

SB Ref: ICSB 13/06

**Bills Committee on
Interception of Communications and Surveillance Bill**

**Response to issues raised
Judge's Authorizations**

Introduction

This paper sets out the Administration's response to various issues raised by the Bills Committee in connection with judge's authorizations¹. It also encloses CSAs that we have previously presented or indicated our agreement to (up to the Bills Committee meeting held on 17 June 2006) for Members' reference.

Response to various issues raised

Issue 1 : To consult the Judiciary on the suggestion that panel judges should be appointed by the Chief Justice instead of the Chief Executive (raised at the meeting on 19 April 2006)

2. As pointed out in the papers presented to the Panel on Security and Bills Committee (relevant extract at **Annex A**), there are various statutory offices to which serving judges are currently appointed, and the Chief Executive (CE) is the appointment authority. The fact that they are appointed by CE in no way affects their independence in carrying out their statutory functions. Moreover, as clearly provided for in the Bill, CE will only appoint the panel judges on the recommendation of the Chief Justice (CJ). The term of appointment would be fixed, and CE would only revoke an appointment on CJ's recommendation and for good cause. There is no question of CE interfering with the consideration of individual cases or indeed the assignment of judges from within the panel to consider individual cases.

¹ At the Bills Committee meeting held on 25 May 2006, the Administration agreed to move Committee Stage Amendments to change the term "judicial authorization" in the Bill to "judge's authorization".

3. We have previously consulted the Judiciary on our proposal for CE to be the appointment authority of the panel judges on the recommendation of CJ, and the Judiciary's position is that the proposal is acceptable. We have relayed to the Judiciary the suggestion that panel judges should be appointed by CJ instead of CE after the Bills Committee meeting on 19 April 2006. The Judiciary has confirmed that its position remains unchanged.

Issue 2 : To consider deleting references to “panel judges” under clause 2(7). (raised at the meeting held on 2 June 2006)

4. As explained to the Bills Committee, clause 2(7) is intended to cover situations of temporary absences and acting appointments. We agree that it should only be applicable to “officers” and not “panel judges”. Since “officers” are already covered by section 54 of the Interpretation and General Clauses Ordinance (Cap. 1), we agree to delete clause 2(7).

Issue 3 : To consider including a provision to provide that panel judges are to be appointed on a personal basis. (raised at the meeting held on 6 June 2006)

5. The Bill provides for the functions and powers of the panel judges. Clause 4 of Schedule 2 in particular provides that a panel judge shall not be regarded as a court in performing any of his functions under the Bill. However, insofar as only eligible judges may be appointed as panel judges, it may be misleading to provide that they are appointed entirely in their personal capacity. We therefore do not consider it appropriate to adopt the proposed amendment.

Issue 4 : To consider, in consultation with the Judiciary, whether it would be appropriate for panel judges to have affiliation with political parties. (raised at the meeting held on 6 June 2006)

6. We have referred the question to the Judiciary. We understand that the subject of “Political Affiliation of Judges” is scheduled for discussion at the Administration of Justice and Legal Services Panel meeting to be held on 26 June 2006.

Issue 5 : To consider expressly providing under clause 1(2) of Schedule 2 that judges would not consider applications in LEA premises. (raised at the meeting held on 6 June 2006)

7. Clause 1(2) of Schedule 2 of the Bill provides that, without prejudice to the requirement that a panel judge shall consider any application made to him under this Ordinance in private, an application may, where the panel judge so directs, be considered at any place other than within the court precincts. It is clear that the decision as to whether and if so where the applications are to be heard rests solely with the panel judge. Nonetheless, as previously advised, the Administration does not envisage that panel judges would consider applications in LEA premises. We have consulted the Judiciary, who also advise that panel judges would not deal with any application at the premises of the LEAs. In view of Members' concern, we have no objection to expressly providing for this in the Bill. We shall introduce CSAs to amend clause 1(2) to read as follows –

“(2) Without prejudice to subsection (1), the application may, where the panel judge so directs, be considered outside the court precincts at any place other than the premises of a department.”

