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立法會 CB(2)1981/07-08(01)號文件
LC Paper No. CB(2)1981/07-08(01)

16 May 2008

Mrs Sharon Tong
Clerk to Bills Committee
Legislative Council Secretariat
Legislative Council Building
8 Jackson Road
Central
Hong Kong

Dear Mrs Tong,

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

At the Bills Committee meeting on 24 April 2008, the Bills Committee Chairman invited IPCC to provide suggested amendments to Clauses 20 and 37. I now attach the proposed amendments for the Bills Committee's consideration.

I also attach two summaries setting out the areas of agreement and disagreement between IPCC and the Administration in respect of the IPCC Bill as well as IPCC's views on transitional matters and financial provision for statutory IPCC, for the Bills Committee's information and consideration.

Yours sincerely,

Handwritten signature of Philomena Leung in cursive.
(Mrs Philomena Leung)
Secretary,

Independent Police Complaints Council

c.c. Secretary for Security (Attn: Mrs Jessie Ting)

Proposed Amendments to Clauses 20 and 37

20. Council may require Commissioner to provide information etc. relating to reportable complaints

- (1) The Council may require the Commissioner –
- (a) to provide any information or material relating to a reportable complaint, including any written statement taken from a person interviewed by a member of the police force in respect of a reportable complaint, and any video recording of the interview; and
 - (b) to clarify any fact or discrepancy relating to a reportable complaint.

(2) Notwithstanding any claim of legal professional privilege, the Commissioner shall provide the Council for the purposes of performing the Council's functions under sections 7(1)(a) to (c) of this Ordinance with all documents between the Commissioner and his professional adviser in so far as the same are relevant to the handling or investigation of any reportable complaint.

(3) In this section, “video recording” (錄影紀錄) means a recording, on any medium, from which a moving image may by any means be produced and includes the accompanying sound-track.

37. Duty to keep confidence

(1) Except in the circumstances provided for in subsections (2), a specified person must not disclose any protected information.

(2) Subsection (1) does not prevent a specified person from disclosing any protected information if the disclosure is necessary –

- (a) for the performance of his functions under this Ordinance;
- (b) for the purpose of reporting evidence of any crime to such authority as he considers appropriate;
- (c) for the purpose of complying with –
 - (i) an order of a court; or

- (ii) a requirement in or made under an enactment or any other law,
in relation to any criminal, civil or disciplinary proceedings; or
- (d) for the purpose of complying with a data access request made under section 18 of the Personal Data (Privacy) Ordinance (Cap. 486).

(3) For the avoidance of doubt, where there is disagreement between the Council and the Commissioner regarding –

- (a) the findings and classifications of any reportable complaint; or
- (b) the actions taken or to be taken by the Commissioner against any member of the police force,

the Council may disclose all facts relating to such disagreement to such persons as it considers appropriate, and such disclosure shall be regarded as being necessary for the performance of the Council’s functions under this Ordinance.

(4) Subject to subsection (5), subsection 2(a) does not authorize the disclosure of the identity of –

- (a) any complainant;
- (b) any member of the police force whose conduct is the subject of a complaint; or
- (c) any person who assists or has assisted the Commissioner in the handling or investigation of a complaint.

(5) A disclosure of any identity referred to in subsection (4)(a), (b) or (c) may be made pursuant to subsection (2)(a) if the disclosure is made to –

- (a) a specified person within the meaning of paragraph (a), (b), (c), (d) or (e) of the definition of “specified person” in section 36;
- (b) the complainant;
- (c) the Commissioner;
- (d) a person who assists or has assisted the Commissioner in the handling or investigation of a complaint; or
- (e) a person interviewed by the Council pursuant to section 19.

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1. Clauses 16 and 17 - Commissioner of Police to submit investigation reports and interim investigation reports on Reportable Complaints to IPCC

1.1 IPCC's stance¹

- (a) A provision covering amended investigation reports and supplementary investigation reports should be added.

1.2 The Administration's stance²

- (a) Clause 25(b) already covers amended investigation reports.
- (b) Clauses 12(1) and 16 already cover supplementary reports.

1.3 IPCC's further stance³

- (a) For the avoidance of doubt, there is merit in reinstating a provision requiring Commissioner of Police (CP) to submit a report to IPCC on any reportable complaint (RC).

