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Legislative Council

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Panel on Administration of Justice and Legal Services

**Background prepared by the Legislative Council Secretariat
for the meeting on 27 March 2006**

Budgetary arrangement and resources for the Judiciary

Purpose

This paper provides background information on the past discussions of Members of the Legislative Council (LegCo) on issues relating to the budgetary arrangement and resources for the Judiciary.

Background

2. In 2002-03, all directors of bureaux were required to achieve a saving of 1.8% in the operating expenditure on the existing and new or improved services as planned in 2003-04, and an additional saving of 1% each year from 2004-05 to 2006-07.

3. The Chief Justice (CJ) had made reference to budgetary constraints of the Judiciary in his speeches made at the Ceremonial Opening of the Legal Year in 2003, 2004 and 2005. In his speech made on 17 February 2005, CJ had reiterated that despite budgetary constraints, the quality of justice must not be compromised and must be maintained. However, the inevitable consequence of budgetary constraints over a long period of time would be the lengthening of waiting times at all levels of court. When the waiting times were considered to be unacceptable, the question of providing additional resources to the Judiciary would have to be raised and addressed by the Administration and the Legislature.

Discussions of the Panel on Administration of Justice and Legal Services (AJLS Panel) on budgetary arrangement for the Judiciary

4. The subject of budgetary arrangement for the Judiciary was first discussed at the AJLS Panel meeting on 24 February 2003. It was then followed up at the meetings on 24 November 2003, and 25 April, 23 May and 12 July 2005.

5. At the meeting on 24 February 2003, the Panel passed the following motion which was moved by Hon Martin LEE –

“That this Panel urges the Judiciary not to introduce, for the purpose of implementing the Administration’ austerity programme, any cost saving measures which would adversely affect the quality of judicial services.”

6. To facilitate discussion by members, the Panel requested the Research and Library Services Division of the LegCo Secretariat to conduct a research on how the budgetary arrangements for the judiciaries were handled in overseas jurisdictions. The Panel discussed the Research Report on “Budgetary arrangements for overseas judiciaries” (RP02/03-04) at its meeting on 24 November 2003.

Concerns expressed by members

7. At the relevant meetings of the Panel, members expressed concern that the constitutional responsibility of the Judiciary for administering justice and upholding the rule of law would be affected by budgetary constraints. Members noted that the savings measures introduced by the Judiciary to cope with budgetary constraints since 2003-04, such as the closure of Magistrates’ Courts and reduction in the number of judges and temporary judges, had already brought about problems in the face of increasing workload, i.e. the lengthening of waiting times at all levels of court. Further savings measures introduced to minimise the impact on waiting times, such as Saturday sittings in Magistrates’ Courts and the District Court, would pose additional strain on judges and judicial officers and might adversely impact on the quality of justice. The Judiciary was exploring a number of options to address the situation which was no longer considered acceptable.

8. The Administration advised members that in addition to the constitutional safeguards under the Basic law to protect the independent operation of the Judiciary, it would also observe the relevant provisions of the Beijing Statement of Principles of the Independence of the Judiciary which provided, among other things, that the needs of the Judiciary and the court system be accorded a high level of priority in the allocation of resources for the purpose of the maintenance of the rule of law when there were economic constraints.

9. Members agreed that there should be better protection of the Judiciary’s budgetary arrangement to ensure that judicial independence would not be subject to executive influence, and the Judiciary should be provided with adequate resources to administer justice without undue delay. The existing arrangement for the Administration to set savings targets to be achieved by the Judiciary, and to determine the approved provisions for the Judiciary in the annual resource allocation exercise, should be reviewed.

10. Members noted that under Article 62(4) of the Basic Law, the Government should draw up and introduce budgets and final accounts. Members considered that there was scope under the Basic Law for the Administration to provide greater flexibility and autonomy for the Judiciary to prepare its budget.

Members' suggestions

11. In the light of the Panel's discussion, members agreed at the meeting on 23 May 2005 that the Administration and the Judiciary Administration should be requested to consider the following suggestions –

- (a) judicial remuneration should be protected by statute in line with other jurisdictions in which judicial independence was given constitutional importance, as recommended in Sir Anthony Mason's Consultancy Report on "System for the Determination of Judicial Remuneration";
- (b) the Administration should not unilaterally impose savings targets set for bureaux and departments on the Judiciary, but should consult the Judiciary as to what savings targets would be compatible with the proper administration of justice;
- (c) the Judiciary should have autonomy to prepare its own budget on the basis of objective yardsticks, such as existing resources, projected needs, workload and staff remuneration. Members had pointed out that in the United States, the bulk of the funds allotted to individual courts were determined by formulas which were developed by the judiciary as an objective means for determining the workload and resource needs of the judiciary;
- (d) the Administration should formally adopt as a rule of practice that the budgetary proposals of the Judiciary would not normally be reduced;
- (e) the Administration should, in due course, consider the establishment of a consolidated fund to cater for specific resource needs of the Judiciary, e.g. the payment of judicial remuneration. Members considered that a continuing security for the payment of remuneration was a necessary element in safeguarding judicial independence. Members had pointed out that in the United Kingdom, judicial remuneration was paid out of a consolidated fund which was not subject to parliamentary authorisation, any government appropriation process or budget legislation; and
- (f) with respect to the Judiciary's 2006-07 budget, the Administration should give serious consideration to the warning given by CJ (paragraph 3 above refers).

