

立法會
Legislative Council

LC Paper No. CB(1)720/06-07
(These minutes have been seen
by the Administration)

Ref: CB1/BC/4/05/2

Bills Committee on Unsolicited Electronic Messages Bill

**Minutes of the eleventh meeting on
Tuesday, 19 December 2006, at 10:45 am
in Conference Room B of the Legislative Council Building**

- Members present** : Hon Howard YOUNG, SBS, JP (Chairman)
Hon SIN Chung-kai, 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 Jasper TSANG Yok-sing, GBS, JP
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 Franco KWOK
Assistant Secretary for Commerce, Industry and
Technology (Communications and Technology) B1
- Mr SO Tat-foon
Assistant Director of Telecommunications (Support)
- 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)538/06-07 -- Minutes of meeting on 5 December 2006)

The minutes of the meeting held on 5 December 2006 were confirmed.

II Papers issued since last meeting

(LC Paper No. CB(1)537/06-07(01) -- Outstanding issues requiring follow-up action by the Administration (Position as at 18 December 2006)

LC Paper No. CB(1)502/06-07(01) -- Submission dated 24 November 2006 from Hong Kong General Chamber of Commerce

LC Paper No. CB(1)502/06-07(02) -- Submission dated 6 December 2006 from The Hong Kong Call Centre Association)

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

LC Paper No. CB(1)202/06-07(01) -- Extracts of relevant statutory provisions

Action

- 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) regarding the service of a notice by the enforcement authority concerned under various provisions of the Bill, consider adding provisions to prescribe the manner in which such a notice should be served on the person concerned; reference might be made to the relevant provisions in the Broadcasting Ordinance (Cap. 562);
 - (b) explain how the provisions on powers of entry, search and arrest in the Bill were compared with the similar provisions in the Telecommunications Ordinance (Cap. 106), the Broadcasting Ordinance (Cap. 562) and the Interception of Communications and Surveillance Ordinance (Cap. 589);
 - (c) regarding the execution of a warrant for entry, search and arrest, explain how far the relevant existing procedures adopted by the Telecommunications Authority and the Police could provide the person affected with adequate information on the reason(s) for the entry, search and arrest and the legal basis for the exercise of the power, confirm whether the affected person would be provided with a copy of the warrant under the existing procedures, and consider whether there was a need to change the existing procedures to safeguard the rights of the person affected;
 - (d) clarify the intended scope of application of clause 39(1)(b) and what was to be covered by "any requirement properly made" referred to in the clause (for example, whether it covered the requirement given in a direction issued by TA under clause 33(1)), and consider the need to amend clause 39 to reflect accurately the intended scope of application;

Action

- (e) regarding clause 40(1), explain the policy of allowing TA to recover the costs and expenses of investigation and whether other trading funds had adopted similar policy, provide the basis and criteria for determining the costs and expenses of investigation by TA, consider stating explicitly what costs and expenses would be included, and consider whether the clause, as drafted, would apply to recovery of costs and expenses incurred by TA only notwithstanding that TA had called upon police officers to assist him in the course of investigation; and
- (f) consider stating explicitly in clause 43 of the Bill the basic criteria (such as the need to ensure that there would be no conflict of interest) for the appointment of the Chairman, Deputy Chairmen and panel members to the Unsolicited Electronic Messages (Enforcement Notices) Appeal Board (Appeal Board), and specify the maximum tenure of appointment of panel members.

IV Any other business

- 5. Members noted that the next meeting would be held on Tuesday, 16 January 2007, at 4:30 pm.
- 6. There being no other business, the meeting ended at 12:45 pm.

Council Business Division 1
Legislative Council Secretariat
15 January 2007

**Proceedings of the eleventh meeting of the
Bills Committee on Unsolicited Electronic Messages Bill
on Tuesday, 19 December 2006, at 10:45 am
in Conference Room B of the Legislative Council Building**

Time marker	Speaker	Subject(s)	Action required
000000 - 000100	Chairman	Confirmation of minutes of the meeting held on 5 December 2006 (LC Paper No. CB(1)538/06-07)	
000101 - 000406	Chairman Ms Emily LAU Mr WONG Ting-kwong	Enquiry on whether individual members might propose amendments to the Bill so that clauses 7 and 12 would also apply to person-to-person interactive telemarketing calls Response that the matter was still under consideration and a decision had yet to be made	
000407 - 000910	Chairman ALA3 Ms Emily LAU	ALA3's suggestion that provisions might be added to the Bill to prescribe the mode of service of documents in line with the practice adopted in some existing Ordinances such as section 40 of the Broadcasting Ordinance Continuation of clause-by-clause examination of the Bill starting from clause 37(4)	The Administration to consider
000911 - 003341	Administration Ms Emily LAU Mr SIN Chung-kai Chairman	Clauses 37(4) to 38 Enquiry on whether there were tighter requirements on the use of a warrant under the Bill The Administration's response that while a warrant would be required for entering and searching private premises or places under other Hong Kong legislation, the requirement under the Bill would apply to all premises and places	

