

**President's ruling on
Committee Stage Amendments to
Interception of Communications and Surveillance Bill
proposed by Hon Margaret NG, Hon James TO Kun-sun,
Hon Albert HO Chun-yan, Hon LEE Wing-tat
and Hon CHEUNG Man-kwong
(First Part)**

Hon Margaret NG, Hon James TO Kun-sun, Hon Albert HO Chun-yan, Hon LEE Wing-tat and Hon CHEUNG Man-kwong have each given notice to move Committee Stage Amendments ("CSAs") to the Interception of Communications and Surveillance Bill ("the Bill"), if the Bill gets its Second Reading at the Council meeting to be held on 2 August 2006. I am required to rule whether they are admissible under the Council's Rules of Procedure. Before making the ruling, I have invited the Secretary for Security ("S for S") to offer his comments on the CSAs, and the Members concerned to offer their responses. I have also sought the advice of Counsel to the Legislature.

The Administration's view and responses from the Members

2. For easier reading, details of those amendments proposed by Hon Margaret NG, Hon James TO Kun-sun and Hon Albert HO Chun-yan, on which S for S has commented, and the respective responses of the Members concerned are summarized in the attached **Appendix**. S for S has made no comment on the amendments proposed by Hon LEE Wing-tat and Hon CHEUNG Man-kwong.

3. Owing to time constraints, the ruling will be split into two parts. This is the **first part** which deals with those CSAs which I have ruled as admissible for presentation to the Council for consideration. The second part, which covers those which I am considering, will be issued as soon as possible.

4. The provisions in the Rules of Procedure relating to amendments to bills, which S for S has referred to in his comments, are:

(a) Rule 57(4)(a)

An amendment must be relevant to the subject matter of the bill and to the subject matter of the clause to which it relates;
and

(b) Rule 57(6)

An amendment, the object or effect of which may, in the opinion of the President or Chairman, be to dispose of or charge any part of the revenue or other public moneys of Hong Kong shall be proposed only by -

- (a) the Chief Executive; or
- (b) a designated public officer; or
- (c) a Member, if the Chief Executive consents in writing to the proposal.

Advice of Counsel to the Legislature

5. Counsel to the Legislature has tendered his advice, as follows:

Subject Matter of the Bill

6. It is well established that when the President is considering whether a proposed CSA complies with the requirement of Rule 57(4)(a) of the Rules of Procedure, i.e. whether a proposed CSA is relevant to the subject matter of the bill and to the subject matter of the clause to which it relates, she first forms a view on the scope of the bill, against which she considers whether the effect of the proposed amendment is within that scope, hence relevant to the subject matter of the bill.

7. The purpose of the Bill as set out in its long title is to "regulate the conduct of interception of communications and the use of surveillance device by or on behalf of public officers and to provide for related matters". Clause 2 defines "communication" which, read together with clause 4, makes it clear that the Bill only seeks to regulate interception carried out by public officers of the kinds of communications as defined, but not others. The term "covert surveillance" is defined in clause 2. It is clear from the formulation of this definition and clause 5 that the Bill seeks to regulate surveillance carried out by (or on behalf of) public officers with the use of surveillance device. The Bill does not cover surveillance, whether covert or otherwise, carried out without the use of any device.

8. The background to the Bill is a relevant factor for the President to take into account when forming her view on the scope of the Bill. However, she does not need to be concerned with the question of whether the Bill as presented would successfully achieve the policy objectives as stated by the Administration in the LegCo Brief. If she did, she would be considering issues of merit which are not relevant to her rulings which concern procedure.

Charging Effect of proposed CSAs

9. The restriction of Rule 57(6) was adapted from the Standing Orders of the pre-1997 Legislative Council. It was a procedural device provided to protect the Crown's financial initiative, reflecting the constitutional arrangement that it is the government which demands and the legislature which provides. Articles 73(3) and 64 of the Basic Law reflect this arrangement. Against this background, the President had said in her previous rulings that it was not an exact science in forming an opinion under the Rule and she had to have regard to all relevant considerations and to bear in mind the purpose of the rules.