12. At the meeting on 12 July 2005, the Judiciary Administration briefed members on its response as follows –

- (a) in January 2004, having considered the Judiciary's proposal to adopt the recommendations and views contained in Sir Anthony Mason's Consultancy Report on "System for the Determination of Judicial Remuneration", the then Chief Executive (CE) had asked an

independent body, the Standing Committee on Judicial Salaries and Conditions of Service, to make recommendations to him on the appropriate institutional structure, mechanism and methodology for the determination of judicial remuneration and in particular, to make recommendations on whether the proposal of the Judiciary based on the Consultancy Report should be accepted. The Standing Committee had yet to report to the CE;

- (b) the Judiciary had achieved a total of \$148 million in savings in the financial years of 2000-01 to 2005-06, meeting the targets set by the Administration. The savings target for 2006-07 had not been set by the Administration;
- (c) as regards the Judiciary's budget for 2006-07, in order to ensure that the Judiciary was provided with adequate resources to deliver judicial services of high quality and to avoid further worsening of the court waiting time, the Judiciary was exploring various options, including the withdrawal of some savings measures submitted to the Government and making a bid to the Government for a reasonable increase of resources in subsequent financial years. The Judiciary was finalising a proposal to the Administration regarding its budget in 2006-07, having regard to the existing and anticipated caseload; and
- (d) in relation to the withdrawal of some savings measures submitted to the Administration –
 - (i) the Tsuen Wan Magistrates' Courts would not be closed in January 2006 as planned. The position would be reviewed after 2006-07;
 - (ii) the Judiciary considered that the freeze on the recruitment of Judges and Judicial Officers (JJOs) in the years ahead should be lifted. It was therefore reviewing the savings committed attributable to the planned recruitment freeze in the coming years; and
 - (iii) to avoid worsening of waiting times, in particular for the High Court and the Magistrates' Courts, the Judiciary was considering the extent to which Deputy JJOs should be appointed to cope with the judicial work and the additional provisions which would be required to cater for court support staff in order to provide the necessary support to any newly recruited JJOs and additional Deputy JJOs.

The Judiciary Administration's response is set out in its letter dated 5 July 2005 (LC Paper No. CB(2) 2234/04-05(02)).

13. The Financial Services and the Treasury Bureau (FSTB) provided a paper setting out the Administration's response to the Panel's suggestions as follows –

- (a) the Administration had taken note of the view that it should not impose on the Judiciary savings targets set for bureaux and departments, which might affect the resources available to the Judiciary for the proper administration of justice. To enhance efficient consultation with the Judiciary, the Administration was agreeable to consulting the Judiciary on its overall resource requirements, prior to the setting of government budgetary targets. This would not however preclude discussions on modifications or exempt the Judiciary from following the due process for resource bidding;
- (b) the Administration had always respected the independence of the Judiciary, including the autonomy in preparing its budget. The Judiciary Administrator (JA) prepared the budget of the Judiciary in consultation with CJ. When preparing the annual draft Estates of expenditure, FSTB would examine and discuss with JA the provision sought for the Judiciary, normally on the basis of the requirements of individual expenditure components or subheads as anticipated by JA. The final incorporation of the draft Estimates for the Judiciary into the overall draft Estimates was also subject to consultation with JA;
- (c) the Administration did not agree that there should be a general rule or practice against reduction of the Judiciary's budgetary provision. Much as the Administration would strive to accommodate justifiable funding requirements for the Judiciary to the extent possible, the Administration could not rule out the need for downward adjustments to the Judiciary's funding provision having regard to overall economic constraints. The Administration believed that some degree of efficiency savings inevitably existed for an organisation with about 160 JJOs and about 1 500 supporting staff from the civil service. While the Administration would not compromise judicial independence, it preferred a more pragmatic approach in discussing with and consulting JA on the annual draft estimates for the Judiciary rather than imposing a rigid bar on budgetary reductions;
- (d) the funding for the Judiciary formed part of the Government's overall expenditure and was subject to the annual appropriation by LegCo and separate approvals by LegCo's Finance Committee or the Financial Secretary under the Public Finance Ordinance (Cap. 2). The Administration did not see the need for a separate fund which was exempted from the LegCo appropriation process to cater for the Judiciary's resource requirements, and
- (e) with regard to the Judiciary's 2006-07 budget, the Administration would accord it with the usual top priority. The Administration would be as

facilitating and constructive as possible in considering the Judiciary's resource requirements.

FSTB's response is set out in (LC Paper No. CB(2)2234/04-05(03)).

14. The views expressed by the Panel at the meeting on 12 July 2005 are summarised below –

- (a) the Panel welcomed the Administration's statements made in its paper that it was "inconceivable that the Administration would need to or wish to contemplate not seeking sufficient appropriation to meet payment of judicial remuneration", and that it would be "as facilitating and constructive as possible in considering the JA's proposal on the Judiciary's resource requirements for 2006-07". The Administration should fully observe these commitments;
- (b) the Panel supported the Judiciary's proposals to withdraw some of the savings measures and to appoint additional number of JJOs and Deputy JJOs;
- (c) the Judiciary Administration and the Administration should reconsider the proposal that the Judiciary should have autonomy to determine its budget on the basis of some objective yardsticks or predetermined formulas in the light of the merits of such a system, e.g. greater objectivity and transparency in the determination of appropriate resource allocation for the Judiciary; and
- (d) the Judiciary Administration and the Administration should advise the Panel in due course whether the arrangement for the Administration to consult the Judiciary on its overall resource requirements, prior to the setting of government budgetary targets, was successful in enhancing independence of the Judiciary in preparing its budget and bringing about more effective consultation between the Judiciary and the Administration on resource bidding by the Judiciary.

