

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 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
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