10. In the Administration's letter on the Members' proposed CSAs, the expression "new and distinct function" had been referred to as one of the grounds for justifying the Administration's view that a certain CSA has charging effect. This expression is an abbreviated form for saying that the effect of the relevant CSA is to create a new function or power for, or to impose a new duty on, the Government and that the discharge of such function or duty, or the exercise of such power would incur public expenditure in respect of which no provision of public money has been made under existing law or, in the case of an original bill, it is beyond what is envisaged in the bill.

11. As a matter of general principle, when the President is considering the admissibility of Members' proposed CSAs to bills under Rule 57(4) and (6), she is examining their proposals in the context of the bills as presented to the Council only; whether or not the Administration has proposed any CSA which may change financial implications is not relevant.

12. Where the President has considered that a proposed CSA is outside the scope of a bill, it would not normally be necessary for her to go on to consider other grounds.

My opinion

13. I accept Counsel to the Legislature's advice on the principles that are adopted in making rulings under Rule 57(4)(a) and 57(6) on the admissibility of CSAs proposed to bills.

14. My opinion on the scope and subject matter of the Bill is that it is abundantly clear that the object of the Bill is to regulate the conduct of interception of communications and the use of surveillance devices by or on behalf of public officers.

15. My analysis of the CSAs which I consider as admissible is in the following paragraphs.

Hon Margaret NG's CSAs

Proposed amendment to the definitions of "Type 1 surveillance" and "Type 2 surveillance"

16. Covert surveillance is categorised in the Bill into Type 1 surveillance and Type 2 surveillance. The former is defined by means of general exclusion, in that Type 1 surveillance means "any covert surveillance other than Type 2 surveillance". The Bill provides that Type 1 surveillance requires the authorization of a panel judge. Type 2 surveillance is defined in more specific terms, and requires the authorization of an authorizing officer who is designated as such from among an officer not below the rank equivalent to that of senior superintendent of police.

17. The CSA to the definition of Type 1 surveillance would change the original approach by defining it in specific terms. In the CSA to Type 2 surveillance, the term would be defined by means of general exclusion so that it would mean any covert surveillance other than Type 1 surveillance. The effect of these two CSAs on a panel judge's functions as provided in the Bill does not seem to result in any change in substance. A panel judge would still have to act in accordance with the provisions of the Bill when considering an application for authorization. For example, all the conditions specified in clause 3 for issue, renewal or continuation of an authorization given by a panel judge would still apply no matter how the respective definitions of Type 1 surveillance and Type 2 surveillance were to be amended. The proposed amendments to the two definitions do not have the effect of creating a new function for the panel judges and they should not be considered as having charging effect.

Proposed new clause 40(4)

18. The CSA seeks to add a general power to conduct any investigation as the Commissioner considers necessary into the conduct of any person apart from a panel judge and to refer any matter to the Director of Public Prosecutions upon conclusion of such investigation. This power of investigation could only be exercised if it is in relation to reviews conducted by the Commissioner under clause 40(1). Arguably, this proposed power of investigation may not be necessary as clause 51 (1)(a) already provides the Commissioner with the power to require any public officer or any other person to answer any questions, and to provide any information etc. for the purpose of performing any of his functions under the Bill. The proposed addition in clause 40 of an investigatory power does not appear to give rise to a substantially new condition for incurring new public expenditure. Since under clause 41(3) of the Bill, the Commissioner is already empowered to refer the findings of a review conducted under clause 40(1) to the Chief Executive or

the Secretary for Justice or both, I do not think that the proposed power to refer matters to the Director of Public Prosecutions upon conclusion of investigations would require more than a negligible amount of public expenditure. I do not therefore consider this proposed subclause should be considered as having charging effect.

