

**For discussion
on 22 May 2006**

**Legislative Council Panels on Security and
Administration of Justice and Legal Services**

**Staffing Implications of the Implementation of the
Interception of Communications and Surveillance Bill**

PURPOSE

This paper explains the staffing implications arising from the implementation of a new regime for the regulation of interception of communications and covert surveillance under the Interception of Communications and Surveillance Bill (the Bill) after it comes into effect.

BACKGROUND

The Bill

2. The Legislative Council (LegCo) Brief dated 1 March 2006 (Ref. SBCR 3/2/3231/94) sets out the background to the Bill. In essence, the Bill provides a new legal basis for interception of communications and covert surveillance operations by the law enforcement agencies (LEAs), replacing the current systems under section 33 of the Telecommunications Ordinance and the Law Enforcement (Covert Surveillance Procedures) Order. Its object is to regulate the conduct of interception of communications and the use of surveillance devices by or on behalf of public officers.

3. Under the proposed regime, the authority for authorizing all interception of communications and the more intrusive covert surveillance operations would be vested in a member of a Panel of Judges, consisting of three to six judges of the Court of First Instance (CFI) of the High Court. Moreover, a Commissioner on Interception of Communications and Surveillance (the Commissioner) will be appointed as an independent oversight authority to keep under review LEAs' compliance with the provisions of the legislation, the code of practice to be issued thereunder and the requirements under the prescribed authorizations, as well as to investigate complaints against unlawful interception of communications or covert surveillance and, where appropriate, award compensation. The Commissioner is proposed to be a sitting or retired judge not below the level of the Judge of the CFI of the High Court. The Chief Executive (CE) will make these appointments on the recommendation of the Chief Justice.

Additional judicial resources required by the Judiciary

4. The Judiciary has carefully assessed the regime proposed under the Bill. In assessing the impact of the new regime on judicial resources, the following factors are relevant –

- (a) the actual time to be devoted by the appointed judges to other judicial duties;
- (b) the arrangement on listing;
- (c) the availability of judges to act in rotation as duty judges for dealing with urgent CFI business; and
- (d) the arrangement for hearing cases where conflict of interest may arise due to the Panel Judges' appointment.

Encl. 1 The more detailed considerations are at **Enclosure 1**.

5. As for the Commissioner, as provided for in the Bill, his main functions are to oversee the compliance by LEAs and their officers with the relevant requirements. More specifically, he would –

- (a) conduct reviews on compliance by departments and their officers with the requirements of the Bill, the code of practice to be issued thereunder, and prescribed authorizations issued by the authorization authorities;
- (b) carry out examinations upon applications from persons who believe themselves to be subject to unlawful interception or covert surveillance operations by an LEA;
- (c) prepare and submit reports to CE on any matters relating to the performance of his functions under the Bill (including an annual report which will be tabled at LegCo);
- (d) make recommendations to the LEAs on changes to any arrangement made by their respective departments to better carry out the objects of the Bill or the provisions of the code of practice; and
- (e) make recommendations to the Secretary for Security on the code of practice for better carrying out of the objects of the Bill.

6. At this stage, it is not possible to forecast precisely the time that the duties of the Panel Judges would likely take. Nonetheless, taking into account the number of cases of interception of communications and covert surveillance in the last three months of 2005 (i.e. 178 and 170 cases of interception of

communications and covert surveillance respectively), there is a need to provide two additional posts of the Judge of the CFI of the High Court to the Judiciary to cover the impact of the work of judicial authorization as well as the Commissioner's work on judicial resources. The Judiciary considers this acceptable.

7. The above manpower requirement is worked out on the basis that the Commissioner would be a serving (instead of a retired) judge. The actual amount of judicial resources that the appointment would take up would depend on, inter alia, caseload. Our current assessment is that given the nature and estimated volume of work of the Commissioner as set out above, the duties would take up a substantial amount of the time of the judge.

Additional supporting staff required by the Judiciary

8. For the handling of judicial authorizations, the Panel Judges need supporting staff to assist them in the administrative work involved. The Judiciary's assessment is that as the Panel Judges would be performing an entirely new function, no supporting staff in the present establishment of the Judiciary can be redeployed to provide that assistance. Hence, the Administration will provide necessary resources to the Judiciary for creating under delegated authority three non-directorate posts (two Executive Officers I and one Clerical Officer) for this purpose.

