

立法會
Legislative Council

LC Paper No. CB(1)2226/10-11
(These minutes have been seen
by the Administration)

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**Bills Committee on Anti-Money Laundering and
Counter-Terrorist Financing (Financial Institutions) Bill**

**Sixth meeting on
Monday, 24 January 2011, at 2:30 pm
in Conference Room B of the Legislative Council Building**

- Members present** : Hon CHAN Kam-lam, SBS, JP (Chairman)
Hon James TO Kun-sun (Deputy Chairman)
Dr Hon Margaret NG
Hon Mrs Sophie LEUNG LAU Yau-fun, GBS, JP
Hon Audrey EU Yuet-mee, SC, JP
Hon WONG Ting-kwong, BBS, JP
Hon CHIM Pui-chung
Hon Starry LEE Wai-king, JP
Hon Paul CHAN Mo-po, MH, JP
- Members absent** : Hon Albert HO Chun-yan
Dr Hon David LI Kwok-po, GBM, GBS, JP
Dr Hon Philip WONG Yu-hong, GBS
- Public officers
Attending** : Mr Patrick HO
Deputy Secretary for Financial Services and the
Treasury (Financial Services)
- Miss Melo MAN
Acting Principal Assistant Secretary for Financial
Services and the Treasury (Financial Services)

Ms Monica LAW
Senior Assistant Law Draftsman
Department of Justice

Mr Alan CHONG
Senior Government Counsel
Department of Justice

Mr Trevor KEEN
Head (Banking Conduct)
Hong Kong Monetary Authority

Mr Hon CHAN
Senior Manager (Anti-money Laundering)
Office of the Commissioner of Insurance

Mr CHEUNG Sai-yan
Head of Trade Controls
C & E Department

Clerk in attendance : Ms Anita SIT
Chief Council Secretary (1)5

Staff in attendance : Miss Kitty CHENG
Assistant Legal Adviser 5

Mr Daniel SIN
Senior Council Secretary (1)7

Ms Haley CHEUNG
Legislative Assistant (1)8

I Confirmation of minutes of meeting

(LC Paper No. CB(1)1083/10-11 — Minutes of meeting on
9 December 2010)

The minutes of the meeting held on 9 December 2010 were confirmed.

II Meeting with the Administration

Follow-up to issues raised at the meeting on 7 January 2011

(LC Paper No. CB(1)1051/10-11(01) — List of follow-up actions arising from the meeting on 7 January 2011 prepared by the Legislative Council Secretariat

LC Paper No. CB(1)1051/10-11(02) — Administration's paper on "Comparison between the Guidelines Issued by the Hong Kong Monetary Authority and the Bill in respect of Politically Exposed Persons"

LC Paper No. CB(1)1124/10-11(01) — Administration's paper on "The Intended Scope and Contents of the Guidelines to be Issued under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill"

LC Paper No. CB(1)1051/10-11(03) — Administration's paper on "Appointment of 'Authorized Persons' for Routine Inspection"

LC Paper No. CB(1)1124/10-11(02) — Administration's paper on "The Scope of Clause 9(3)(b) of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill"

Follow-up to issues raised at the meeting on 13 January 2011

(LC Paper No. CB(1)1124/10-11(03) — List of follow-up actions arising from the meeting on 13 January 2011 prepared by the Legislative Council Secretariat

LC Paper No. CB(1)1124/10-11(04) — Administration's paper on "Coverage of Paragraph (a)(iii) of the Definition of 'Business

Premises' under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill")

Clause-by-clause examination of the Bill (starting at clause 12)

- (LC Paper No. CB(3)122/10-11 — The Bill
- LC Paper No. CB(1)705/10-11(06) — Letter from Assistant Legal Adviser to the Administration dated 7 December 2010
- LC Paper No. CB(1)863/10-11(03) — Administration's paper on "Information on Reference Materials" (members may just bring Annex F to the paper)
- LC Paper No. CB(1)979/10-11(03) — Paper on "Hong Kong legislative reference used by the Administration in drafting the Bill" prepared by the Legal Service Division
- LC Paper No. CB(1)979/10-11(04) — Marked-up copy of the consequential and related amendments of the Bill prepared by the Legal Service Division)

Discussion

2. The Bills Committee deliberated (Index of proceedings attached at the **Appendix**).

Admin Follow-up actions to be taken by the Administration

3. The Administration was requested to:

(a) Clause 12

explain the rationale for including "all other assistance" in clause 12(2)(d);

(b) Clause 13(7) and (8)

- (i) provide examples of the use of "concerned in the management of [an institution]" in other legislation; and
- (ii) provide examples of the use of "causes or allows [an institution] to fail to comply" in other legislation and information on any case law to illustrate the scenario caught by such provision.