1.4 The Administration's further stance⁴

- (a) Will make additional provisions under Clauses 16 and 18 to expressly provide for the Police's submission of amended investigation report and supplementary investigation report to IPCC.

1.5 IPCC's latest stance

- (a) No further comments.

2. Clauses 17(3) and (4) - IPCC may advise CP of its opinion on interim investigation report

2.1 IPCC's stance⁵

- (a) Apart from giving opinion on CP's explanation for progress of the investigation and reasons for not being able to complete investigation within six months, IPCC should also be allowed to give observations on other matters, e.g. the NRC categorization of an allegation.

¹ Per p. 6 of LC Paper No. CB(2)563/07-08(01)

² Per p. 8 of LC Paper No. CB(2)829/07-08(01)

³ Per p. 5 of LC Paper No. CB(2)1281/07-08(02)

⁴ Per p. 11-14 of LC Paper No. CB(2)1689/07-08(01)

⁵ Per p. 8 of LC Paper No. CB(2)563/07-08(01)

2.2 The Administration's stance⁶

- (a) IPCC's powers to monitor the categorization of non-reportable complaints already provided for under Clause 15.
- (b) Clause 17(4) should be adequate in empowering the IPCC to monitor the progress of the investigation. Together with the general provision under Clause 7(2), IPCC should be adequately empowered to provide opinions on CAPO's interim investigation reports.

2.3 IPCC's further stance⁷

- (a) IPCC does not insist on amending Clauses 17(3) and (4).
- (b) IPCC will examine the non-reportable complaint categorization as reported in the final investigation reports.

3. Clause 22 - CP to inform complainant of matters relating to police operation

3.1 IPCC's stance⁸

- (a) It should be for CP to reply to the complainant on matters relating to police operation raised by the complainant.

3.2 The Administration's stance⁹

- (a) As a matter of existing practice, CAPO's reply will address enquiries or suggestions made by the complainant.
- (b) The Administration does not consider it appropriate to cover them in the Bill.

3.3 IPCC's further stance¹⁰

- (a) To avoid disputes, the IPCC would need the Police's assurance on the Administration's response above.

3.4 The Administration's further stance¹¹

- (a) The Police will in future address other questions from the complainants separately so that IPCC's replies to the complainants will be confined to matters related to the latter's requests for review.

⁶ Per p.13-14 of LC Paper No. CB(2)829/07-08(01)

⁷ Per p. 7 of LC Paper No. CB(2)1281/07-08(02)

⁸ Per p. 8 of LC Paper No. CB(2)563/07-08(01)

⁹ Per p. 14-15 of LC Paper No. CB(2)829/07-08(01)

¹⁰ Per p. 7 of LC Paper No. CB(2)1281/07-08(02)

¹¹ Per p. 21-22 of LC Paper No. CB(2)1689/07-08(01)

3.5 IPCC's latest stance

- (a) Welcomes the assurance and suggests that this be expressly spelt out in the CAPO Manual.

4. Clause 28 - Reports to CE

4.1 IPCC's stance¹²

- (a) Clause 28 should be amended to provide that CE would give a response to the IPCC's report made to him.

4.2 The Administration's stance¹³

- (a) It is an established practice that CE or his authorized officer will respond to the statutory body submitting a report to him.
- (b) Not necessary to make an express provision for this.

4.3 IPCC's further stance¹⁴

- (a) An express provision would be in the interest of the Council in discharging its functions.

4.4 The Administration's further stance¹⁵

- (a) Express provision not necessary. No such provision is found in a number of other Ordinances establishing statutory bodies.

4.5 IPCC's latest stance

- (a) No further comments.

5. Clause 37(4) - Disclosure of identity of parties involved in a complaint

5.1 IPCC's stance¹⁶

- (a) IPCC should be allowed to disclose the identity of parties involved in a complaint to potential witnesses, CE, other relevant Government departments or statutory/advisory bodies, and legal representatives, friends or relatives who accompany a witness to be interviewed by the IPCC.