15. The relevant extract from the minutes of the meeting on 12 July 2005 is in **Appendix I**.

Resource implications for the Judiciary arising from the proposed legislative framework regulating the conduct of interception of communications and covert surveillance by law enforcement agencies

Discussion of the Panel on Security

16. The Panel on Security discussed the Administration's proposed legislative framework regulating the conduct of interception of communications and covert

surveillance by law enforcement agencies at its meeting on 21 February 2006. Under the proposed legislative framework, the authority for authorising all interception of communications and the more intrusive covert surveillance operations would be vested in a Panel of Judges, consisting of three to six Judges of the Court of First Instance (CFI), and the Commissioner on Interception of Communications and Surveillance was proposed to be a sitting or retired judge not below the level of the CFI.

17. The Judiciary Administration also provided a paper on the resource implications for the Judiciary for the meeting (**Appendix II** refers). Members noted that the Judiciary Administration considered that the Administration's legislative proposals would have a serious impact on the deployment of judicial resources. The Judiciary took the firm position that if the legislative proposals were enacted and implemented, it would be necessary to provide sufficient resources to the Judiciary in order to enable the judges to discharge their responsibilities under the legislative proposals properly and effectively. The Judiciary Administration estimated that the following additional resources would be required –

- (a) a minimum of one additional CFI and probably two CFI posts, on the assumption that a Panel of only three Judges for judicial authorisation was initially required;
- (b) two full-time properly trained support staff for the Panel Judges; and
- (c) other infrastructural support, e.g. security installations such as strong room for record keeping, secure fax line/computers/telephone, etc.; and
- (d) one full-time CFI post in the event that a serving Judge was appointed as the Commissioner on Interception of Communications and Surveillance.

18. The Security Bureau provided information on the cases of interception of communications and covert surveillance in the last three months of 2005 to the Panel on Security after the meeting (**Appendix III** refers).

Discussion of the AJLS Panel

19. At the AJLS Panel meeting on 27 February 2006, members expressed concern whether sufficient resources would be provided to the Judiciary for the additional responsibilities involved under the legislative proposals without compromising the administration of justice. The Panel agreed to follow up the matter and discuss the resource implications for the Judiciary arising from the Administration's legislative proposal at the coming meeting on 27 March 2006.

Discussion of the Finance Committee

20. At the special meeting of the Finance Committee to examine the Estimates of

Expenditure 2006-07 on 15 and 16 March 2006, written questions and supplementary questions were raised by some members on the same subject.

21. The Judiciary Administration informed members that no provision had been made in the 2006-07 estimates for the Judiciary to undertake the additional functions arising from the legislative proposals. If the legislative proposals were enacted and implemented, it would be necessary to provide the Judiciary with sufficient resources. The Administration was aware of the Judiciary's position.

22. In its replies to Members' written questions, the Administration had undertaken to provide the Judiciary with the necessary resources for implementing the new legislative regime. The Administration added that it was still assessing the resource implications fully, and would continue to do so in parallel with the discussion of the Bill with LegCo. It would try to meet the additional requirements from existing resources if possible, and would seek additional resources where necessary in line with established procedures.

Latest position

23. FSTB has advised the Panel that the revised budgetary arrangement will be reviewed upon completion of the estimates preparation work for 2006-07. The Panel will discuss the outcome of the review and other relevant issues as well as the resource implications for the Judiciary arising from the Administration's legislative proposals on the regulation of the conduct of interception of communications and covert surveillance by law enforcement agencies at the next meeting on 27 March 2006.

Relevant papers

24. A list of the relevant papers is in **Appendix IV** for members' easy reference. These papers are available on the LegCo website (<http://www.legco.gov.hk>).

**Extract from minutes of meeting on
Panel on Administration of Justice and Legal Services on 12 July 2005**

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III. Budgetary arrangement for the Judiciary

(LC Paper No. CB(2)2234/04-05(01) – Letter dated 25 May 2005 from Clerk to Panel to Secretary for Financial Services and the Treasury

LC Paper No. CB(2)2234/04-05(02) – Letter dated 5 July 2005 from the Judiciary Administrator setting out the Judiciary's position on the suggestions made by Panel members at the meeting on 23 May 2005

LC Paper No. CB(2)2234/04-05(03) – Paper provided by the Financial Services and the Treasury Bureau)

3. Judiciary Administrator (JA) briefed members on the Judiciary Administration's letter dated 5 July 2005 to the Panel (LC Paper No. CB(2)2234/04-05(02)), which responded to the issues raised during previous Panel discussion on the budgetary arrangement for the Judiciary. She summarised the response as follows –