Issue 6 : To explain the operational arrangements of the panel judges in their performance of authorization functions. (raised at the meeting held on 6 June 2006)

8. We have discussed the question with the Judiciary. The broad operational arrangements for panel judges to perform their functions are set out in Schedule 2 to the Bill. In processing applications, panel judges would apply the tests and follow the procedures set out in the enacted legislation in handling a case. In a normal case, LEAs would have to submit a written application, supported by an affidavit setting out the justifications for the application. The panel judge would consider the application in private, and give careful consideration to whether the materials are sufficient to satisfy the statutory tests of proportionality and necessity. If necessary, the panel judge may seek further information and clarification from the LEAs. These broad arrangements are summarized in the flowchart at **Annex B** for Members' reference. As to

whether more detailed operational arrangements would have to be devised, it is primarily a matter for the panel judges to decide.

Issue 7 : To explain if panel judges constitute an “entity”. (raised at the meeting held on 6 June 2006)

9. Applications submitted by the LEAs are considered and determined by individual panel judges. The panel judges do not exercise their decisions collectively; to that extent they are not an “entity”. That said, the panel judges will be assisted by a common pool of support staff in their operations.

Issue 8 : To consider making clear our policy intention of allowing panel judges the discretion to decide whether to hold a hearing. (raised at the meeting held on 6 June 2006)

Issue 9 : To consider amending clause 1(3) of Schedule 2 to explicitly refer to oral applications. (raised at the meeting held on 6 June 2006)

Issue 10 : To consider explicitly providing for in the Bill the power of the panel judges, in respect of their consideration of an application, to require LEA officers to appear before them. (raised at the meeting on 8 June 2006)

10. The effect of clause 1(3) of Schedule 2 is to put beyond doubt that the panel judges have the discretion to consider applications solely on the basis of written submissions made to them if they consider appropriate. The reference to “without prejudice to Division 5 of Part 3 of this Ordinance” is intended to make clear that this provision is not meant to override the oral application procedures as separately provided for under that Division. On the basis of the current construction of the provision, and especially having regard to clause 1(1) and 1(2), it is clear that the judges have the power to consider an application at a hearing before him. Nonetheless, in view of Members’ concern, we propose to introduce the following CSAs to put the matter beyond doubt –

“(3) The panel judge may consider the application with or without a hearing as he considers appropriate.”

Issue 11 : To consider mandating that panel judges must conduct a hearing, with the applicant present, in all cases except for oral applications.

11. We consider that the panel judge should be given the discretion to decide whether he would wish to consider applications on the basis of written submissions. If the written applications provide adequate justifications, the panel judge should not be compelled to conduct a hearing. At the same time, a panel judge may always ask the LEA applicants to appear before him to provide clarifications on the applications concerned.

Issue 12 : To explain, by way of a flowchart if appropriate, the application process for judicial authorization. (raised at the meeting on 8 June 2006)

12. A flow chart setting out the application process for judge's authorization is at **Annex B** for Members' reference.

Issue 13 : To consider stipulating that panel judges have to give reasons for variations. (raised at the meeting on 10 June 2006)

Issue 14 : To consider providing explicitly that the panel judges have the discretion to give reasons for variations. (raised at the meeting on 13 June 2006)

13. The present clause 9(3)(a) envisages that the reason for any variation made by the judge would likely be self-explanatory (e.g. shortening the authorization period). In other words, he already has the discretion to give reasons for variations as he sees fit. The giving of reasons for variations would in many cases be unnecessary. Furthermore, where the judge considers it necessary, the present provision would not prohibit him from setting out his reasons in his determination, so that the LEA would be informed of the reason(s). We consider that no change is required in this regard.

Committee Stage Amendments Proposed So Far

14. Up to the Bills Committee meeting held on 17 June 2006, the

Administration has presented to the Bills Committee or indicated agreement to a number of CSAs in respect of various issues (including those presented above). A summary table setting out in gist the CSAs proposed is at **Annex C**. The detailed provisions are reproduced at **Annex D**.

Security Bureau

June 2006

Interception of Communications and Covert Surveillance

Appointment of Panel of Judges

Relevant extracts from the Information Paper for the meeting of LegCo Panel on Security on 16 February 2006

Item 14 : To reconsider whether the panel of judges authorizing interception of communications and the more intrusive covert surveillance operations should be appointed by the Chief Executive.

23. Vesting the approving authority for interception of communications and the more intrusive covert surveillance in a panel of High Court judges would –

- ensure that the cases would be considered by senior judges with considerable judicial experience;
- allow the building up of expertise in dealing with the usually highly sensitive cases;
- facilitate the application of consistent standards in dealing with the cases; and
- facilitate the Judiciary in planning and deploying judicial resources, for example, in the listing of cases.