Staffing resources required by the Secretariat for the Commissioner

Directorate support

9. The heavy and sensitive duties of the Commissioner as set out in paragraph 5 above call for a strong team of supporting staff. In particular, much coordination work with the LEAs is anticipated to ensure the smooth functioning of the review and complaint handling systems, while strong analytical support is required to assist the Commissioner in assessing the compliance of LEAs in individual cases and making recommendations on the code of practice and arrangements of the LEAs on covert operations. Solid coordination support is also needed for the compilation of the annual reports to CE and other reports that the Commissioner may prepare from time to time in carrying out his functions under the Bill.

10. In the light of the above, we need an officer (the Secretary) with strong organizational skills at a sufficiently senior level to head the Secretariat. The Secretary will be the head of the Secretariat responsible for overseeing the day-to-day operation of the Secretariat. He/She will also be the Controlling Officer of the new Head of Expenditure to be created. In addition, the Secretary

will need to assist the Commissioner in carrying out complex reviews and examinations as set out in paragraph 5 above. Much liaison with the LEAs and other parties concerned is envisaged in order to ensure the smooth operation of the review and complaint-handling systems. Moreover, given the sensitive nature of the materials involved and the important role played by the Commissioner as one of the key safeguards for the new regime proposed, the Secretary's work is expected to be complex and sensitive. Only a sufficiently senior and experienced officer could meet the requirements. On the basis of the above, we consider it necessary to rank the Secretary of the Secretariat at Principal Executive Officer (PEO) level (D1).

Other supporting staff

11. Apart from the PEO post for heading the Secretariat proposed in paragraph 10 above, we need other supporting staff for the Secretariat. In particular, to build up expertise in examining cases involving different LEAs so that more effective and efficient review and complaint handling functions could be performed, we intend to set up two dedicated teams, each to be headed by one Senior Executive Officer and supported by two Executive Officers I, plus clerical and logistical support for the Secretariat as a whole (including two Clerical Officers, four Assistant Clerical Officers, one Senior Personal Secretary, one Personal Secretary II, one Chauffeur and one Workman II). A proposed organisation chart of the Secretariat of the Commissioner is at

Encl. 2 **Enclosure 2.**

FINANCIAL IMPLICATIONS

12. The proposed staffing resources will bring about the following financial implications –

(a) *The Judiciary*

The creation of two posts of the Judge of the CFI of the High Court and three non-directorate posts will entail an additional notional annual salary cost at mid-point (NAMS) of \$5,800,320 and an additional full annual average staff cost, including salaries and staff on-cost, of \$9,609,000.

(b) *The Secretariat of the Commissioner*

The creation of one post of PEO and 16 non-directorate posts will entail an additional NAMS of \$6,427,032 and an additional full annual average staff cost, including salaries and staff on-cost, of \$9,178,000.

IMPLEMENTATION

13. The Bills Committee is still scrutinizing the Bill. We intend to put the new statutory regime in place as soon as possible once the Bill is passed. There is general consensus that the Administration should provide the Judiciary with sufficient resources to implement the new regime in order not to affect the current waiting time for other judicial services. We plan to seek approval for the above proposal (for three directorate posts and for changes to the 2006/07 Estimates) from the Establishment Subcommittee (ESC) and Finance Committee (FC) within this legislative session. Subject to the approval of the ESC and FC, we will create the relevant posts after the passage of the Bill.

Security Bureau
May 2006

Additional Judicial Resources : Considerations

Authorization

Under the Interception of Communications and Surveillance Bill (the Bill), 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 three to six Court of First Instance (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 cannot reasonably be furthered by other less intrusive means. The Panel Judge would have to give careful consideration to the relevant factors as required under the Bill in determining whether to issue authorization for carrying out the operations.