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		<p>Request for a comparison of the provisions in relation to powers of entry, search and arrest under the Bill, Telecommunications Ordinance, Broadcasting Ordinance and Interception of Communications and Surveillance Ordinance</p> <p>Enquiry on whether prior notice would be given to the affected person before TA applied for a search warrant</p> <p>The Administration's response that TA would apply direct to the magistrate for a search warrant without giving any prior notice to the affected person to prevent the evidence from being damaged or destroyed intentionally</p> <p>Concern about the procedures in relation to the use of warrants, such as whether a copy of the warrant would be provided to enable the affected person to know what information was required and why it was required, especially when false incrimination by rigging events or evidence might be involved</p> <p>Request for the Administration to provide information on how far the relevant existing procedures adopted by TA and the Police could provide the person affected with adequate information on the reason(s) for the entry, search and arrest and the legal basis for the exercise of the power, confirm whether the affected person would be provided with a copy of the warrant under the existing procedures, and consider whether there was a need to change the existing procedures to safeguard the rights of the person affected</p>	<p>The Administration to provide information</p> <p>The Administration to provide information and consider</p>

Time marker	Speaker	Subject(s)	Action required
003342 - 004848	Administration Ms Emily LAU Mr WONG Ting-kwong Chairman	<p>Clause 39</p> <p>View that the affected person should have a right to know the requirement with which he had to comply under clause 39(1)(b) and this should be stipulated clearly in the Bill</p> <p>The Administration's explanation that the notice served by TA for obtaining information or documents relevant to investigation would include the relevant details and the affected person would have an opportunity to make representations if the person was of the view that he could not, or did not wish to comply with the request. The warrant issued by a magistrate would also contain the relevant details</p> <p>Enquiry on whether clause 39(1) would apply to cases of non-compliance under clause 33</p> <p>The Administration's explanation that although clause 39 was a general obstruction provision, the Administration's intention was to apply the penalties provided for in clause 39 to cases of non-compliance under clause 37, and an amendment to add new provisions would be proposed to sanction a telecommunications service provider who failed to comply with a direction issued by TA under clause 33</p> <p>View that clause 39(1) might be too broad in coverage and request for clarification of the intended scope of application of clause 39(1)(b) and what was to be covered by "any requirement properly made" referred to in the clause (for example, whether it covered the requirement</p>	<p>The Administration to report</p>

Time marker	Speaker	Subject(s)	Action required
		<p>given in a direction issued by TA under clause 33(1)), and consideration of the need to amend clause 39 to reflect accurately the intended scope of application</p>	
004849 - 012010	<p>Administration Chairman Ms Emily LAU ALA3 Mr SIN Chung-kai Mr WONG Ting-kwong</p>	<p>Clause 40</p> <p>Reference to some deputations' view that recovery of costs and expenses should follow normal court practice</p> <p>Enquiry on whether the practice proposed under the Bill in relation to recovery of costs and expenses was different from normal court practice</p> <p>The Administration's response that under the Costs in Criminal Cases Ordinance (Cap. 492), the determination on the award of costs by the court was confined to the costs and expenses associated with the legal proceedings, while clause 40(1) would empower the court to order the convicted person to pay the costs and expenses incurred for investigation by TA</p> <p>The Administration's further explanation that unlike other law enforcement agencies, the Office of the Telecommunications Authority (OFTA) was a trading fund agency under which it was not funded by the Government but by licence fees. Therefore, it was reasonable for OFTA to recover the costs and expenditure incurred by the investigation. It was not a common arrangement because few trading fund agencies were responsible for law enforcement</p> <p>ALA3's reference to the similar practice adopted by the Securities and Futures Commission which was</p>	