We have consulted the Judiciary and the Judiciary's position is that the proposal is acceptable.

24. Prior to making the appointments, CE would ask the Chief Justice (CJ) for recommendations. In other words, CE would only appoint someone recommended by CJ. The term of appointment would be fixed at three years, and we propose that CE would only revoke an appointment on CJ's recommendation and for good cause. We have consulted the Judiciary, and the Judiciary's position is that the proposal is acceptable.

25. Judges appointed to the panel will receive no advantages from that appointment. They will continue to be judges and whatever they do while on the panel will in no way affect their continued eligibility as judges. That they are appointed by CE to the panel therefore would

give no positive or negative incentives that might affect their independence when carrying out their duties as judges on the panel.

26. Designating selected judges to deal with different types of case is not uncommon either in Hong Kong or overseas. For example, the Judiciary practises a listing system designating certain judges to handle certain types of case. In the US, applications for foreign electronic surveillance orders may only be made to one of 11 federal judges. The Australian experience also indicates that not all judges are prepared to take up the responsibility.

27. The proposed appointment arrangement takes into account the above considerations; and would be comparable with the arrangement elsewhere for the appointment to be made by a senior member of the government. For example, in Australia, a Minister nominates the members of the Administrative Appeals Tribunal to approve interception of communications. In the UK, the Prime Minister appoints the Surveillance Commissioner for approving intrusive surveillance operations.

Relevant extracts from the Information Paper titled “Panel of Judges” for the meeting of LegCo Panel on Security on 7 March 2006

15. The Bill provides for comprehensive safeguards to cater for the special nature of the applications. These include, for example, the establishment of an independent oversight authority and the protection of products obtained from interception and covert surveillance operations. As far the panel judges are concerned, their independence is safeguarded with the proviso that CE may appoint them on CJ’s recommendation, and for a fixed term. Since CE may only revoke the appointment during the term on CJ’s recommendation and for good cause, there should not be any question of interference with their independence. More importantly, the security of their tenure as judges is never in question.

Relevant extracts from the Information Paper Ref: ICSB No. 4/06

- *To provide information on the other instances involving appointment of judges to statutory positions and whether they are all made by CE.*

10. Judges are appointed to various statutory positions. CE is the

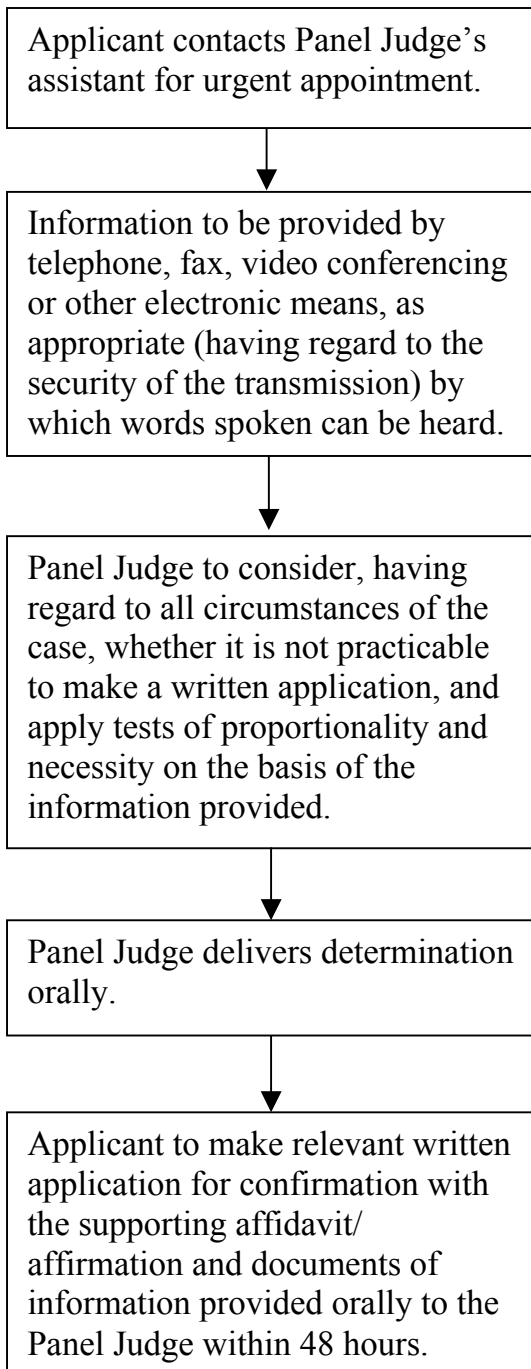
appointment authority for the statutory positions set out in **Annex B** to which serving judges are currently appointed. In some cases, e.g. the Market Misconduct Tribunal and the Securities and Futures Appeals Tribunal, it is stipulated in the relevant legislation that the chairman shall be appointed by CE on the recommendation of the Chief Justice (CJ). In the case of the Electoral Affairs Commission, it is stipulated in the legislation that the chairman shall be appointed by CE in consultation with CJ. As we have pointed out previously, the fact that they are appointed by CE in no way affects their independence in carrying out their statutory functions.