- (a) in January 2004, having considered the Judiciary's proposal to adopt the recommendations and views contained in Sir Anthony Mason's Consultancy Report on "System for the Determination of Judicial Remuneration", the then Chief Executive (CE) had asked an independent body, the Standing Committee on Judicial Salaries and Conditions of Service, to make recommendations to him on the appropriate institutional structure, mechanism and methodology for the determination of judicial remuneration and in particular, to make recommendations on whether the proposal of the Judiciary based on the Consultancy Report should be accepted. The Standing Committee had yet to report to the CE;
- (b) the Judiciary had achieved a total of \$148 million in savings in the financial years of 2000-01 to 2005-06, meeting the targets set by the Administration. The savings target for 2006-07 had not been set by the Administration;
- (c) as regards the Judiciary's budget for 2006-07, in order to ensure that the Judiciary was provided with adequate resources to deliver judicial services of high quality and to avoid further worsening of the court waiting time, the Judiciary was exploring various options, including the withdrawal of some savings measures submitted to the Government and making a bid to the Government for a reasonable increase of resources

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in subsequent financial years. The Judiciary was finalising a proposal to the Administration regarding its budget in 2006-07, having regard to the existing and anticipated caseload;

- (d) in relation to the withdrawal of some savings measures submitted to the Administration –
 - (i) the Tsuen Wan Magistrates' Courts would not be closed in January 2006 as planned. The position would be reviewed after 2006-07;
 - (ii) the Judiciary considered that the freeze on the recruitment of Judges and Judicial Officers (JJOs) in the years ahead should be lifted. It was therefore reviewing the savings committed attributable to the planned recruitment freeze in the coming years;
 - (iii) to avoid worsening of waiting times, in particular for the High Court and the Magistrates' Courts, the Judiciary was considering the extent to which Deputy JJOs should be appointed to cope with the judicial work and the additional provisions which would be required to cater for court support staff in order to provide the necessary support to any newly recruited JJOs and additional Deputy JJOs.

4. Deputy Secretary for Financial Services and the Treasury (Treasury) (DS(Tsy)) briefed the Panel on the paper provided by the Administration (LC Paper No. CB(2)2234/04-05(03)). She highlighted the major response of the Administration as follows –

- (a) the Administration had taken note of the view that it should not impose on the Judiciary savings targets set for bureaux and departments, which might affect the resources available to the Judiciary for the proper administration of justice. To enhance efficient consultation with the Judiciary, the Administration was agreeable to consulting the Judiciary on its overall resource requirements, prior to the setting of government budgetary targets. This would not however preclude discussions on modifications or exempt the Judiciary from following the due process for resource bidding;
- (b) the Administration did not agree that there should be a general rule or practice against reduction of the Judiciary's budgetary provision. Much as the Administration would strive to accommodate justifiable funding requirements for the Judiciary to the extent possible, the Administration could not rule out the need for downward adjustments to the Judiciary's funding provision having regard to overall economic constraints. The Administration believed that some degree of

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efficiency savings inevitably existed for an organisation with about 160 JJOs and about 1 500 supporting staff from the civil service. While the Administration would not compromise judicial independence, it preferred a more pragmatic approach in discussing with and consulting the Judiciary Administrator on the annual draft estimates for the Judiciary rather than imposing a rigid bar on budgetary reductions; and

- (c) with regard to the Judiciary's 2006-07 budget, the Administration would accord it with the usual top priority. The Administration would be as facilitating and constructive as possible in considering the Judiciary's resource requirements.

Issues raised

5. In response to the Chairman and Ms Emily LAU, JA said that the Judiciary welcomed the agreed measure for the Administration to consult the Judiciary on its overall resource requirements prior to the setting of government budgetary targets. She considered that the new arrangement would be conducive to enhancing objective discussion between the two parties on the resource requirements of the Judiciary. DS(Tsy) added that the arrangement could address the concern that the Government's savings targets might impose pre-set limitations on the Judiciary in preparing its own budget, before any consultation between the two sides actually started.

6. In relation to the proposed measures set out in paragraph 3 (d) above, JA said that the Judiciary might be able to submit its finalised proposals to the Administration in August 2005.

7. Ms Emily LAU expressed support for the Judiciary's proposal to withdraw some of its savings measures originally submitted to the Administration in order to maintain the quality of judicial services. She said that as the Judiciary was in the best position to decide its priority areas of work and the resource needs, it should be given the greatest possible autonomy in preparing its own budget, with input of views from the Administration. She added that there was monitoring within the Administration and by the public to ensure that the resources of the Judiciary would be effectively used.

8. DS(Tsy) said that the Administration was conscious of the importance of maintaining judicial independence. She advised that under the current system of resource allocation, the Administration would not normally be involved in drawing up the annual funding requirements for the Judiciary, or in determining how the approved provision should be allocated amongst different performance areas. Basically, the Administration would only consider the Judiciary's overall resource requirements and discuss with the Judiciary any discrepancy between the Judiciary's overall estimates and the Administration's proposed provisions, taking into account the need for upholding the Judiciary's independent and efficient operation, before finalising the estimates. The Administration would continue to count on the advice of JA, who

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was the Controlling Officer responsible for preparing the budget of the Judiciary.

9. JA emphasised that in preparing the Judiciary's estimates of expenditure, the necessity to maintain the quality of judicial services and the requirement of effective utilisation of resources had been given paramount importance.