2. Apart from and beyond the time which must be spent on judicial scrutiny, there are additional requirements on judicial resources arising from judicial authorization by Panel Judges under the Bill –

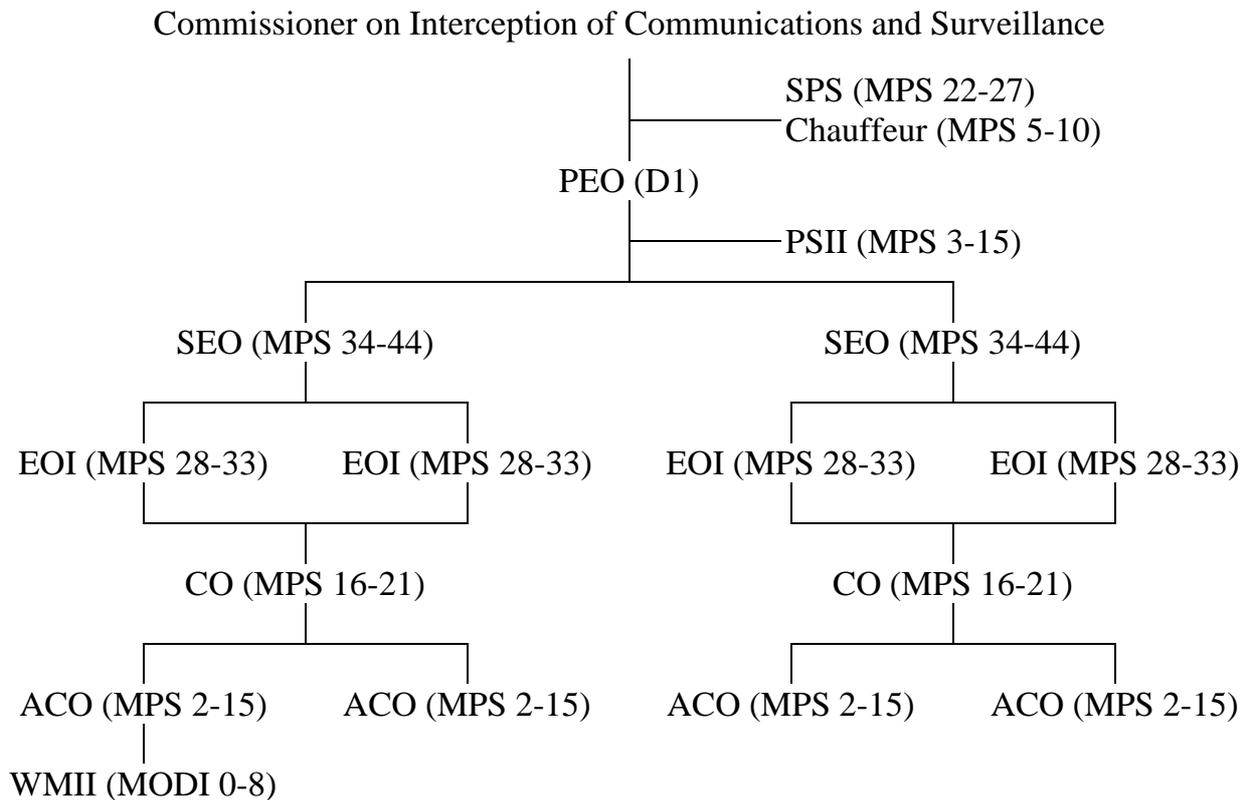
- (a) The Panel Judge on duty would have to be available to deal with applications for judicial authorizations on an urgent basis when they arise. This means that long and heavy cases cannot be listed before him. Short cases would have to be listed with room for flexibility in his or her diary.
- (b) 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. Thus 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.
- (c) A judicial authorization is obtained in the course of investigation by a law enforcement agency. 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. 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 has 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), to avoid any possible problems and to ensure that justice is seen to be done, all Panel Judges should be excluded from hearing cases where in the course of investigation a judicial authorization has 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 two 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.

3. Further, it should be noted that 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.

**Proposed Organization of the Secretariat of the Commissioner
on Interception of Communications and Surveillance**



Note: (1) Figures in brackets indicate Government Directorate / Master / Model Scale I Pay Scales

(2) The Commissioner would be a sitting or retired judge not below the level of the Judge of the Court of First Instance of the High Court

Legend

PEO	Principal Executive Officer
SEO	Senior Executive Officer
EO I	Executive Officer I
SPS	Senior Personal Secretary
PSII	Personal Secretary II
CO	Clerical Officer
ACO	Assistant Clerical Officer
WMII	Workman II