*not
attached*

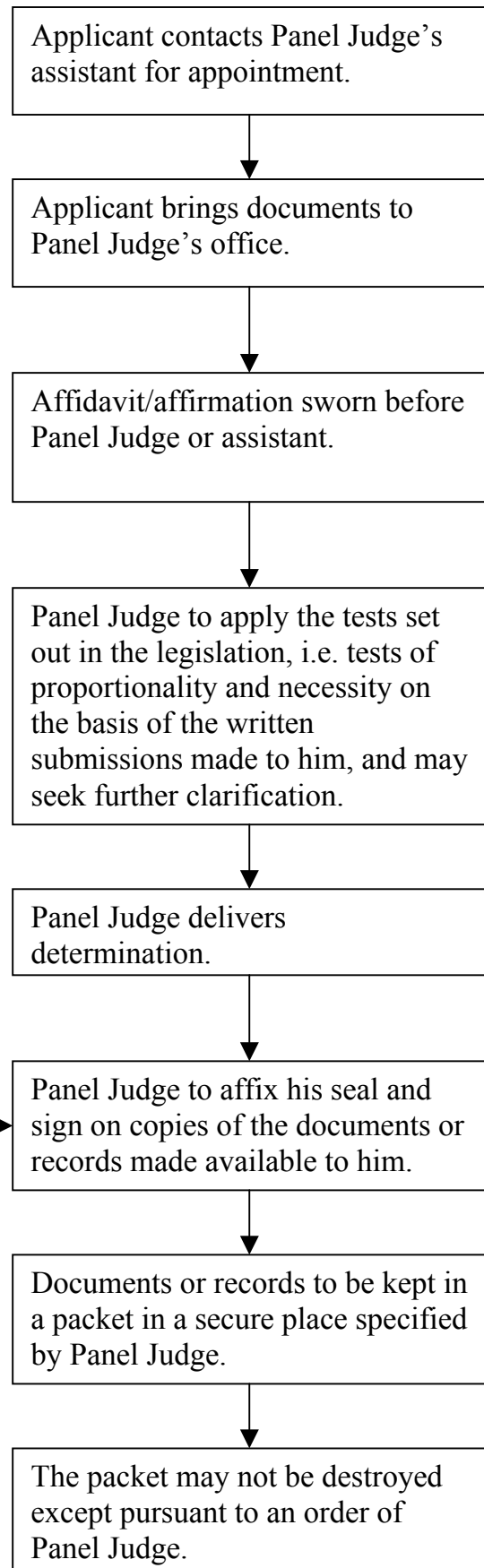
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**Flow Chart of Application for Judge's Authorization under the
Interception of Communications and Surveillance Bill**

Oral Application



Written Application



Interception of Communications and Surveillance Bill
Summary of Committee Stage Amendments

(as at 17 June 2006)

Provision		Amendments Proposed	Reference
Clause 2 - Interpretation			
1.	Definition of “copy”	To amend the definition of “copy” to include “any copy, extract or summary of contents” (clause 2(1) and clause 65(3)).	Para. 3, ICSB 9/06
2.	Definition of “covert surveillance”	To remove reference to “systematic” from paragraph (a) of the definition of “covert surveillance” and expand paragraph (b) to refer to spontaneous reaction to unforeseen events.	Para. 7, ICSB 9/06
3.	Definition of “head”	To change “deputy of the head of the department” to “deputy head of the department”.	Meeting on 25 May 2006
4.	Definition of “judicial authorization”	To change the term to “judge’s authorization” throughout the Bill.	Meeting on 25 May 2006
5.	Definition of “interception”	To amend “the communication” in paragraph (a) of the definition of “interception” along the lines of “that communication”; and To amend “in respect of communications” in paragraph (b) of the definition of “interception” along the lines of “in respect of any communication”.	Meeting on 25 May 2006