Hon James TO's CSAs

Proposed new clause 2(5C)

19. The CSA provides, "Notwithstanding anything in this Ordinance, no officer shall use any surveillance device unless the device has been certified by the Director of Department of Health that it will have no adverse effect to the health of any person". It should be clear from the context of the Bill that the term "officer" is intended to mean the public officers referred to in clauses 4 and 5, and includes those who come under the regulatory scheme established by the Bill.

20. This CSA is couched as a prohibition against public officers' use of surveillance devices not certified by Director of Health. It does not expressly impose a statutory obligation on or create a statutory function for the Director of Health to certify surveillance devices presented to him for certification that they have no adverse effect on a person's health. The CSA does not have charging effect.

Proposed new clauses 9(1A), 12(1A), 15(1A), 18(1A) and 24(1A) Inviting Privacy Commissioner to act as special advocate

21. The CSAs are to confer a discretion on a panel judge, or District Judge who is proposed by Hon James TO (CSAs to clauses 14 - 19) to replace "an authorizing officer" in provisions related to the operation of scheme for issuing executive authorizations, to "invite the Privacy Commissioner for Personal Data ("Privacy Commissioner") to make submission as a special advocate".

22. The Privacy Commissioner is a statutory office established by section 3 of the Personal Data (Privacy) Ordinance (Cap. 486). Its functions are provided in section 8. The Privacy Commissioner is only empowered to perform functions which are created in sufficiently clear term by the Ordinance or other enactment.

23. The above CSAs are couched in such terms as to enable a panel judge or District Judge to invite the Privacy Commissioner to make submissions. As the operative word is to "invite", it does not appear that the Privacy Commissioner must make submissions upon being invited. The Privacy Commissioner would have to consider the substance of the matter on

which he is invited to make a submission. Only when the matter comes within the ambit of his statutory functions will the Privacy Commissioner consider that he is obliged to accept the invitation.

24. The CSAs do not appear to have the result of creating a new function for the Privacy Commissioner and incurring new expenditure. However, clause 15(1A) and 18(1A) are related to clauses 14-19 which Hon James TO wishes to amend. I will make my ruling on the two clauses together with his CSAs to clauses 14 to 19.

Proposed new definition of "Type 2 surveillance"

25. The proposed new definition is limiting this type of surveillance to covert surveillance that is carried out with the use of an optical surveillance device or a tracking device if the use of the device does not involve entry onto any premises without permission or interference with the interior of any conveyance or object without permission. The effect of limiting the scope of Type 2 surveillance would be to expand that of Type 1 surveillance because Type 1 surveillance is defined as any covert surveillance other than Type 2 surveillance.

26. On the basis of my analysis in paragraphs 15 and 16 regarding Hon Margaret NG's proposed CSAs to the definitions of Type 1 surveillance and Type 2 surveillance, this CSA also does not have charging effect.

Proposed clause 51(1)(c)

27. The proposed clause 51(1)(c) would empower the Commissioner to require a head of department to take such remedial action and make compensation as he considers reasonable and necessary for the purpose of performing any of his functions under this Ordinance. The heading to clause 51 is "Further powers of Commissioner". The proposed new power may be considered as an extension or variation of the Commissioner's power to require heads of department to take certain actions or to order the Government to make compensation. However, as regards taking remedial actions, a head of department is already required under clause 50(2), to submit to the Commissioner a report with details of any measures taken by the department to implement recommendations for changing arrangements made to better carry out the objects of the Bill or provisions of the code of practice. As regards the power to order a head of department to make compensation, such power is already provided for in clause 43(2) except that the order is directed against the Government. Such extension or variation does not appear to impose new duties on a head of department nor create new contingent liability on the Government. Moreover, the proposed new powers may only be exercised for the purpose of performing functions under the Bill. I consider that the CSA does not have charging effect.

Hon Albert HO's CSA involving the consideration of charging effect issues

Clause 6(1)

28. Under clause 6(1) of the Bill, the Chief Executive would be required to appoint 3 to 6 judges of the Court of First Instance to be panel judges for the purposes of the Bill. Hon Albert Ho's proposed CSA seeks to change the number of judges required to be appointed to not less than 10. These panel judges are not remunerated for their performance of functions under the Bill. The number of applications for authorization does not have a direct relationship with the number of judges for performing these functions in the proposed mode. I do not think there is charging effect.