(c) Clause 14

- (i) clarify the need for the provision for an authorized person or an investigator to apply to the Court of First Instance relating to non-compliance with requirements under clause 9 or 12, considering that such non-compliance is a criminal offence under clause 10 or 13, and in this connection, consider if a person being required to comply with requirements made under clause 9 or 12 should be allowed to make an application to the Court of First Instance to set aside the requirements; and
- (ii) clarify the need for clauses 13(10) and 14(4) given that there is already protection against res judicata under the common law.

(d) Part 3

consider whether apart from the claims for a lien, the Bill should include provisions to clarify that other claims in relation to a legal right or obligation should not affect the requirement to produce records or documents under Part 3 of the Bill.

(e) Clause 17

- (i) confirm that a warrant issued under clause 17 would not be executed by the Police alone;
- (ii) consider whether provisions on the procedures for sealing documents pending determination by the court on legal professional privilege should be incorporated under this clause; and
- (iii) clarify whether under sub-clause(3)(b) which empowers the "authorized person" to "take any other step that appears to the authorized person to be necessary...", the authorized person may require a person on the premises subject to a warrant to perform a certain act.

(f) Clause 21

- (i) consider whether it is necessary to amend sub-clause (2)(c) to take into account the profit gained or cost avoided by a third party as a result of the contravention in determining the maximum level of fine; and
 - (ii) with reference to sub-clause (5), provide examples of other legislation providing for the registration of orders to pay pecuniary penalties in the Court of First Instance.
- (g) confirm whether the Law Society of Hong Kong and the Hong Kong Bar Association has made any comment relating to "legal professional privilege" in response to the Administration's past consultations or the Bills Committee's invitation for views on the Bill.

III Any other business

Date of next meeting

4. The Chairman reminded members that the next meeting would be held on 9 February 2011.
5. There being no other business, the meeting ended at 4:30 pm.

Council Business Division 1
Legislative Council Secretariat
18 May 2011

**Proceedings of the
Bills Committee on Anti-Money Laundering and
Counter-Terrorist Financing (Financial Institutions) Bill
Sixth meeting on Monday, 24 January 2011, at 2:30 pm
in Conference Room B of the Legislative Council Building**

Time Marker	Speaker	Subject(s)	Action Required
000248 – 000344	Chairman	Confirmation of minutes of meeting on 9 December 2010 (LC Paper No. CB(1)1083/10-11) Introductory remarks	
000345 – 000746	Administration	Briefing by the Administration on the paper on "Comparison between the Guidelines Issued by the Hong Kong Monetary Authority and the Bill in respect of Politically Exposed Persons" (LC Paper No. CB(1)1051/10-11(02))	
000747 – 000935	Administration	Briefing by the Administration on the paper on "The Intended Scope and Contents of the Guidelines to be Issued under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill" (LC Paper No. CB(1)1124/10-11(01))	
000936 – 001037	Administration	Briefing by the Administration on the paper on "Appointment of 'Authorized Persons' for Routine Inspection" (LC Paper No. CB(1)1051/10-11(03))	
001038 – 001336	Administration	Briefing by the Administration on the paper on "Coverage of Paragraph (a)(iii) of the Definition of 'Business Premises' under the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill" (LC Paper No. CB(1)1124/10-11(04))	
001337 – 001706	Administration	Briefing by the Administration on the paper on "The Scope of Clause 9(3)(b) of the Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Bill" (LC Paper No. CB(1)1124/10-11(02))	
001707 – 001940	Administration	<u>Clause-by-clause examination of the Bill</u> <u>Clause 12 – Powers of investigators to require production of records or documents etc.</u> Clause 12 (1) to (4)	