Provision		Amendments Proposed	Reference
6.	Definition of “public security”	To make it explicit that “public security” should be that of Hong Kong (Clause 2(1)).	Para. 7(a), ICSB 8/06
7.	Exclusion of peaceful advocacy for “public security”	To exclude peaceful advocacy from threats to public security (Clause 2(5A)).	Para. 7(c), ICSB 8/06
8.	Reference to “judges” in 2(7)	To delete Clause 2(7).	Para. 4, ICSB 13/06
Clause 6			
9.	Reappointment of panel judges	To amend clause 6 to provide that a panel judge may be reappointed on recommendation of the Chief Justice as well.	CSA tabled at the meeting on 6 June 2006.
Clause 30A			
10.	Protection for Legal Professional Privilege (LPP) materials	To introduce various amendments to further enhance the protection of LPP materials.	Para. 5, ICSB 11/06
Clause 54-59			
11.	Destruction of materials protected by LPP	To provide for additional clauses on LPP materials.	Para. 9, ICSB 11/06
12.	LPP materials to remain privileged	To expressly provide that any information that is subject to LPP is to remain privileged notwithstanding that it has been obtained pursuant to a prescribed authorization.	Para. 10, ICSB 11/06

Provision		Amendments Proposed	Reference
Schedule 2			
13.	Panel judge to consider application outside the premises of the LEAs	To provide expressly that the panel judge would not deal with any application at the premises of the LEAs.	Para. 7, ICSB 13/06
14.	Panel judge to consider application with or without hearing	To provide expressly that the panel judge may consider the application with or without a hearing.	Para.10, ICSB 13/06
Schedule 3			
15.	Public security - connection with Hong Kong	To require an assessment of the impact, direct or indirect, of the threat on the security of Hong Kong, the residents of Hong Kong, or other persons in Hong Kong.	Para. 7(b), ICSB 8/06

Security Bureau
June 2006

Detailed Provisions of Committee Stage Amendments
Proposed or Agreed

1. Definition of “copy” (ICSB 9/06)

Under the definition of “copy” in clause 2(1), the reference to “*any copy, extract or summary of such contents which identifies itself as such copy, extract or summary of such contents*” in paragraph (a)(i) will be amended as –

“any copy, extract or summary of such contents;”.

Similar references under paragraph (b)(i) and (ii) and clause 65(3) will be amended accordingly.

2. Definition of “covert surveillance” (ICSB 9/06)

Under the definition of “covert surveillance” in clause 2(1), the reference to “*systematic*” will be deleted from paragraph (a), and paragraph (b) will be expanded along the following line –

“does not include –

- (i) any spontaneous reaction to unforeseen events or circumstances; and*
- (ii) any such surveillance to the extent that it constitutes interception under this Ordinance;”*.

3. Definition of “head” (meeting on 25 May 2006)

Under the definition of “head” in clause 2(1), the expression “*deputy of the head of the department*” will be changed to “*deputy head of the department*”.

4. Definition of “judicial authorization” (meeting on 25 May 2006)

The term “*judicial authorization*” in the Bill will be changed to “*judge’s authorization*”.

5. Definition of “interception” (meeting of 25 May 2006)

Textual amendments to the definition of “interception” under clause 2(1) will be made as follows –

“ *“interception” (截取) –*

*(a) in relation to any communication, means the carrying out of any intercepting act in respect of **that** communication; or*

*(b) when appearing in a context with no specific reference to any communication, means the carrying out of any intercepting act in respect of **any** communications;”*

6. Definition of “public security” (ICSB 8/06)

The following definition of “public security” will be added to clause 2(1) –

““public security” (公共安全) means the public security of Hong Kong;”

7. Peaceful advocacy not itself considered as a threat to public security (ICSB 8/06)

The following sub-clause will be added under clause 2 –

“(5A) For the purposes of this Ordinance, advocacy, protest or dissent (whether in furtherance of a political or social objective or otherwise), unless likely to be carried on by violent means, is not of itself regarded as a threat to public security.”

8. Reference to panel judges under Clause 2(7)(b) (ICSB 13/06)

Clause 2(7) will be deleted.

9. Reappointment of panel judges (*meeting on 6 June*)

Clause 6(2) will be amended as follows –

"(2) A panel judge shall be appointed for a period of 3 years; and may from time to time be reappointed."