10. The Chairman noted that the Administration had not indicated support for the Panel's proposal that the Judiciary should have autonomy to prepare its own budget on the basis of some objective yardsticks or predetermined formulas, which was a practice adopted in some overseas jurisdictions. Such yardsticks included the Judiciary's caseload, existing and forecast resource needs and staff remuneration etc. She called upon the Judiciary Administration and the Administration to reconsider the proposal seriously.

11. JA responded that the Judiciary had noted the suggestion. She said that the Judiciary's position was that it would keep an open mind on any suggested measures within the parameters of the Basic Law governing budgetary arrangements which would safeguard judicial independence and ensure that the Judiciary was provided with adequate resources to administer justice without delay.

12. The Chairman pointed out that there had already been incidents which showed that the administration of justice by the Judiciary had been affected because of insufficient resources. She pointed out that a number of Mainland visitors on two-way permits had been arrested for involving in pornographic and other vice activities. Some of them were detained in custody for protracted periods pending trial, due to the long waiting times of the courts. There was also feedback that some of the arrested persons pleaded guilty in the hope that they could be sent back to the Mainland at an earlier time.

13. Mr Martin LEE expressed the view that with the enactment of the Bill of Rights Ordinance (BORO), the chances of the Government being sued by prosecuted persons for damages for prolonged custody had increased. He pointed out that there were precedent cases in some European countries where even convicted offenders could seek compensation for excessively long period of custody pending trial. He urged that the Administration and the Judiciary Administration should ensure that there would be sufficient number of JJOs to dispose of court cases expeditiously.

14. The Chairman and Mr Martin LEE said that the Judiciary Administration should provide information on the number of additional JJOs and Deputy JJOs required, and the consequences of not increasing the number of JJOs such as the impact on the courts' waiting times. JA responded that the number of additional JJOs required had yet to be decided. The Judiciary Administration would provide detailed information and justifications when it submitted the relevant proposals to the Administration in due course.

15. Mr Albert HO enquired about the reasons for the Judiciary's decision not to close the Tsuen Wan Magistrates' Courts in January 2006, and whether the planned

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closure reflected a less than thorough assessment of the resource requirements of the Judiciary.

16. JA responded that the plan to close or merge certain Magistrates' Courts was to achieve more efficient utilisation of court resources through strengthened centralisation of the resources. However, after a review of the closure of two Magistrates' Courts (the Western Magistrates' Court and North Kowloon Magistrates' Court) and with the current proposed plan to de-freeze the recruitment of JJOs and appoint additional Deputy JJOs, the Judiciary considered that it would not be desirable to close more Magistrates' Courts in order to ensure that the Judiciary had the necessary flexibility and capacity to maintain sufficient number of courts to deal with the increased caseload.

JA 17. The Chairman requested JA to explain in writing the factors which the Judiciary had considered in deciding to withdraw the planned closure of the Tsuen Wan Magistrates' Court, e.g. whether there had been an unforeseen large increase in the caseload and difficulties in handling cases diverting from the closed Magistrates' Courts by other courts.

JA 18. Regarding the impact of closure of Magistrates' Courts, Mr Albert HO requested JA to provide information on the number (and the percentage in relation to the total) of cases which had been listed for trial on a particular date but subsequently adjourned because the court had no time to deal with the case on the trial date.

19. In reply to Ms Emily LAU's enquiry on the work of the Standing Committee on Judicial Salaries and Conditions of Service, Deputy Director of Administration (DD of Adm) informed members that the Standing Committee had provided its preliminary observations on Sir Mason's Consultancy Report to the CE in late 2004, and considered it prudent to take more time to conduct the study on the mechanism for determination of judicial remuneration in the light of the Consultancy Report's proposals. A concrete timetable for completing the study had not yet been set by the Standing Committee.

20. In further response to Ms Emily LAU, DD of Adm said that the Standing Committee was chaired by Mr Christopher CHENG Wai-chee, and members included Dr Victor FUNG Kwok-king, Mr Henry FAN Hung-ling, Mr Anthony NEOH and Mr Herbert TSOI Hak-kong.

21. Ms Emily LAU said that the community expected a high level of transparency in the operation of the Standing Committee and its deliberations, and that the Committee should conduct wide-ranging consultations before finalising its recommendations.

22. DD of Adm reported that the Administration had conveyed the views expressed by the Panel and the two legal professional bodies in previous discussions on remuneration of JJOs to the Committee for its consideration. The Administration would report to the Panel on developments in due course.

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23. In reply to the Chairman, DD of Adm said that previous reductions in civil service salaries in 2002, 2004 and 2005 did not apply to JJOs.

24. In concluding, the Chairman made the following remarks –

(a) the Panel welcomed the Administration’s statements made in its paper that it was inconceivable that the Administration would need to or wish to contemplate not seeking sufficient appropriation to meet payment of judicial remuneration, and that it would be as facilitating and constructive as possible in considering the JA’s proposal on the Judiciary’s resource requirements for 2006-07. The Administration should fully observe these commitments;

(b) the Panel supported the Judiciary’s proposals to withdraw some of the savings measures and to appoint additional number of JJOs and Deputy JJOs;

(c) the Judiciary Administration and the Administration should reconsider the proposal that the Judiciary should have autonomy to determine its budget on the basis of some objective yardsticks or predetermined formulas in the light of the merits of such a system, e.g. greater objectivity and transparency in the determination of appropriate resource allocation for the Judiciary; and

JA/Admin

(d) the Judiciary Administration and the Administration should advise the Panel in due course whether the arrangement for the Administration to consult the Judiciary on its overall resource requirements, prior to the setting of government budgetary targets, was successful in enhancing independence of the Judiciary in preparing its budget and bringing about more effective consultation between the Judiciary and the Administration on resource bidding by the Judiciary.