Ruling

29. I rule that the CSAs proposed by Hon Margaret NG, Hon James TO Kun-sun and Hon Albert HO Chun-yan, as detailed in this part of the ruling, do not have charging effect for the purpose of Rule 57(6) of the Rules of Procedure.

(Mrs Rita FAN)
President
Legislative Council

31 July 2006

Interception of Communications and Surveillance Bill

Summary of Members' proposed Committee Stage amendments (CSAs), Secretary for Security's (S for S) comments and Members' responses

Committee Stage Amendments by	S for S's comments	Members' responses
<i>Hon Margaret NG</i>		
<p>(i) Clause 2(1) Proposed new definition of "covert surveillance", to include undercover agent of a scheduled department, and to delete "systematic"</p>	<p>The main purposes of the Bill are to regulate the conduct of interception of communications and the <u>use of surveillance devices by or on behalf of public officers</u>. By extending the Bill to cover surveillance by undercover agents of scheduled departments without the use of surveillance devices, the CSA significantly extends the Bill beyond its scope.</p>	<p>The basis for the urgent enactment of the Bill is to fill the legal vacuum and meet the requirements of Article 30 of the Basic Law to regulate infringement upon the freedom and privacy of communication by the Government or its agents. The LegCo Brief refers to "covert surveillance", and not the use of surveillance alone.</p> <p>Surveillance by means of undercover agents falls fairly and squarely within the ordinary concept of "covert surveillance" and is well within the object and scope of the Bill.</p>
<p>(ii) Clauses 4 and 5 Proposed new clauses 4(1) and 5(1), on persons subject to prohibition, to include the Chief Executive, ExCo Members, bureau heads insofar as they are not public servants</p>	<p>The long title of the Bill provides that the Bill is to regulate the conduct of interception of communications and the use of surveillance devices <u>by or on behalf of public officers</u>. The proposed new clauses extend the regulation to persons who are not public officers. They are outside the scope of the Bill.</p>	<p>The amendments make clear that the prohibition against unauthorized interception and surveillance by the government includes doing so by way of the personal action or instruction of the Chief Executive and is within the scope of the Bill.</p>

Committee Stage Amendments by	S for S's comments	Members' responses
<p>(iii) Clause 2(1) Proposed new definitions of "communication" (to change definition to refer to communication transmitted "by any means"), "intercepting act" (to include interception by a recipient who is an undercover agent of a scheduled department) and "covert surveillance"</p>	<p>The CSAs have a charging effect, contrary to Rule 57(6).</p> <p>(a) The definitions of "communication" and "intercepting act" in the Bill clearly limit the types of communication the interception of which would require authorization, i.e., communications transmitted by a postal service and a telecommunications system, intercepted during the course of their transmission. The CSA would widen the scope of the Bill to cover the interception of communication that is transmitted <u>by other means beyond postal service and telecommunications, and at any stage of the communication</u> (presumably before, during and after the communication is transmitted).</p> <p>(b) The definition of "covert surveillance" in the Bill clearly limits it to surveillance <u>with the use of surveillance device</u>. The CSA does not have such limitation. This would considerably widen the scope of conduct by law enforcement agencies that would require authorization under the</p>	<p>The amendments do not widen the scope of the Bill, nor have any charging effect. Expenses arise from the applications for, determinations on and implementation of authorization for interception or surveillance.</p> <p>The Administration's argument that the amendments will result in more applications for authorization is a fallacy. The amendments seek to reduce the incidents of interception and covert surveillance by raising the threshold for applications for authorization.</p>