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		<p>also not funded from the Government coffers, in the Securities and Futures Ordinance (Cap. 571)</p> <p>Reference to the concern raised by Wharf T&T Limited that local telecommunications service providers, which funded the operation of OFTA through payment of licence fees, would also need to fund the various activities to be undertaken by TA to administer and enforce the provisions under the Bill</p> <p>The Administration's response that the recovery of costs and expenses was targeted only at persons convicted of an offence under the Bill and to a certain extent, it could also serve as a deterrent for non-compliance. TA would seek to recover costs and expenses of investigation on a cost-recovery basis but the actual amount would be subject to the court's decision</p> <p>Enquiry on whether the costs and expenses to be recovered would include those incurred by the Hong Kong Police Force</p> <p>The Administration's clarification that the costs and expenses incurred by the Hong Kong Police Force would not be included</p> <p>Request for the Administration to explain the policy of allowing TA to recover the costs and expenses of investigation and whether other trading funds had adopted similar policy, provide the basis and criteria for determining the costs and expenses of investigation by TA, consider stating explicitly what costs and expenses would be included, and consider whether the clause, as</p>	<p>The Administration to provide information and consider</p>

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		drafted, would apply to recovery of costs and expenses incurred by TA only notwithstanding that TA had called upon police officers to assist him in the course of investigation	
012011 - 012244	Administration Ms Emily LAU	<p>Clause 41</p> <p>Enquiry on whether clause 41 was a standard provision and whether the immunity was for personal liability for civil liability or claim only</p> <p>The Administration's response that clause 41 was modelled on the Telecommunications Ordinance. This clause would not affect the right of any party under common law to initiate civil litigation against the enforcement agency</p>	
012245 - 012342	Chairman	Remark that some deputations had expressed views on Part 6 of the Bill	
012343 - 012523	Administration	<p>Clause 42</p> <p>Members did not raise any questions</p>	
012524 - 015219	Administration Chairman Mr WONG Ting-kwong Ms Emily LAU	<p>Clause 43</p> <p>Enquiry on whether there were any differences in the criteria for appointment as Chairman or Deputy Chairman of the Appeal Board when compared with those of other similar appeal boards</p> <p>The Administration's response that for the Telecommunications (Competition Provisions) Appeal Board established under the Telecommunications Ordinance, a person who was qualified for appointment as a judge of the High Court was eligible for appointment as chairman or deputy chairman. Under the Bill, however, a person</p>	

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		<p>qualified for appointment as a District Judge would be eligible for appointment as chairman or deputy chairman of the Appeal Board, similar to the requirements for the Administrative Appeals Board</p> <p>Enquiry on why the number of Deputy Chairmen was not specified in the Bill</p> <p>The Administration's response that as a Deputy Chairman might preside at a hearing of the Appeal Board, the number of Deputy Chairmen was not specified so as to maintain flexibility. The number required would depend on the actual workload of the Appeal Board</p> <p>Enquiry on whether the "six-year rule" and "six-board rule" would be adhered to and the criteria for appointment as panel members</p> <p>The Administration's response that the rules would be adhered to as far as possible taking into consideration the availability of suitable persons who had the necessary legal qualifications, technical knowledge and operational knowledge</p> <p>View that basic criteria, such as no conflict of interest, for appointment of panel members should be specified in the Bill</p> <p>The Administration's reservation on the idea and assurance that only persons with the right capability and integrity would be appointed because there was no reason to appoint a person who could not contribute to the work of the Appeal Board. Criteria for appointment of panel members were also not specified in</p>	

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		<p>the case of other appeal boards, such as the Telecommunications (Competition Provisions) Appeal Board</p> <p>Seeking clarification on the tenure of panel members of the Appeal Board and enquiry on whether a serving panel member who was appointed as Chairman or a Deputy Chairman would revert to the status of being a panel member after the tenure as Chairman or a Deputy Chairman had expired</p> <p>The Administration's response that although no specific tenure was specified in the Bill for panel members so as to maintain flexibility, the appointment letters would specify the tenure of the members having regard to the wish and commitments of individual panel members. As the appointment as Chairman or a Deputy Chairman was a separate appointment with a specific tenure, a serving panel member so appointed would have to relinquish the status of being a panel member and would therefore not revert to the status of being a panel member after the tenure as Chairman or a Deputy Chairman had expired</p> <p>Request for the Administration to consider stating explicitly in clause 43 the basic criteria (such as the need to ensure that there would be no conflict of interest) for the appointment of the Chairman, Deputy Chairmen and panel members to the Appeal Board, and to specify the maximum tenure of appointment of panel members</p> <p>Enquiry on the amount of remuneration of the Chairman, a</p>	<p>The Administration to consider</p>

Time marker	Speaker	Subject(s)	Action required
		Deputy Chairman and a panel member The Administration's response that the amount of remuneration would be determined by the Financial Secretary. Reference would be drawn from the arrangement of other appeal boards, such as the Administrative Appeals Board	
015220 - 015558	Chairman Ms Emily LAU	Completion of clause-by-clause examination of the Bill up to clause 43(9) Date of next meeting	

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15 January 2007