25. The Chairman said that the Panel could follow up developments of the relevant issues at a later stage.

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Legislative Council Panel on Security

Interception of Communications and Covert Surveillance :

Resource Implications for the Judiciary

Purpose

This paper sets out the Judiciary's views on the resource implications for the Judiciary arising from the Administration's proposed legislative framework regulating the conduct of interception of communications and covert surveillance by law enforcement agencies ("LEAs").

The Judiciary's Position

2. According to the information in the Administration's paper entitled "Proposed Legislative Framework on Interception of Communications and Covert Surveillance" (LC Paper No. CB(2)997/05-06(01)), the Judiciary considers that the proposals would have a most serious impact on the deployment of judicial resources. If the legislative proposals are enacted and implemented, the Judiciary takes the firm position that it would be necessary to provide the Judiciary with sufficient resources, which must be in the form of (i) additional posts at the Court of First Instance ("CFI") level, (ii) supporting staff posts and (iii) related expenses for infrastructural support. The provision of such resources would be essential in order to enable the judges to discharge their responsibilities under the legislative proposals properly and effectively.

3. Whilst taking on these important responsibilities, it must be emphasized that the Judiciary's fundamental role is to adjudicate disputes between citizens and between citizens and government fairly and efficiently. The Judiciary must ensure that its essential judicial work in the adjudication of disputes would not be adversely affected. Adequate resources must therefore be provided to the Judiciary for the additional responsibilities involved under the legislative proposal. Otherwise, the administration of justice by the Judiciary would inevitably be compromised.

4. Details of the impact of the proposals on judicial resources are set out below.

I. Authorisation Authority

5. The Administration has proposed that the authority for authorizing (i) all interception of communications and (ii) the more intrusive covert surveillance operations would be vested in one of a Panel of Judges, consisting of 3 to 6 CFI Judges. Authorization should only be given where the tests of proportionality and necessity are met, taking into account the gravity and immediacy of the case and whether the purpose sought can reasonably be furthered by other less intrusive means.

Impact on Judicial Resources

6. Having regard to the rigorous nature of judicial scrutiny, the time that would have to be involved in dealing with each case by a Panel Judge is likely to be significant. The Panel Judge would have to give careful consideration to whether the materials are sufficient to satisfy the statutory tests. Matters which have to be considered would include the purpose sought to be achieved, the gravity and immediacy of the matter; whether the purpose can reasonably be furthered by other less intrusive means, the likely intrusion into the privacy of the target and other people, the likely benefit from the proposed operation, whether the operation may cover information that may be subject to legal professional privilege and so on.

7. However, it is important to recognize that quite apart from and beyond the time which must be spent on judicial scrutiny, there are extensive repercussions on judicial resources arising from judicial authorization by Panel Judges under the legislative proposal -

- (a) The Panel Judge on duty would have to be available to deal with applications for judicial authorizations on an urgent basis when they arise. This means that long and heavy cases cannot be listed before him. Short matters would have to be listed with room for flexibility in his or her diary.
- (b) All CFI judges have to act in rotation as duty judge for dealing with urgent CFI business, such as the granting of urgent injunctions. The duty judge carries a pager and must be available at any time, including outside normal working hours. The Panel Judges by rotation have to be on duty in a similar way for dealing with judicial authorizations. This additional requirement would be an onerous burden on the Panel Judges. The Panel Judges may have to be taken out of the roster for

duty judge for CFI business. And if they are, this will impact on the workload of other CFI judges adversely.

- (c) A judicial authorization is obtained in the course of investigation by a LEA. Where eventually, the case is brought to court, the Panel Judge concerned obviously would not be able to try the case in question. This is because the judge would have been involved in the investigation process and would have been privy to investigatory materials. Related cases may be brought and the Panel Judge concerned equally would not be able to try them. In fact, it is extremely likely that all Panel Judges will be excluded from any case which is brought as a result of investigations in the course of which a judicial authorization had been obtained. This is because Panel Judges would act in rotation. Where a judicial authorization with X as the target has been obtained from Judge A, it is extremely likely that Judges B and C when on duty would have dealt with (i) matters arising out of the initial authorization, such as, renewal, and/or (ii) judicial authorizations with Y and Z as target arising out of the same investigation.
- (d) Further to (c), (i) to avoid any possible problems and (ii) to ensure that justice is seen to be done, all Panels Judges should be excluded from hearing cases where in the course of investigation a judicial authorization had been obtained.
- (e) The Panel Judges would have to conduct their own legal research and to keep pace with developments in other jurisdictions. Other jurisdictions would have adopted the same or similar tests as the tests in the proposed legislation.
- (f) The decisions of the Panel Judges may be subject to judicial review. The case will have to be heard by a bench of 2 CFI judges in accordance with established practice. This is because it is unsatisfactory for a single CFI judge to entertain an application for judicial review of a decision of another CFI judge since they are both at the same level. For example, in accordance with this practice, a bench of 2 CFI judges hears judicial review applications of decisions of the Insider Dealing Tribunal (consisting of a CFI judge and lay members).