¹² Per p. 7 of LC Paper No. CB(2)563/07-08(01)

¹³ Per p.10 of LC Paper No. CB(2)829/07-08(01)

¹⁴ Per p. 6 of LC Paper No. CB(2)1281/07-08(02)

¹⁵ Per p.17-18 of LC Paper No. CB(2)1689/07-08(01)

¹⁶ Per p.9 of LC Paper No. CB(2)563/07-08(01)

5.2 The Administration's stance¹⁷

- (a) Clause 37(4)(e) already permits disclosure of such personal data to a person interviewed by the IPCC pursuant to Clause 19. The Administration will further examine the IPCC's comments in considering whether Clause 37(4) should be refined.
- (b) Clause 37(2)(b) as read with Clause 37(3) provide that the IPCC may disclose "protected information" for the purpose of reporting evidence of any crime to such authorities as the IPCC considers appropriate.
- (c) Clause 7(1)(a) empowers the IPCC to make recommendations on the Police's handling or investigation of reportable complaints. If the IPCC considers that a case should be referred to other relevant Government departments or statutory/advisory bodies for necessary actions, it may make such recommendations to CAPO. Under Clause 25(b), the IPCC may require CAPO to submit to the IPCC a report on the actions taken/to be taken in respect of such recommendations. Hence, the Administration does not consider it necessary to expand Clause 37(4) to cover other relevant Government departments or statutory/advisory bodies.

5.3 IPCC's further stance¹⁸

- (a) If the IPCC directly receives a complaint against the Police that may involve matters of other jurisdictions, IPCC will then refer the case to CAPO for necessary action.

5.4 The Administration's further stance¹⁹

- (a) Will revise Clause 37(4) to include a person whom the IPCC invites to an interview pursuant to Clause 19 and any person that is present at an interview in accordance with Clause 19 as well as the CE.
- (b) If the IPCC directly receives a complaint against the Police that may involve matters within the purview of other statutory bodies, the IPCC can refer the case to CAPO for necessary follow-up actions.

5.5 IPCC's latest stance

- (a) No further comments.

¹⁷ Per p. 15-17 of LC Paper No. CB(2)829/07-08(01)

¹⁸ Per p.7-8 of LC Paper No. CB(2)1281/07-08(02)

¹⁹ Per p. 23-24 of LC Paper No. CB(2)1689/07-08(01)

6. Commencement of the Ordinance

6.1 IPCC's stance²⁰

- (a) Before the Ordinance is brought into operation, the transitional arrangements should be clearly settled with the Administration.

6.2 The Administration's stance²¹

- (a) Agree that the transitional arrangements should be comprehensively deliberated.
- (b) Will examine if there is a need to add a commencement clause to the Bill.

6.3 IPCC's further stance²²

- (a) A commencement clause should be added to allow the coming into operation of the Ordinance after the transitional arrangements have been put in place.

6.4 The Administration's further stance²³

- (a) Will add a commencement clause to the Bill so that the Administration may appoint a commencement date which would be subject to the IPCC's readiness and progress of preparatory arrangements for its operation as a statutory body.

6.5 IPCC's latest stance

- (a) No further comments.

²⁰ Per p. 9 of LC Paper No. CB(2)563/07-08(01)

²¹ Per p.17 of LC Paper No. CB(2)829/07-08(01)

²² Per p. 8 of LC Paper No. CB(2)1281/07-08(02)

²³ Per p. 25 of LC Paper No. CB(2)1689/07-08(01)

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1. Clauses 2, 12 and 16 - Classification for "Informal Resolution" and "Withdrawn"

1.1 The relevant provision

- (a) Under Clause 2, "classification" means classification after investigation and that includes "Informal Resolution" (IR) and "Withdrawn".

1.2 IPCC's stance¹

- (a) Unless "investigation" is extended to cover preliminary steps taken prior to informally resolving a complaint, it would not be right to consider "IR" a "classification" under Clause 2.
- (b) "IR" is not regarded as a result of investigation in CAPO's Manual.

1.3 The Administration's stance²

- (a) "IR" and "Withdrawn" cases are reportable complaints subject to IPCC's monitoring.
- (b) CAPO is required to submit investigation reports in accordance with Clause 16.
- (c) Appropriate to include "IR" and "Withdrawn" under the definition of "classification".