Time Marker	Speaker	Subject(s)	Action Required
001941 – 002404	Mr WONG Ting-kwong Administration	<p>Mr WONG suggested that the Bill should specify clearly the manner (such as in writing) by which the Financial Secretary gave consent for a regulator to appoint an investigator under Clause 11(1).</p> <p>The Administration explained that it was already an established practice that all internal communications relating to any important decision would be recorded in writing.</p>	
002405 – 002715	Administration Chairman	<p>Clauses 12 (5) to (10)</p> <p>In response to the Chairman, the Administration explained that there was no international standard on how soon an investigation report under clause 12(9) should be submitted to a relevant authority.</p>	
002716 – 002851	Administration	<p><u>Clause 13 – Offences for non-compliance with requirements imposed under section 12</u></p> <p>Clause 13 (1) to (5)</p>	
002852 – 003457	Deputy Chairman Administration	<p>The Deputy Chairman sought clarification of the meaning of "all other assistance" in clause 12(2)(d) that an investigator might require a person to provide in connection with an investigation.</p> <p>The Deputy Chairman was concerned that the clause was ambiguous about the nature of "assistance" required and there was no similar requirement in other legislation such as the Organized and Serious Crime Ordinance (Cap. 455). He was also concerned that the person might have to incur expenses in order to provide the "assistance" required under clause 12(2)(d).</p> <p>The Administration was requested to explain the rationale for including "all other assistance" in clause 12(2)(d).</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
003458 – 003611	Administration	<p>Clause 13(6) to (7)</p>	

Time Marker	Speaker	Subject(s)	Action Required
003612 – 005641	Deputy Chairman Administration ALA5 Mrs Sophie LEUNG	<p>Clause 13(7)</p> <p>Referring to clauses 13(7) and (8), the Deputy Chairman asked:</p> <ul style="list-style-type: none">(a) How was an "employee of a financial institution" different from a person who was "employed to work for a financial institution";(b) Whether a person "concerned in the management of a financial institution" might already be covered by the two types of persons in (a) above;(c) What examples could be provided to illustrate who those persons described in (b) were; and(d) What sorts of behaviour would constitute "causing or allowing the financial institution to fail to comply with a requirement" or "causing and allowing" false or misleading information to be given, and whether there was relevant case law. <p>The Administration explained that:</p> <ul style="list-style-type: none">(a) Persons who were "employed to work for a financial institution" include the staff of the Postmaster General; and(b) Persons who were "concerned in the management of a financial institution" were generally the senior management of a financial institution (FI) may or may not be covered by the two types of persons in (a) above. <p>Mrs Sophie LEUNG said that clause 13(7) should be applied by first identifying a person who, with intent to defraud, had caused or allowed a FI to fail to comply with a requirement specified under the Bill, and then by checking if he was a member of the senior management of FI. Prosecution under clause 13(7) could be initiated if both conditions were satisfied. She said a proper form of drafting should be considered to reflect the intention clearly.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>In relation to clause 13(7) and (8), the Administration was requested to</p> <p>(a) provide examples of the use of "concerned in the management of [an institution]" in other legislation; and</p> <p>(b) provide examples of the use of "causes or allows [an institution] to fail to comply" in other legislation and information on any case law to illustrate the scenario caught by such provision.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
005642 – 005845	Administration Deputy Chairman Administration	<p>Clause 13 (10) to (11)</p> <p>The Deputy Chairman queried the need for clauses 13(10)(a) and (b) to codify the principle of double jeopardy, which was already established under Common Law.</p> <p>The Administration explained that clause 13(10) should be read together with clause 14(2)(b), and the provisions were modelled on the Securities and Futures Ordinance (Cap. 571) (SFO).</p>	
005846 – 005948	Administration	<p>Clause 13 (12) to (13)</p> <p>Members raised no question on clause 13(12) to (13).</p>	
005949 – 010131	Administration	<p><u>Clause 14 – Application to Court of First Instance relating to non-compliance with requirements imposed under section 9 or 12</u></p> <p>Clause 14 (1) to (2)</p>	
010132 – 011008	Deputy Chairman Administration Department of Justice (DoJ)	<p>The Deputy Chairman queried the need to create an additional offence in clause 14(2)(b) where the Court of First Instance (CFI) found, after an inquiry applied by an authorized person or investigator under clause 14(1), that a person had failed to comply with the authorized person or investigator's requirement. He said such failure of compliance was already an offence under clause 13.</p> <p>The Deputy Chairman said the Bill should, instead, allow the person to apply to the Court to nullify the authorized person or investigator's requirement if he considered the requirement unreasonable.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>The Administration explained that the provision was modelled on SFO. Experience showed that a person under investigation was more willing to produce the documents or records if the order was issued by the Court.</p> <p>Furthermore, the person involved might still not produce the required documents or records after being prosecuted under clause 13; but the order of the Court in clause 14(2) would require specific performance.</p> <p>With respect to the concerns raised by the Deputy Chairman, the Administration agreed to -</p> <p>(a) clarify the need for the provision for an authorized person or an investigator to apply to CFI relating to non-compliance with requirements under clause 9 or 12, considering that such non-compliance is a criminal offence under clause 10 or 13, and in this connection, consider if a person being required to comply with requirements made under clause 9 or 12 should be allowed to make an application to CFI to set aside the requirements; and</p> <p>(b) clarify the need for clauses 13(10) and 14(4) given that there was already protection against res judicata under Common Law.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
<p>011009 – 011611</p>	<p>Administration Deputy Chairman</p>	<p><u>Clause 15 – Use of incriminating evidence in proceedings</u></p> <p>The Deputy Chairman asked how clause 15(3) would operate in practice in respect of an offence under clause 13(1) or 13(3). These offences concerned a person's own failure to produce or give explanation on certain documents or records required by an authorized person or investigator under clause 12(2) or (3).</p> <p>The Administration explained that during the criminal proceedings for an offence under clause 13(1) or (3), any question made to and any response given by the person concerned would not be covered by clause 15(1) and could be used as evidence in such proceedings.</p>	