Need for Additional Posts of CFI Judges

8. In view of the serious repercussions on judicial resources, it is necessary for additional posts of CFI Judges to be created to undertake judicial authorizations.

9. The Judiciary's view that additional CFI posts are necessary must be seen in the context that the CFI is already very substantially under-established. Over the past two decades or so, the Judiciary has supplied judges for a range of statutory positions with only a very limited increase in the establishment. Some of this work is paid for by reimbursement (i.e. the Administration reimburses the Judiciary with resources calculated on the estimated amount of time the Judges would be spending on the work involved) and some is not. The present situation is not satisfactory. Although the establishment for the CFI is 25 judges, the Judiciary has consistently needed at least 10 deputy CFI judges making a total of at least 35 judges.

10. Further, it should be noted that –

- (a) There are substantial areas of work which must be done by substantive CFI judges and not by Deputy Judges. These include murder and manslaughter trials, heavy criminal trials, including complex commercial crime, heavy civil cases, all judicial review cases, and sitting in the Court of Appeal.
- (b) The diversion of Panel Judges to deal with judicial authorizations would mean a significant reduction in judicial manpower of substantive CFI Judges.
- (c) Such reduction could not be compensated by the use of Deputy Judges since they cannot be deployed to handle the substantial areas of work referred to in (a).

Number of Additional CFI Judges Required

11. In view of the above, the Judiciary is of the firm view that CFI posts must be created in order to handle the work involved in judicial authorization in the proposed legislation. On the assumption that a Panel of only 3 Judges for judicial authorizations is initially required, the maximum number required would be 3 additional CFI posts. However, on the assumption that the number of applications is unlikely to take up 3

full-time CFI Judges, the Judiciary's position is that the minimum of 1 additional CFI and probably 2 CFI posts would be required.

12. The Judiciary is not aware of any past statistics from the Administration of the number of interceptions of communications and covert surveillance conducted by LEAs.

Support Staff Required

13. Apart from additional CFI posts, it would be necessary for the Administration to provide the Judiciary with additional supporting staff to assist the Panel Judges in dealing with the work involved in judicial authorizations, such as liaison with the LEAs, documenting the Panel Judge's queries to the LEA and his decisions, security arrangements for documents, filing etc. As the Panel Judges would be performing an entirely new function, there is no suitable support staff in the Judiciary's present establishment who can provide the necessary assistance to the Panel Judges. They have to be provided by the Administration to the Judiciary. As an assistant would have to be available at all times (including outside office hours) to assist the Panel Judge to process applications, and as leave relief is necessary, we expect that there should be at least 2 full-time support staff for the Panel Judges. Moreover, they have to be properly trained for the specific tasks to be performed.

Infrastructural Support

14. The Administration should also provide the Judiciary with other infrastructural support, e.g. security installations such as strong room for record keeping, secure fax line/ computers /telephone, etc. There may well be the need to enhance the security of the court premises in general.

15. The Administration is aware of the Judiciary's position on adequate resources required as set out above, including in particular the CFI posts required. Discussions are continuing on this matter between the Administration and the Judiciary.

II. Independent Oversight Authority

16. The Administration has also proposed to establish an independent oversight authority, entitled the "Commissioner on Interception of Communications and Surveillance" ("the Commissioner"),

to (i) keep under review LEAs' compliance with the provisions of the legislation and any code of practice; and (ii) investigate complaints against unlawful interception of communications or covert surveillance and awarding compensation. The Commissioner is proposed to be a sitting or retired judge not below the level of the CFI of the High Court.

17. The Judiciary understands that the function of the Commissioner is non-judicial, and is entirely outside the work of the Judiciary. The Commissioner's office will be located at separate premises outside the Judiciary's premises.

Impact on Judicial Resources

18. If the Commissioner is a retired Judge, it would not have any impact on judicial resources. However, it may be relevant to note that that the pool of retired judges resident in Hong Kong is very limited. Further, they may not be willing to take on the work.

19. In the event that a serving Judge is appointed as the Commissioner, this would also have a most serious impact on judicial resources. Having regard to the onerous responsibilities and the nature and volume of work involved under an entirely new regime, the Judiciary considers that substantial time would have to be spent by the Judge concerned, and the Judiciary should be provided with 1 full-time CFI post. The Judiciary is also in continuing discussion with the Administration on this.

Support for the Commissioner

20. As the Commissioner's function is entirely non-judicial and outside the Judiciary, the additional support staff for the Commissioner should also be outside the Judiciary's establishment. The level and number of staff required is a matter for the Administration to consider. However, the Judiciary considers it necessary for the Administration to provide the Commissioner with adequate and appropriate staff to enable it to discharge its statutory functions effectively and efficiently.

Timing

21. It is important that the timetable for the creation of judicial and other supporting posts and the provision of related expenses should dovetail with that of the legislative exercise. This is to avoid a very

undesirable situation, whereby the implementation of the judicial authorization system, and the functioning of the independent oversight authority (assuming the Commissioner is a serving Judge) under the enacted legislation, would be adversely affected or would prejudice the essential judicial work of the administration of justice.