1.4 IPCC's further stance³

- (a) Seems different views on what constitutes "investigation".
- (b) Clause 16(3) should be rephrased to stipulate that the Commissioner of Police must submit a report to IPCC on such cases.

1.5 The Administration's latest stance⁴

- (a) The preliminary steps are considered to be part of the investigation and CAPO Manual will be amended.
- (b) The definition of "classification" in Clause 2 will be amended to list out all existing classifications.
- (c) Clause 12 will be amended to expressly provide that "IR" cases are not subject to review.

¹ Per p. 7-8 of LC Paper No. CB(2)563-07-08(01)

² Per p. 10-13 of LC Paper No. CB(2)829/07-08(01)

³ Per p. 6-7 of LC Paper No. CB(2)1281/07-08(02)

⁴ Per p. 18-19 of LC Paper No. CB(2)1689/07-08(01)

- (d) Will consider amending Clause 12 to reflect the possibility of re-activating "Withdrawn" and "Not Pursuable" cases.

2. Clauses 7(1)(b) and 24 - IPCC to advise the Commissioner of Police or the Chief Executive of its opinion on the Commissioner's action taken on a member of the police force

2.1 The relevant provisions

- (a) Clause 7(1)(b) provides that the function of the IPCC is to monitor actions taken or to be taken in respect of any member of the police force by the Commissioner in connection with reportable complaints, and to advise the Commissioner or the Chief Executive its *opinion* on such actions.
- (b) Under Clause 25(b), the Council may require the Commissioner to submit to Council a report on any action taken or to be taken in respect of a *recommendation* of the Council. There is no need to submit a report in relation to *opinion* expressed by Council.

2.2 IPCC's stance⁵

- (a) IPCC is concerned about:
 - (i) training needs of officers;
 - (ii) service improvement suggestions; and
 - (iii) terms of a reply to a complainant.

2.3 The Administration's stance⁶

- (a) Clause 7(1)(c) already enables IPCC to make recommendations in respect of faulty or deficient police practices or procedures.
- (b) Clause 7(1)(c) is sufficient to meet the concerns of the Council.

2.4 IPCC's further stance⁷

- (a) Clause 7(1)(c) is inadequate. The advice on service quality improvement may not arise from a fault or deficiency in police practices or procedures.

2.5 The Administration's latest stance⁸

- (a) Clause 7(1)(c) should be able to serve the purpose of empowering the IPCC to make recommendations on how service quality can be

⁵ Per p. 6 of LC Paper No. CB(2)563/07-08(01)

⁶ Per p. 6-7 of LC Paper No. CB(2)829/07-08(01)

⁷ Per p. 4-5 of LC Paper No. CB(2)1281/07-08(02)

⁸ Per p. 10-11 of LC Paper No. CB(2)1689/07-08(01)

improved.

3. Clauses 8(3) and 15(3) - The Commissioner of Police to provide brief descriptions of Non-Reportable Complaints and explanations to support the Non-Reportable Complaints categorization

3.1 The issue

- (a) This relates to IPCC's function of monitoring the categorization of non-reportable complaints (NRC).

*3.2 IPCC's stance*⁹

- (a) Clause 7(2) provides that "The Council may do all such things that are reasonably necessary for, or incidental or conducive to, the performance of its function under this Ordinance".
 - (i) This is not a sufficient basis for Council to demand additional information from Commissioner of Police in relation to NRC.
 - (ii) It does not impose an obligation on Commissioner of Police for compliance.
- (b) There should be explicit provision (similar to Clause 20(1)) providing the Council complete access to information.

*3.3 The Administration's stance*¹⁰

- (a) Clauses 8, 15(3) and 7(2) should sufficiently enable the Council to require the Police to provide additional information on NRCs.
- (b) A provision similar to Clause 20(1) is not necessary.

*3.4 IPCC's further stance*¹¹

- (a) The Administration states that the Police stands ready to provide additional information about NRCs. It should not therefore have objection to express provisions.

*3.5 The Administration's latest stance*¹²

- (a) Council has sufficient powers in:
 - (i) Clause 7(1)(f);
 - (ii) Clause 7(2); and
 - (iii) Clause 15(3).