Time Marker	Speaker	Subject(s)	Action Required
011612 – 011911	Administration Deputy Chairman	<p><u>Clause 16 – Lien claimed on records or documents</u></p> <p>The Deputy Chairman asked the Administration to consider whether apart from the claims for a lien, the Bill should include provisions to clarify that other claims in relation to a legal right or obligation should not affect the requirement to produce records or documents under Part 3 of the Bill.</p>	The Administration to take action as per paragraph 3 of the minutes.
011912 – 012018	Administration	<p><u>Clause 17 – Magistrate's warrants</u></p>	
012019 – 012819	Deputy Chairman Administration Chairman	<p>Clause 17(1)(a)</p> <p>The Deputy Chairman enquired about the rationale for specifying in the provision that a warrant issued by the magistrate under clause 17 had to be executed within 7 days from the date of the warrant. He was not aware that such condition applied to warrants issued to the Police in relation to crime-related investigations.</p> <p>The Administration explained that clause 17 was modelled on SFO. In general, a warrant did not have a specific expiry period. The purpose of specifying a valid period of 7 days was to ensure that the regulators would execute the warrant issued by the magistrate without delay.</p> <p>In response to the Deputy Chairman's concern, the Administration explained that it was not the intention of the Bill to ask the Police to conduct independent investigation into any offence under the Bill and apply for a warrant for such purpose. The role of the Police was to facilitate the authorized person or investigator to enter the premises concerned.</p> <p>The Deputy Chairman commented that the Police could in fact apply for a warrant under clause 17 as currently drafted. If it was not the intention to so do, the Administration should confirm that a warrant issued under clause 17 would not be executed by the Police alone.</p>	The Administration to take action as per paragraph 3 of the minutes.
012820 – 013000	Administration	<p>Clause 17 (2) to (4)</p>	

Time Marker	Speaker	Subject(s)	Action Required
013001 – 013401	Deputy Chairman Administration	<p>The Deputy Chairman queried the need to empower an authorized person to prohibit any person from removing records or documents from premises under clause 17(3) when the warrant already allowed him to seize such documents or records.</p> <p>The Administration explained that clause 17(3) would prevent any documents or records from being removed or tampered with before the authorized person could physically seize them under clause 17(1).</p>	
013402 – 013651	Dr Margaret NG Administration DoJ	<p>Dr NG shared the Deputy Chairman's concern about the protection and safeguards afforded by the Bill to persons required to produce documents or records. Regarding the Administration's explanation that the legal privilege protection was provided under clause 80, Dr NG asked -</p> <p>(a) Whether the phrase "the Ordinance does not affect" in clause 80(1) would have the same effect as "nothing in this Ordinance would affect" as commonly adopted in other legislation; and</p> <p>(b) Whether the Bar Association and the Law Society had been consulted.</p> <p>The Administration confirmed that -</p> <p>(a) The present-day drafting style adopted a more direct approach, and both forms of wording as quoted by Dr NG had the same legal effect.</p> <p>(b) Views of the Law Society and the Bar Association had been sought on the Bill, and no particular comments had been received regarding the legal professional privilege.</p> <p>The Administration was requested to confirm whether the Law Society of Hong Kong and the Hong Kong Bar Association had made any comments relating to "legal professional privilege" in response to the Administration's past consultations or the Bills Committee's invitation for views on the Bill.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>