Committee Stage Amendments by	S for S's comments	Members' responses
	<p>Bill.</p> <p>These amendments would result in a considerably larger number of cases to be subject to the new authorization regime, and hence resource implications on the authorization authorities. It is impossible to estimate accurately the likely expenditure involved because the definitions are cast so widely, but it would not be unreasonable to assume that the number of cases would easily multiply that envisaged under the Bill by a few times. The necessary expenditure would correspondingly multiply.</p>	
<p>(iv) Clause 2(1) Proposed new definition of "Type 1 surveillance"</p>	<p>The CSA has a charging effect.</p> <p>The proposed new definition of "Type 1 surveillance", which requires judge's authorization, will include the following new elements –</p> <p>(a) what is now included in the definition of "Type 2 surveillance" in the Bill, which only requires executive authorization; and</p> <p>(b) any surveillance without the use of surveillance devices if it involves entry onto any premises without permission or interference with the</p>	<p>The object of the Bill is to require authorization for covert surveillance of various levels of intrusiveness. The CSAs do not alter the scheme of applying for a prescribed authorization from a relevant authority. Increase in one (type of authorization) means decrease in another. The more stringent requirement for application to a panel judge seeks to discourage abuse, while a more relaxed system will be likely to encourage proliferation of applications and therefore greater charge on the revenue.</p>

Committee Stage Amendments by	S for S's comments	Members' responses
	<p>interior of any conveyance or object without permission.</p> <p>These elements involve <u>new and distinct functions for panel judges</u> not envisaged in the Bill, and thus have a charging effect.</p> <p>According to past experience, the number of Type 2 surveillance cases outnumbered that of Type 1 cases (e.g., 194 Type 2 cases vs 44 Type 1 cases in the period 20 February 2006 to 19 May 2006). Although the Administration does not keep the number of surveillance cases without the use of surveillance devices, such surveillance is part and parcel of any law enforcement agency's work. From experience, the number of such cases is quite large. The effect of the proposed new definition on expenditure would therefore be substantial.</p>	
<p>(v) Proposed new clause 6(3C) Panel judges not to sit as ordinary judges during their appointment as panel judges</p>	<p>The CSA has a charging effect.</p> <p>The Bill provides that three to six panel judges be appointed. In assessing the impact of the Bill on judicial resources, the Judiciary has worked on the basis that the panel judges, apart from dealing with applications for judge's authorizations, may be assigned to hear cases.</p>	<p>The more panel judges who sit as ordinary judges, the more likely they are involved at one stage or another (of a case involving applications for authorization). The CSA means only that full-time panel judges will be withdrawn from hearing (ordinary) cases. It is impossible to speculate on the resources involved under each scenario. It is perfectly possible that the</p>

Committee Stage Amendments by	S for S's comments	Members' responses
	<p>The CSA prohibits the panel judges from sitting as ordinary judges. The Judiciary has advised that this would have very serious repercussions for the Judiciary and would be very disruptive of the work of the High Court, as the panel judges would be taken out from regular judicial duties totally. The proposal would mean two to five additional Court of First Instance (CFI) judge posts (full staff cost of each post being \$3,992,100 each year) would be required to cater for the impact on judicial resources, on top of the one CFI judge post approved by the Finance Committee under the original proposal in the Bill.</p>	<p>amendment will reduce the charge on the revenue.</p>
<p>(vi) Proposed new clauses 39(b)(v) and 40(4) Commissioner on Interception of Communications and Surveillance (Commissioner) to have function and power of investigation</p>	<p>The CSAs have a charging effect.</p> <p>The proposed new clause 39(b)(v) would create <u>a new function</u> to "investigate complaints made by any person in relation to any interception or surveillance carried out whether with or without authorization".</p> <p>The proposed new clause 40(4) provides the Commissioner with a general power to conduct any investigation as he considers necessary into the conduct of any person. These would require the Commissioner to investigate complaints in relation to any interception</p>	<p>The relevant consideration for charging the revenue is not an increase in the Commissioner's workload because his remuneration is fixed whatever the workload, unless the increase is so drastic as to make it necessary to employ an extra Commissioner or members of his staff. Any increase on the CSAs is speculative and will be insignificant even if there is.</p>