⁹ Per p.5 of LC Paper No. CB(2)563/07-08(01)

¹⁰ Per p.2-3 of LC Paper No. CB(2)829/07-08(01)

¹¹ Per p. 3 of LC Paper No. CB(2)1281/07-08(02)

¹² Per p. 6 of LC Paper No. CB(2)1689/07-08(01)

4. **Clause 20 - Provision of information relating to a Reportable Complaint and Legal Professional Privilege (LPP)**

4.1 IPCC's stance¹³

- (a) IPCC should have full and unrestricted access to information pertaining to complaint investigations.
- (b) The Commissioner of Police should not have the discretion to invoke his LPP as he deems fit.

4.2 The Administration's stance¹⁴

- (a) Committed to ensuring that IPCC has access to "relevant information".
- (b) The common law legal position in relation to LPP should be preserved.
- (c) The Bill permits the Police to consider waiving their right on LPP on a case-by-case basis.

4.3 IPCC's further stance¹⁵

- (a) Past experience indicates that legal advice tendered did affect the classification of an allegation.
 - (i) CAPO initially refused to
 - 1) change the "Unsubstantiated" classification of an "Assault" complaint; and
 - 2) provide Commissioner of Police's communications with the Department of Justice (DoJ).
 - (ii) After protracted discussions, CAPO agreed to classify the allegation as "Not Fully Substantiated", and eventually as "Substantiated".
 - (iii) CAPO still refused IPCC sight of Consent Order and DoJ's advice.
- (b) CAPO had *unilaterally* removed from the CAPO Manual the requirements to record in CAPO's investigation reports to IPCC the legal advice on complaint cases.

¹³ Per p. 4-5 of LC Paper No. CB(2)563/07-08(01)

¹⁴ Per p. 1-2 of LC Paper No. CB(2)829/07-08(01)

¹⁵ Per p. 1-2 of LC Paper No. CB(2)1281/07-08(02)

- (i) IPCC would not know whether CAPO had sought legal advice.
- (ii) CAPO insisted on the amendments asserting its true reflection of the spirit of LPP.

4.4 The Administration's further stance¹⁶

- (a) In relation to the previous refusal:
 - (i) communication was subject to LPP; and
 - (ii) Consent Order contained a confidentiality provision.
- (b) In relation to amendments to the CAPO Manual to remove provisions that
 - (i) DoJ's statement of not accepting a case for advice; and
 - (ii) Superintendent's decision of not referring an assault case to DoJshould be included in the report submitted to IPCC, the amendments were made on the basis of the spirit to protect information subject to LPP.
- (c) That IPCC was not consulted on the amendments was an administrative oversight.

4.5 Chairman's submission on behalf of IPCC

- (a) The Administration is merely paying lip service to the principle that IPCC must be supplied with all information.
- (b) The Administration is seeking to vest a discretion on CAPO to supply to IPCC such information as they deem to be relevant.
- (c) The legal advice is relevant information as indicated by past experience.
- (d) The unilateral amendment to the CAPO Manual is a deliberate attempt to conceal from IPCC the existence of relevant information.

5. **Clause 27 - Commissioner of Police to comply with the requirements of IPCC**

5.1 The relevant provision

- (a) Under Clause 27, the Commissioner of Police must comply with any requirement made by the Council unless he is satisfied that compliance would be likely to prejudice
 - (i) the security of Hong Kong; or
 - (ii) the investigation of any crime.

¹⁶ Per p. 1-5 of LC Paper No. CB(2)1689/07-08(01)

5.2 IPCC's stance¹⁷

- (a) The term "any crime" is too wide.

5.3 The Administration's stance¹⁸

- (a) Not practicable to qualify "any crime".
- (b) Commissioner of Police will not lightly rely on Clause 27 for non-compliance. In the event of non-compliance, he will provide explanation to IPCC. If not satisfied, IPCC can report to Chief Executive.

5.4 IPCC's further stance¹⁹

- (a) The "requirement made by the Council under this Ordinance" covers a wide range of matters:
 - (i) under Clause 20(1): provision of information in relation to a reportable complaint;
 - (ii) under Clause 21(1): to investigate a reportable complaint;
 - (iii) under Clause 22: to inform the complainant of the classification of the reportable complaint;
 - (iv) under Clause 25(a): to compile and submit statistics; and
 - (v) under Clause 26(1): to consult the Council on orders and manuals relating to the handling or investigation of reportable complaints.

