAU	Clause 45 Enquiry on what would constitute "in the interests of justice" in holding sittings of the Unsolicited Electronic Messages (Enforcement Notices) Appeal Board (Appeal Board) in private and whether it was for the parties concerned to raise such a request, and view that sittings should be held in public as far as possible The Administration's explanation	

Time marker	Speaker	Subject(s)	Action required
		that sittings involving the disclosure of sensitive commercial information; internal operation and procedures of a company; and information affecting the reputation of a company and the like might have to be held in private. The party making such a request had to put forward reasons as to why a sitting should not be held in public. The wording "in the interests of justice" was a very common expression in law and both the interest of the parties concerned and the interest of the public would be taken into consideration	
001544 - 002248	Chairman Administration Mr SIN Chung-kai	Clause 46 Enquiry on whether the decision of the Appeal Board was final and whether an appeal against the decision of the Appeal Board to the higher courts was possible; and whether the decision of the Appeal Board would be subject to judicial review The Administration's response that the decision of the Appeal Board would be final unless any party to the appeal case sought judicial review or referred the case to the Court of Appeal for determination on points of law. The express provision in the Telecommunications Ordinance (Cap. 106) stating that the decision of an appeal board was final was not adopted in the light of the recent decision of the Court of Final Appeal on a case involving the interpretation of this type of provision	
002249 - 002751	Administration Chairman	Clauses 47 to 50 Members did not raise any questions	

Time marker	Speaker	Subject(s)	Action required
002752 - 005219	Administration Ms Emily LAU ALA3 Chairman Mr SIN Chung-kai	Clause 51 Enquiry on whether the rules made under clause 51 were subsidiary legislation and the timing of making the rules, and view that the relevant Legislative Council Panel should be consulted on the rules at the drafting stage ALA3's remark that if the Administration's intent was that the rules were not subsidiary legislation, it should be clearly specified in the Bill The Administration's response that the rules made under clause 51 would be subsidiary legislation. There might be no need for the Secretary for Commerce, Industry and Technology (the Secretary) to make such rules because in the absence of such rules, the Chairman of the Appeal Board had the authority to determine any matter of practice or procedure relating to the hearing of appeals in accordance with clause 46(4). Clause 51 only empowered the Secretary to make rules; it did not require the Secretary to do so. Notwithstanding that there might be no need for the Secretary to make such rules, it was necessary to include clause 51 for the sake of providing a comprehensive legislative framework to cater for any future situation where there was a need to make such rules Enquiry on whether rules had been made for other appeal boards and whether there were such rules made under the Telecommunications Ordinance The Administration's response that	

Time marker	Speaker	Subject(s)	Action required
		while there were rules in the form of subsidiary legislation for some existing appeal boards, no rules had been made under the Telecommunications Ordinance in relation to the Telecommunications (Competition Provisions) Appeal Board. In the past, the Chairman of the board had determined the practice and procedure for the board and no major difficulties in this regard had been encountered. Normally, if agreed by both parties to the appeal case, the board would largely follow the Rules of the High Court (Cap. 4 sub. leg. A) with modifications appropriate to the circumstances of each case	
005220 - 010023	Administration Chairman Ms Emily LAU Mr SIN Chung-kai	Clause 52 Reference to some deputations' view that there should be a lower limit for the amount to be claimed and the Administration's response that there should not be a lower limit Enquiry on how to handle claims of a small amount The Administration's response that those claims would be handled by the Small Claims Tribunal View that claiming for loss or damage was a right and should be respected	
010024 - 011916	Administration Mr WONG Ting-kwong Ms Emily LAU Chairman	Clause 53 Enquiry on whether there would be any guidelines to demonstrate what actions would constitute "took such steps as were practicable" The Administration's response that such guidelines would be prepared	

Time marker	Speaker	Subject(s)	Action required
		and examples would be provided for the public's reference to facilitate compliance with the provisions of the Bill Concern that the liability imposed on employers under clause 53(1) appeared onerous The Administration's response that vicarious liability was a general legal principle, and clause 53 did not introduce any new concept. It would be fair for employers to prove that they took practical steps, such as providing training, promulgating circulars or providing guidelines to prevent their employees from doing the acts. It would be a defence to employers if they could establish that they had taken those steps. Clause 53 would be to the benefit of employers in facilitating them to comply with the provisions of the Bill and there would be publicity on the matter. Sub-clauses 53(1) to 53(3) were modelled on comparable provisions in the Personal Data (Privacy) Ordinance while sub-clauses 53(4) to 53(5) were modelled on those in the Securities and Futures Ordinance	
011917 - 013558	Chairman Administration Mr WONG Ting-kwong Ms Emily LAU ALA3 Mr SIN Chung-kai	Clause 54 Enquiry on the criteria for a person to be considered as responsible for the internal management of a company and whether all executive directors would be held liable The Administration's response that non-executive directors would not be considered as responsible for internal management, and the liability of individual executive directors would depend on actual circumstances such	