Committee Stage Amendments by	S for S's comments	Members' responses
	<p>or surveillance even where the complainant believes or suspects that the interception or surveillance has been carried out by someone other than a department, including private parties. For this, new expenditure has to be provided.</p>	
<p>(vii) Proposed new clause 43(2A) Payment of compensation by Government ordered by Commissioner</p>	<p>The CSA has a charging effect.</p> <p>The CSA provides for the Commissioner to order compensation, which imposes a contingent liability on Government payable out of public moneys.</p>	
<p>(viii) Proposed clause 46A(7) Notification to relevant persons – definition of "relevant person"</p>	<p>The CSA has a charging effect.</p> <p>New clause 46A(7) seeks to include "such person as being affected by interception or covert surveillance carried out", in addition to "any person who is the subject of the interception or covert surveillance concerned". The effect is that the number of possible persons to be subject to the notification / compensation regime will be substantially increased.</p>	

Committee Stage Amendments by	S for S's comments	Members' responses
<i>Hon James TO Kun-sun</i>		
<p>(ix) Clause 2(1) Proposed new definition of "covert surveillance"</p>	<p>The proposed new provision will extend the Bill to cover surveillance by "an undercover agent or by any person on the instruction of or under the control of or with the cooperation of an officer of a department specified in Schedule 1" <u>without the use of surveillance devices</u>. The CSA is outside the scope of the Bill.</p>	<p>Paragraph 7 of the Legislative Council Brief on the Bill states that the Bill is to provide for a new legal basis for interception of communications and covert surveillance operations by the law enforcement agents, replacing the current systems. Thus, the current operation of covert surveillance by all means (whether or not by the use of surveillance device) should be within the scope of this Bill.</p> <p>The CSA is to make the Bill consistent with Article 30 and 39 of the Basic Law which protect against infringement or restriction of freedom and privacy of communications.</p>
<p>(x) Clauses 4 and 5 Proposed new clauses 4(1) and 5(1) on persons subject to prohibition, to include the Chief Executive, bureau heads insofar as they are not public servants</p>	<p>The long title of the Bill provides that the Bill is to regulate the conduct of interception of communications and the use of surveillance devices by or on behalf of <u>public officers</u>. The proposed new clauses extend the regulation to persons who are not public officers. They are therefore outside the scope of the Bill.</p>	<p>The Chief Executive and bureau heads have close association with public officers. They form a necessary integral part of the government agency and should also be subject to prohibition in their public capacity.</p>
<p>(xi) New clause 2(5C) Certification of surveillance devices by Director of Health</p>	<p>The CSA has a charging effect. The proposed new clause 2(5C) introduces a requirement for all</p>	<p>The mission statement of the Department of Health makes it clear that it is an integral part of the duty of the Director of Health to prevent any harm that may</p>

Committee Stage Amendments by	S for S's comments	Members' responses
	<p>surveillance devices to be certified by the Director of Health before they may be used. This creates a <u>new and distinct function</u> for the Director of Health. Given the scope and types of surveillance device that may be used in covert surveillance, there could be considerable resource implications. Product certification scheme adopted worldwide, if a scheme is required, is to allow the testing of products by independent laboratories/certification bodies according to prescribed international or national standards and guidelines. The Administration estimates that the annual cost to run such a scheme is around \$7.5 to 10 million.</p>	<p>be caused to individuals as well as the community by the use of surveillance devices.</p> <p>As far as costing is concerned, many of the surveillance devices have already been certified by relevant authorities. The Director of Health has full discretion to issue the certificate for the use of surveillance devices for the purpose of this Bill after enactment. The CSA does not create a new and distinct function for the Director of Health.</p>
<p>(xii) Clauses 9, 12, 15, 18 and 24 Proposed new clauses 9(1A), 12(1A), 15(1A), 18(1A) and 24(1A), on the Privacy Commissioner being invited by the relevant authorization authorities to act as a special advocate in applications for judicial authorization</p>	<p>The CSAs have a charging effect.</p> <p>The proposal is not provided for in the Bill. Therefore, the proposed arrangement is a <u>new function imposed on the Privacy Commissioner</u>. New expenditure would have to be provided out of public money.</p> <p>It is difficult to forecast with accuracy the number of cases where the Privacy Commissioner would be required to act as a special advocate. Using the total number of cases of</p>	<p>The workload for the Privacy Commissioner depends on the volume of interception and covert surveillance and whether the judges invite the Commissioner to assist. Over time, the need to seek advice may decline. It is an integral part of the role and duty of the Commissioner to protect privacy, interests of individuals.</p>