A new sub-clause 6(4A) will be added –

"(4A) A person previously appointed as a panel judge may from time to time be further appointed as such in accordance with the provisions of this Ordinance that apply to the appointment of a panel judge."

10. Prohibition of covert operations targeting lawyers (*ICSB 11/06*)

The following new clause will be added –

"30A. What a prescribed authorization may not authorize in the absence of exceptional circumstances

(1) Notwithstanding anything in this Ordinance, unless exceptional circumstances exist –

- (a) no prescribed authorization may contain terms that authorize the interception of communications by reference to –*
 - (i) in the case of a postal interception, an office or other relevant premises, or a residence, of a lawyer; or*
 - (ii) in the case of a telecommunications interception, any telecommunications service used at an office or other relevant premises, or a residence, of a lawyer, or any telecommunications service ordinarily used by a lawyer for the purpose of providing legal advice to clients; and*
- (b) no prescribed authorization may contain terms that authorize any covert surveillance to be carried out in respect of oral or written*

communications taking place at an office or other relevant premises, or a residence, of a lawyer.

(2) For the purposes of subsection (1), exceptional circumstances exist if the relevant authority is satisfied that there are reasonable grounds to believe –

(a) that –

(i) the lawyer concerned;

(ii) in the case of an office or other relevant premises of the lawyer, any other lawyer practising with him or any other person working in the office; or

(iii) in the case of a residence of the lawyer, any other person residing in the residence,

is a party to any activity which constitutes or would constitute a serious crime or a threat to public security; or

(b) that any of the communications concerned is for the furtherance of a criminal purpose.

(3) In this section –

“lawyer” (律師) means a barrister, solicitor or foreign lawyer as defined in section 2(1) of the Legal Practitioners Ordinance (Cap.159) who practises as such, or any person holding an appointment under section 3(1) of the Legal Aid Ordinance (Cap. 91);

“other relevant premises” (其他有關處所), in relation to a lawyer, means any premises, other than an office of the lawyer, that are ordinarily used by the lawyer and by other lawyers for the purpose of providing legal advice to clients.”

11. Destruction of materials protected by legal professional privilege (ICSB 11/06)

The following will be added to Clause 56

“(1A) Where any protected product described in subsection (1) contains any information that is subject to legal

professional privilege, subsection (1)(c) is to be construed as also requiring the head of the department concerned to make arrangements to ensure that any part of the protected product that contains the information –

- (a) in the case of a prescribed authorization for a postal interception or covert surveillance, is destroyed as soon as its retention is not necessary for the purposes of any civil or criminal proceedings before any court that are pending or are likely to be instituted; or*
- (b) in the case of a prescribed authorization for a telecommunications interception, is as soon as reasonably practicable destroyed.”*

12. Information subject to legal professional privilege will remain privileged (ICSB 11/06)

The following new clause will be added –

“58A. Information subject to legal professional privilege

Any information that is subject to legal professional privilege is to remain privileged notwithstanding that it has been obtained pursuant to a prescribed authorization.”

13. Panel judges not to deal with applications at the premises of the LEAs (ICSB 13/06)

To amend clause 1(2) to read as follows –

“(2) Without prejudice to subsection (1), the application may, where the panel judge so directs, be considered outside the court precincts at any place other than the premises of a department.”

14. Consideration of applications by panel judges (ICSB 13/06)

Clause 1(3) of Schedule 2 will be amended as follows -

“(3) The panel judge may consider the application with or without a hearing as he considers appropriate.”

15. Information provided for application on grounds of public security (ICSB 8/06)

Paragraph (b)(v) of Part 1 of Schedule 3 will be replaced by the following new sub-paragraph –

“(v) the following information –

(A) where the purpose sought to be furthered by carrying out the interception is that specified in section 3(1)(a)(i) of this Ordinance, the nature of, and an assessment of the immediacy and gravity of, the serious crime to be prevented or detected; or

(B) where the purpose sought to be furthered by carrying out the interception is that specified in section 3(1)(a)(ii) of this Ordinance, the nature of, and an assessment of the immediacy and gravity of, the particular threat to public security, and an assessment of the impact, both direct and indirect, of the threat on the security of Hong Kong, the residents of Hong Kong, or other persons in Hong Kong;”

Similar amendments will be made to paragraph (b)(vi) of Part 2 and paragraph (b)(vi) of Part 3 of Schedule 3 with minor adaptations.

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