Time marker	Speaker	Subject(s)	Action required
		as the organizational structure of the company Enquiry on clause 54(3) and concern that the burden of proof was placed on the defendant The Administration's response that if sufficient evidence was adduced to raise an issue, and either the contrary was not proved by the prosecution beyond reasonable doubt or the prosecution did not take any action to disprove it, the person charged would be taken to have proved that he did not authorize the act in question to be done. The evidence was not limited to that provided by the person charged. The wording of the clause was derived from recent decisions of the Court of Final Appeal on two cases relating to the shifting of the burden of proof from the prosecution to the defendant Enquiry on the scope of application of clause 54 and the relevant penalty The Administration's explanation that clause 54 defined the liability of various persons. It would apply to all offence provisions of the Bill and the penalty levels would depend on the specific provisions contravened ALA3's remark that before reading clause 54(3), the wording of clauses 54(1) and 54(2) alone seemed to imply that a legal burden of proof was imposed on the person charged; and reference to the wording of similar provisions in the Copyright (Amendment) Bill 2006 The Administration's response that the wording of clause 54 was modelled on the wording of similar	

Time marker	Speaker	Subject(s)	Action required
		provisions in the Copyright (Amendment) Bill 2006. The Administration would make reference to the deliberations of the relevant Bills Committee on those provisions of that Bill and see if alternative wording was proposed Request for the Administration to consider amending the wording "unless he proves that he did not authorize the act" in clauses 54(1) and 54(2) to make it clear that the statutory presumption only imposed an evidential burden, rather than a legal burden, on the accused; and to ensure consistency with similar provisions in the Copyright (Amendment) Bill 2006	The Administration to consider
013559 - 013618	Administration	Clause 55 Members did not raise any questions	
013619 - 013910	Administration Ms Emily LAU Chairman	Clause 56 Enquiry on whether regulations made under clause 56 were subsidiary legislation and whether there would be any consultation in preparing those regulations, and enquiry on the content of and timing for making those regulations The Administration's response that those regulations would be subsidiary legislation and they would be related to matters such as the specific requirements for providing accurate sender information for different types of commercial electronic messages. There would be consultation and the Administration planned to consult the relevant LegCo Panel on the draft regulations within two to three months after enactment of the Bill	

Time marker	Speaker	Subject(s)	Action required
013911 - 015821	Chairman Administration Mr SIN Chung-kai Ms Emily LAU Mr Jasper TSANG	Clause 57 and Schedules 1 to 2 View that given the wording of Item 3 of Schedule 1, broadband television programme services not subject to regulation under the Broadcasting Ordinance might be subject to the regulation of the Bill, and request for the Administration to confirm whether the legislative intent was to also exclude those services, and if so, to report on the necessary amendments to the Bill The Administration's response that television services delivered over the public internet ought to be excluded from application of the Bill as such services were delivered to the viewer in response to the request by the viewer Enquiry on whether the wording "is activated in response to information communicated by the caller" in Item 2 of Schedule 1 was clear enough to reflect the legislative intent The Administration's response that Item 2 was intended to cover those electronic messages which involved person-to-person interactive communications as well as pre-recorded / synthesized messages activated in response to information communicated by the caller, such as hotline service using the Interactive Voice Response System The Administration's further advice that it was already considering to make amendments to Schedule 1 to clarify that web traffic and certain modes of information provision in response to a request would be excluded from application of the Bill and the opportunity could also be	The Administration to confirm and report

Time marker	Speaker	Subject(s)	Action required
		taken to clarify the exclusion or otherwise of television services delivered over the public internet that were not subject to regulation under the Broadcasting Ordinance Enquiry on whether Schedule 1 had to be amended if clauses 7 and 12 were to apply to person-to-person interactive telemarketing calls The Administration's response that certain aspects of Schedule 1 had to be amended if that was the case Members noted that the Bills Committee had already examined Schedule 2 (Consequential Amendments) to the Bill at the meeting on 7 November 2006, and that the Administration had undertaken to propose amendments to narrow the scope of legislation to be covered by the proposed section 24(2)(a) of the Telecommunications Ordinance Completion of clause-by-clause examination of the Bill	
015822 - 020227	Chairman Mr WONG Ting-kwong Administration Ms Emily LAU	Date of next meeting and scheduling of further meetings	