Committee Stage Amendments by	S for S's comments	Members' responses
	<p>interception and covert surveillance in the period 20 February to 19 May 2006 as the basis for estimation, the number of cases in one quarter would be about 400, extrapolated to be 1 600 in one year. Even if the Privacy Commissioner would be required to act as a special advocate in only 10% of the cases, he would have to handle well over 150 cases a year.</p>	
<p>(xiii) Clause 2(1) Proposed new definition of "Type 2 surveillance", redefining this type of surveillance which the Bill proposes for executive authorization only</p>	<p>The CSA has a charging effect.</p> <p>The proposed definition of "Type 2 surveillance" has the effect of "upgrading" to Type 1 operations participant-monitoring cases involving the use of listening or optical surveillance devices. This would increase the authorization workload for panel judges envisaged in the Bill.</p>	<p>Upgrading the standard used for (authorizing) Type 2 surveillance will not affect the principal role or function of the judge for the purpose of this scheme. If abuse can be avoided by a more reasonable and proper scheme for authorization, public money will be saved.</p>
<p>(xiv) Clauses 14 to 19 District Court authorizations, instead of executive authorization, required for Type 2 surveillance</p>	<p>The CSAs have a charging effect.</p> <p>The proposal for District Court judges to consider applications for Type 2 surveillance, which the Bill proposes to be subject to executive authorization, would result in <u>expenditure which would be entirely new and distinct</u>. The Judiciary has estimated that it would require at least 1 additional District Judge (the full staff cost being</p>	<p>It is the usual duty and function of a District Court judge to consider applications for authorizing government departments to conduct various activities such as by the issue of a search warrant. The proposed authorization of Type 2 surveillance will not constitute a new and distinct function. As more stringent definition for Type 2 surveillance will reduce applications to the District Court, the workload for the</p>

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	<p>\$2,571,450 per year) and the same level of support staff (i.e. 2 Executive Officers I and 1 Clerical Officer at a total full staff cost of \$1,595,502 per year) to deal with applications for Type 2 surveillance as proposed by the CSA.</p>	<p>27 judges will not be significant.</p>
<p>(xv) Proposed new clauses 39(b)(ia) and 46AA Commissioner on Interception to Communications and Surveillance (Commissioner) to have function and power of investigation</p>	<p>The CSAs have a charging effect. Considerations similar to those in item (vi) above.</p>	<p>The proposal is to enhance the function of the Commissioner without adding any new and distinct category of work.</p>
<p>(xvi) Clause 43 Proposed new clause 43(1A) and (2A), on Commissioner finding case in applicant's favour</p>	<p>The CSAs have a charging effect. The CSAs add a new ground for finding the case in the applicant's favour and giving notification, i.e., that the applicant has sustained damage. Since any damage, no matter how minor, could trigger notification and compensation, the proposal will result in payment of compensation in circumstances not envisaged under the Bill. While it is difficult to provide an accurate estimate of the exact quantum, the CSAs would impose a contingent liability on Government.</p>	<p>To provide that the Commissioner may invite persons who have sustained damages to confirm whether they wish to seek an order for compensation will not widen the scope of compensation which is payable for damages anyway.</p>