Time Marker	Speaker	Subject(s)	Action Required
013652 – 013908	Deputy Chairman	<p>The Deputy Chairman said there were existing statutes that prescribed the procedure to seal records or documents when there was disagreement over a claim for legal professional privilege pending a decision by the Court.</p> <p>The Deputy Chairman asked the Administration to consider whether provisions on the procedures for sealing documents pending determination by the court on legal professional privilege should be incorporated under this clause.</p>	The Administration to take action as per paragraph 3 of the minutes.
013909 – 014046	Administration	Clause 17 (5) to (11)	
014047 – 014446	Deputy Chairman Administration	<p>The Deputy Chairman was concerned that clause 17(3)(b) might give an authorized person the power to order or require any person to take active steps to enable the authorized person to preserve or otherwise prevent interference with the records or documents produced under clause 17(2). This might put the person concerned at risk of breaching clause 17(9) which was liable to a heavy fine and penalty under clause 17(10).</p> <p>The Administration explained that clause 17(3)(b) only referred to actions that the authorized person could take.</p> <p>The Deputy Chairman requested the Administration to clarify whether under sub-clause (3)(b) which empowered the "authorized person" to "take any other step that appeared to the authorized person to be necessary...", the authorized person had the power to require a person on the premises subject to a search warrant to perform a certain act.</p>	The Administration to take action as per paragraph 3 of the minutes.
014447 – 014602	Administration	<p><u>Clause 18 – Production of information in information systems etc.</u></p> <p>Members raised no question on proposed clause 18.</p>	
014603 – 014941	Administration Deputy Chairman	<p><u>Clause 19 – Inspection of records and documents seized etc.</u></p> <p><u>Clause 20 – Destruction of documents etc.</u></p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>The Deputy Chairman asked if a breach of a "reasonable condition" imposed under clause 19(2) constituted an offence.</p> <p>The Administration explained that no offence was provided for the breach of such conditions.</p>	
014942 – 015134	Administration	<p>Part 4</p> <p>Disciplinary Actions by Relevant Authorities</p> <p><u>Clause 21 – Relevant authorities may take disciplinary actions</u></p> <p>Clause 21(1) to (3)</p>	
015135 – 015718	Deputy Chairman Administration	<p>Clause 21(2)(c)</p> <p>The Deputy Chairman asked if the penalty under clause 21(2) should take into account the profit gained or cost avoided by a third party, as a result of the contravention by a FI of a specified provision defined by clause 5(10).</p> <p>The Administration explained that the provision was also modelled on SFO which reflected the prevailing practice of the Securities and Futures Commission and SFO in formulating the Bill. The objective was to regulate the conduct of FIs and not that of a third party so it was not appropriate to take into account the profit gained or cost avoided by a third party in determining the pecuniary penalty for an FI.</p> <p>The Deputy Chairman requested the Administration to consider whether it was necessary to amend sub-clause (2)(c) to take into account the profit gained or cost avoided by a third party as a result of the contravention in determining the maximum level of fine.</p>	The Administration to take action as per paragraph 3 of the minutes
015719 – 015856	Administration	Clause 21(4) to (8)	
015857 – 020256	Deputy Chairman Administration	<p>Clause 21(5)</p> <p>The Deputy Chairman queried the need for a regulator to register an order to pay a pecuniary penalty made under clause 21(1) or 21(4) in CFI, as the payment order was already enforceable on its own.</p>	

Time Marker	Speaker	Subject(s)	Action Required
		<p>The Administration explained that registering a payment order in CFI would enable the handling of the payment order in the same manner as a court order.</p> <p>The Deputy Chairman asked the Administration to, with reference to sub-clause (5), provide examples of other legislation providing for the registration of orders to pay pecuniary penalties in CFI.</p>	<p>The Administration to take action as per paragraph 3 of the minutes.</p>
020257 – 020323	Chairman	<p><u>Date of next meeting</u></p> <p>The Chairman said that the next meeting would be held on 9 February 2011.</p>	

Council Business Division 1
Legislative Council Secretariat
18 May 2011