The exception should therefore be carefully worded to ensure that IPCC's requirements would not be lightly abrogated.

- (b) IPCC had proposed to:
 - (i) substitute "any crime" by "an indictable offence" and
 - (ii) impose a time limit.

5.5 The Administration's further stance²⁰

- (a) Will revise Clause 27 to provide that Commissioner of Police must comply with any requirement made by IPCC under the Bill unless the Secretary of Security (S for S) certifies that compliance would be likely to prejudice the security of Hong Kong or the investigation of any crime.

¹⁷ Per p.5-6 of LC Paper No. CB(2)563/07-08(01)

¹⁸ Per p.4-6 of LC Paper No. CB(2)829/07-08(01)

¹⁹ Per p 3-4 of LC Paper No. CB(2)1281/07-08(02)

²⁰ Per p. 7-10 of LC Paper No. CB(2)1689/07-08(01)

5.6 IPCC's latest stance

- (a) The certificate from S for S should stipulate a validity period after which S for S should review the matter.

5.7 The Administration's latest stance

- (a) Do not consider such stipulation necessary. The matter would naturally be under regular review.

5.8 IPCC's latest stance

- (a) Stipulation useful.

6. Clause 37 - IPCC's Duty to Keep Confidence

6.1 The issue

- (a) We are dealing with the situation of
 - (i) Police's explanations for not accepting IPCC's advice; and
 - (ii) IPCC's disagreement with the Police.
- (b) Clause 37(2)(a) provides that IPCC may disclose information "if the disclosure is necessary for the performance of his functions under this Ordinance".

6.2 IPCC's stance²¹

- (a) Clause 37(2)(a) is inadequate as this places the onus of proof on IPCC.
- (b) Disclosure is a means for IPCC to invite public's comments and scrutiny on matters which it cannot agree with CAPO. Therefore essential to have express provisions.
- (c) The Administration had undertaken in their letter dated 26.2.2002 to provide IPCC with such powers of disclosure.

6.3 The Administration's stance²²

- (a) The position is regulated by Clause 37(2)(a): there can be disclosure of protected information if disclosure is necessary "for the performance of his functions under this Ordinance".

²¹ Per p.7 of LC Paper No. CB(2)563/07-08(01) & P. 5-6 of LC Paper No. CB(2)1281/07-08(01)

²² Per p. 15-16 of LC Paper No. CB(2)1689/07-08(01)

Transitional Matters and Financial Provision for Statutory IPCC

The Administration's stance

- (a) Committed to ensuring that statutory IPCC will be provided with appropriate support and resources.
- (b) Statutory IPCC will be provided with no less than the current level of financial resources plus resources currently provided free of charge by government departments.
- (c) Any requests for additional resources will be subject to the established resource bidding procedures in the normal manner.
- (d) Like other subvented statutory bodies, statutory IPCC should regularly review the number, ranking and remuneration packages of staff at the top three tiers and submit review reports to the responsible Director of Bureau.

IPCC's Views

Staffing

- (a) The 25 existing posts in the Secretariat should be retained and 6 new posts added.
- (b) Secretary should be retitled as Executive Director, should be pitched at D3, and should be a member of the Council.
- (c) Pending recruitment of IPCC's own staff ready and capable to take up the duties, the Administration should provide adequate civil servants to staff the Secretariat.
- (d) Detailed terms of employment of IPCC staff should be a matter for statutory IPCC to decide.

Funding

- (e) IPCC should be treated as a subvented body with its own head of expenditure, on par with the arrangements applicable to the Office of the Ombudsman.
- (f) Executive Director will serve as controlling officer to IPCC's head of expenditure.

- (g) One-off provision of \$3.7M and additional annual provision of \$14.4M needed (on top of existing provision under Head 121).
- (h) Funding should be correspondingly increased in line with any rental increase for office accommodation.
- (i) Additional provision should be given for unforeseen expenses, such as in the case of any legal suits against IPCC.

Accommodation

- (j) Arrangement should be made for IPCC to “take over” the tenancy under the terms of the existing tenancy agreement.