Committee Stage Amendments by	S for S's comments	Members' responses
<p>(xvii) Proposed new clause 46AB Notifications to relevant persons by a scheduled department</p>	<p>The CSAs have a charging effect.</p> <p>The proposed new clause 46AB would create a general notification mechanism where, after the expiry of all prescribed authorizations for interception or covert surveillance, a department has to give notice to the relevant persons, defined as "any person who is the subject of the interception or covert surveillance concerned". The definition of the term "subject of interception or covert surveillance" also proposed by the Member under clause 2(1) is "any person whose activity is being monitored by interception of his communication or covert surveillance".</p> <p>The combined effect of the CSAs is that, after each interception or covert surveillance operation, the head of department would need to spend reasonable efforts to identify and trace any person (not only the target) whose activity has been monitored by the operation, and then give notice to them separately. For illustrative purpose, adopting the estimated number of 1,600 cases every year, and on the assumption that each operation would on average</p>	<p>The CSAs to require the department head to notify the relevant persons upon expiry of authorization unless exempted by the Commissioner and the Commissioner to consider more thoroughly (such as cases where there is any interception or covert surveillance taken mistakenly or wrongfully or in contravention of this enacted Bill) whether notification would be needed. When the department head comes to the Commissioner to seek his exemption from giving notice, the Commissioner is also exercising his duty to consider whether notification would be needed. This does not constitute a new and distinct function for the Commissioner.</p> <p>As for the department head, it is his utmost responsibility to understand the details of the operation of the interception and covert surveillance undertaken by his department and to report to the Commissioner when required. To require him to give notice as soon as practicable (where relevant person can be traced or identified) or seek exemption from the Commissioner does not require him to perform more duty than is required</p>

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	<p>affect 5 persons (either being the target of the operation or incidentally monitored by the operation), the department would need to locate about 8 000 persons to give them notification.</p> <p>The proposed new clause also envisages that the Commissioner would have to consider applications from departments for exemptions from the notification requirement. This is not a function envisaged for the Commissioner under the Bill. Again, using the figure of 1 600 cases per year, and assuming that in about 30% of the cases an exemption application is made, the Commissioner would have to consider close to 500 cases each year. This clearly has resource implications for the Commissioner.</p>	<p>in relation to interception or covert surveillance.</p>
<p>(xviii) Proposed new clauses 46AA and 46A Powers of investigation and of notification by Commissioner</p>	<p>The CSAs have a charging effect.</p> <p>The proposed new clauses 46AA and 46A would broaden the Commissioner's functions, and require notification to a wider category of persons subject to interception or covert surveillance than envisaged under the Bill. Since notification may be followed by applications for</p>	

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	<p>compensation by the affected persons, the proposed new clauses would result in payment of compensation in circumstances not envisaged under the Bill.</p>	
<p>(xix) Clause 51 Proposed new clause 51(1)(c), commission to order compensation</p>	<p>The CSAs has a charging effect.</p> <p>The proposed new clause 51(1)(c) would enable the Commissioner to order the payment of compensation in circumstances not envisaged under the Bill. This therefore imposes a contingent liability on Government.</p>	<p>The Government is proposing an amendment to clause 43 to empower the Commissioner to order compensation. It will therefore be within his function to require a department head to do so. The CSA does not constitute a new and distinct function.</p>
Hon Albert HO Chun-yan		
<p>(xx) Clause 6(1) Number of panel judges</p>	<p>The CSAs has a charging effect.</p> <p>The Bill provides that three to six panel judges be appointed. The proposed CSA requires not less than 10 panel judges to be appointed. This would require at least four to seven additional panel judges to be appointed. The Judiciary has advised that this would create serious manpower problems for the Judiciary. One reason is because of the need to avoid assigning criminal cases where a judge's authorization has been obtained in the course of investigation. As a result, more CFI judge posts would have to be created.</p>	<p>This proposed increase in the number of panel judges enables the judges to share the necessary work, and there is less chance that they will be involved in (ordinary court) cases where they have issued authorization and will thus be disqualified. These judges will be able to perform their ordinary function in hearing court cases.</p> <p>More panel judges will not reduce the total number of judges for hearing court cases, including criminal cases which involves a judge's issue of authorization (for interception and covert surveillance).</p>