Judiciary Administration
February 2006

政府總部
香港下亞厘畢道



GOVERNMENT SECRETARIAT
LOWER ALBERT ROAD
HONG KONG

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25 February 2006

Mrs Sharon Tong
Clerk to LegCo Panel on Security
Legislative Council
3/F Citibank Tower
3 Garden Road
Central

Dear Mrs Tong,

Interception of Communications and Covert Surveillance

Number of Cases

I refer to paragraph 3 of the Administration's paper that the Panel discussed on 21 February 2006. The law enforcement agencies have in the past few days undertaken a quick review of the cases of interception of communications and covert surveillance in the last three months of 2005. The number of cases is as follows –

- Interception of communications : 178
- Covert surveillance : 170

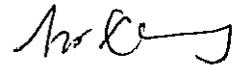
We have previously explained that the current regulatory regime for interception of communications and covert surveillance is different from our proposed regime in various ways. For example, the thresholds for the definition of crime warranting the use of covert surveillance is any crime at present but would be serious crime¹ for the proposed regime. Applying

¹ offences punishable by a maximum of 3 years' imprisonment or above or a fine of \$1 million or above

the criteria of the proposed new legislative regime to these cases, the number of cases of interception of communications that would require judicial authorization would be 178. As regards covert surveillance, 28 cases would require judicial authorization and 114 cases executive authorization. The remainder (28 cases) are accounted for by the differences between the two regimes.

I should be grateful if you would bring this to Members' attention.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Ms Cheung Siu Hing', written in a cursive style.

(Miss Cheung Siu Hing)
for Secretary for Security

Budgetary arrangement for the Judiciary

Relevant papers/documents

LC Paper No.

Papers/Documents

Budgetary arrangement for the Judiciary

Papers provided by the Judiciary Administration/Administration

- | | |
|---------------------|--|
| CB(2)1224/02-03(01) | -- Paper from the Judiciary Administration on "Initiatives on efficiency savings in the Judiciary" |
| CB(2)390/03-04(03) | -- Paper from the Administration on "Budgetary Arrangements for the Judiciary" |
| CB(2)1271/04-05(01) | -- Written response from the Judiciary Administration on "Closure and merger of Magistrates' Courts" |
| CB(2)1288/03-04(01) | -- Paper from the Administration on "Budgetary arrangements for the Judiciary" |
| CB(2)1333/04-05(02) | -- Paper from the Judiciary Administration on "Budgetary arrangements for the Judiciary" |
| CB(2)1333/04-05(03) | -- Paper from the Administration on "Expenditure estimates and charges for the Judiciary" |
| CB(2)2234/04-05(02) | -- Letter dated 5 July 2005 from the Judiciary Administration on "Budgetary arrangements for the Judiciary" |
| CB(2)2234/04-05(03) | -- Paper from the Administration on "Budgetary arrangements for the Judiciary – the Administration's response" |
| CB(2)663/05-06(01) | -- Paper from the Judiciary Administration on "Follow-up actions to meeting on 12 July 2005" |

Papers/letter prepared by the Legislative Council Secretariat

- CB(2)1333/04-05(01) -- Background brief on “Judiciary’s cost saving measures, budgetary arrangements and fees and charges”
- CB(2)1621/04-05(03) -- Background brief on “Budgetary arrangements for the Judiciary”
- CB(2)2234/04-05(01) -- Letter dated 25 May 2005 to the Secretary for Financial Services and the Treasury on budgetary arrangement for the Judiciary

Research report

- RP02/03-04 -- Research report on “Budgetary arrangements for overseas judiciaries” prepared by Research and Library Services Division

Minutes of meetings of the Panel on Administration of Justice and Legal Services

- CB(2)1618/02-03 -- Minutes of meeting on 24 February 2003
- CB(2)729/03-04 -- Minutes of meeting on 24 November 2003
- CB(2)2057/04-05 -- Minutes of meeting on 25 April 2005
- CB(2)2232/04-05 -- Minutes of meeting on 23 May 2005
- CB(2)2621/04-05 -- Minutes of meeting on 12 July 2005

Question raised at Council meeting

- Oral question raised by Hon Margaret NG on the closure and merger of Magistrates’ Courts -- Hansard of the Council meeting on 8 December 2004

Resources for the Judiciary

Papers provided by the Judiciary Administration/Administration

- CB(2)1189/05-06(01) -- Paper from the Judiciary Administration on "Resource implications for the Judiciary"

CB(2)1258/05-06(01)

-- Letter dated 25 February 2006 from the Administration regarding the number of cases of interception of communications and covert surveillance in the last three months of 2005

Question on the resource implications for the Judiciary from the proposed legislative framework regulating the conduct of interception of communications and covert surveillance by law enforcement agencies raised at the special meeting of the Finance Committee to examine the 2006-07 Estimates of Expenditure on 15 and 16 March 2006

Reply Serial No. SB003

-- Security Bureau's reply to the written question asked by Hon LAU Kong-wah

Reply Serial No. SB004

-- Security Bureau's reply to the written question asked by Hon Frederick FUNG

Reply Serial No. SB006

-- Security Bureau's reply to the written question asked by Hon CHEUNG Man-kwong

Reply Serial No. JA013

-- Judiciary Administration's reply to the written question asked by Hon LI Kwok-ying