Independent Police Complaints Council Bill

The Hong Kong Bar Association's Position Paper

1. The Hong Kong Bar Association ("HKBA") has been asked to comment on the Independent Police Complaints Bill ("IPCC Bill").

2. The Explanatory Memorandum of the IPCC Bill states that its main object is to incorporate the existing Independent Police Complaints Council ("IPCC"). The Legislative Council Brief refers to a consultation exercise in 2002 and the support for turning the IPCC into a statutory body.

3. The HKBA has reviewed its submission in the 2002 consultation exercise. The principal submission back in 2002 was a call for a fully accountable complaints system that allows the police internal investigation of a complaint to be re-investigated by an outside independent body, so that the public would have trust and confidence in the integrity of the police force and the complaint mechanism. There were also submissions on specific aspects.

4. The HKBA notes that in March 2006, the UN Human Rights Committee expressed its continuing concern that the investigation of police misconduct were still carried out by the police themselves through the Complaint Against the Police Office ("CAPO") and that the IPCC did not have the power to ensure proper and effective investigation of complaints nor power for the effective implementation of its recommendations. The Human Rights Committee urged the Administration to ensure that the investigation of complaints against the police is carried out by an independent body, the decisions of which are binding on the relevant authorities.

5. The HKBA notes that the IPCC Bill only suggests an "as is" or minimalist approach of merely putting into a statutory basis the current structure of the IPCC and the current division of roles and working relationship between the IPCC and the Commissioner of Police, without contemplating any improvement or enhancement, with the exception, probably, of the elaboration of the IPCC's terms of reference relating to feedback into specific powers in clauses 25 and 26 over statistics and consultation; and the introduction of statutory immunity for members of the IPCC and its Secretariat (but not people the IPCC engage for their technical or professional services).

6. The HKBA strongly urges the Administration to consider establishing a statutory entity, independent of both the police force and the IPCC, that is responsible for investigating complaints against members of the police force. The IPCC may in turn be tasked with overseeing the operation of this statutory investigatory entity. Such an arrangement is not a novel one. Currently, the Ombudsman has jurisdiction to determine complaints of abuse of power by members of the Customs and Excise Department and the Immigration Service, both of which are disciplined services, under the Ombudsman Ordinance (Cap 397).

7. In addition to the aforesaid, the following are the comments of the HKBA on the provisions of the IPCC Bill.

Commissioner's Categorization of Complaints

8. Clause 7(1) of the IPCC Bill indicates that the IPCC is 'to observe, monitor and review the manner in which reportable complaints are handled or investigated by the Commissioner'. This clause highlights the passive role of the IPCC and this is reinforced in the clauses that follow in the strict separation between the Commissioner's investigation role and the IPCC's review role.

9. The IPCC Bill proposes that the Commissioner has the sole power and discretion to categorize complaints as reportable. The Commissioner has, inter alia, to come to an opinion that a complaint is not vexatious or frivolous and is made in good faith, before categorizing a complaint as reportable. The Commissioner will only categorize a belated complaint as reportable if in his opinion, it is of a serious nature. Only reportable complaints will be investigated. The IPCC is to be notified of lists of reportable complaints and non-reportable complaints. It may only ask the Commissioner to reconsider the categorization of a non-reportable complaint. However, the IPCC cannot require the Commissioner to categorize a non-reportable complaint as a reportable complaint. If the Commissioner refuses to categorize a non-reportable complaint as a reportable complaint, the IPCC will only be provided with an explanation and has no other remedy. The HKBA finds this system unsatisfactory. It cannot be right that a complainant or even the IPCC will have to seek judicial review of an invalid categorization decision of the Commissioner before it can be set aside and the Commissioner directed to categorize the complaint in accordance with law.

10. The HKBA urges the Administration to empower the IPCC with the power to require the Commissioner to investigate a complaint he has categorized as non-reportable.

Making a Complaint or Request a Review

11. Clause 10(c) of the IPCC Bill proposes that a condition, among others, for categorization of a complaint as a reportable one is that it is made by or on behalf of a complainant 'directly affected' by police conduct. Clause 14 proposes to limit the categories of persons who may make a complaint on behalf of a complainant to three classes: (i) a parent or guardian making a complaint on behalf of a juvenile person; (ii) a relative or guardian making a complaint on behalf of a mentally incapacitated person; and (iii) a representative who has the written authorization from the complainant. These two requirements may exclude a witness of police misconduct from making a reportable complaint or requesting a review of a classification and will exclude anonymous complaints and complaints lodged by concern groups. As a matter of policy, the HKBA queries whether such restriction is necessary or appropriate.

Classifications

12. Clause 16 of the IPCC Bill indicates that the Commissioner is to conduct investigation into a reportable complaint and determine its classification after investigation. The IPCC may only see a report of the investigation conducted. Although the IPCC may interview privately for the purpose of considering a report, the Commissioner may prevent interviews from being conducted if he is of the opinion that the interviews would be likely to prejudice the

investigation of any crime or any complaint made to him. The sole discretion on the part of the Commissioner to classify complaints may be abused to divert attention of the IPCC away from deserving complaints simply by classifying them as 'customer service issues' suitable 'for informal resolution', since, with such a classification, the IPCC will not read in the investigation report any summary of the investigation and any finding of facts in relation to the complaint and the supporting evidence; the IPCC will most probably read only brief reasons for the classification. The Administration and the police force need to assure the Legislative Council and the public that the apparently more expeditious and cheaper method of informal resolution is properly utilized.

13. The HKBA considers that the Administration and the police force should make plain the standard of satisfaction at which the Commissioner will classify a reportable complaint as one that is substantiated. Similarly, the Administration and the police force should make plain the circumstances in which a reportable complaint will be classified as unsubstantiated.

14. The HKBA urges the Administration to empower the IPCC to conduct private interviews for the purpose of considering investigation reports without requiring the consent of the Commissioner. The HKBA also urges the Administration to delete Clause 16(3).

Consulting the IPCC

15. The HKBA urges the Administration to expand the scope of Clause 26 to require Commissioner to consult the IPCC not only on any proposal relating to the handling or investigation of reportable complaints but also on any significant amendment proposed to be made to the police general orders, the headquarters orders, the Hong Kong Police Force Procedures Manual, and any other orders or manuals of the police force that has anything to do with contact with members of the public, including suspects and arrested persons.

Observers

16. The HKBA urges the Administration to empower the IPCC to appoint observers, rather than proposing to vest the power of appointment with the Secretary for Security.

Financial and Other Provisions

17. Philip Stenning, at the beginning of his essay on *Evaluating Police Complaints Legislation: A Suggested Framework* (in Goldsmith and Lewis (eds), *Civilian Oversight of Policing: Governance, Democracy and Human Rights* (Hart Publishing, 2000) (at pp 146-163)), outlined the following factors for an effective process for handling public complaints against the police: (a) a sound legislative foundation; (b) dedicated, competent,

experienced and/or trained personnel to administer it; (c) a reasonable level of commitment and co-operation on the part of the police organizations and personnel to whom the process applies; (d) an adequate degree of, confidence in, and willingness to use, the process; and good faith, on the part of potential complainants; and (e) the commitment of political support and adequate resources for full and effective implementation of the process. The HKBA respectfully agrees and will invite the Administration to bear these factors in mind when considering the IPCC Bill.

18. The HKBA urges the Administration to ensure that the IPCC receives the financial provision necessary for it to perform its statutory functions, particularly the employment and retention of dedicated and competent staff and the commissioning of necessary research on police complaint data to enable feedback, assisted by public sector organizational learning, to be made to the Administration and the police management.

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Hong Kong Bar Association