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For information

2 May 2006 **SB Ref: ICSB 8/06**

Bills Committee on
Interception of Communications and Surveillance Bill

Response to issues raised
in connection with "Public Security"

Introduction

This paper sets out the Administration's response to some of the issues raised at the Bills Committee on "public security", including those raised at the meeting on 19 April 2006.

Previous Discussions on "Public Security"

2. The Bills Committee has discussed various issues related to the issue "public security". For easy reference, we recap below the main points.

(a) Security protection is a **usual ground for authorizing interception of communications and covert surveillance** by the law enforcement agencies (LEAs) in the United Kingdom (UK), Australia, the United States (US), Canada and New Zealand.

In Hong Kong, Article 30 of the Basic Law provides that "public security" is one of two grounds for the relevant authorities to inspect communication. All the proposed models in the 1996 Law Reform Commission (LRC) Report on interception of communications (the 1996 LRC report), the 1997 Interception of Communications Ordinance (IOCO), and the 2006 LRC report on surveillance (the 2006 LRC report), include "public security" or "security" as a ground separate from criminal investigations for covert operations.

(b) As to **whether terms like "security" or "national security" are defined** in the relevant legislation, the UK and US legislation does not provide such definition, while in the case of

Australia, Canada and New Zealand, although the concept is defined, the definitions tend to be broad (texts at **Annex A**).

In Hong Kong, the term "public security" is not defined in the 1996 LRC report, the IOCO, and the 2006 LRC report. Our Bill follows that approach.

(c) We agree with the European Commission of Human Rights that the term "national security" is **not amenable to exhaustive definition**. Nor do we think that **"public security" should exclude things not criminal, or not related to terrorist activities**. The definitions of "security" in the legislation of Australia, Canada and New Zealand (texts at **Annex A**) cover scenarios beyond criminal or terrorist activities. The decisions of the European Commission and Court of Human Rights, as well as those of the courts in common law jurisdictions, have also suggested that the security ground may be invoked to address concerns other than crime and terrorism. This accords with our own experience (sample cases at Annex A to paper Ref: ICSB 5/06, extracted at **Annex B**).

(d) "Public security" **cannot be confined to things that cause a direct threat to Hong Kong**. First, as a responsible member of the international community, it is our moral obligation to assist in monitoring threats to other jurisdictions, such as bombing in another city. Second, whether we provide such assistance indirectly affects Hong Kong's own security – if we assist others in thwarting a security threat, they are more likely to assist us in case of a threat directed at Hong Kong. Third, we do not wish to be perceived as the weaker link in the global defence against transnational criminal or terrorist activities, lest this be exploited to the detriment of our own security.

(e) Our Bill provides ample **safeguards** against possible abuse. First, the purpose of an operation is only one hurdle in obtaining authorization for operations. The test of proportionality and hence necessity would have to be met. The operations would also be subject to the independent oversight of the Commissioner on Interception of Communications and Surveillance (the Commissioner). For the more intrusive operations, judicial authorization would be required.

As compared with other jurisdictions, in the Bill the regime

regulating operations on security grounds is tighter in various ways. For example –

- in the UK and Australia, all covert operations on security grounds require only executive authorization; and
- in the US, interception of communications and covert surveillance with a consenting party is not subject to statutory control.

(f) We have made clear that the public security ground **would not be used for political purposes, nor for suppressing the right to freedom of expression or the right of peaceful assembly, and that the Bill is unrelated to the BL23 exercise**. These statements are a matter of public record and would bind all applications.

3. Having said the above, we have taken advice from Members that we should try to formulate an exclusion provision for the term "public security". We now propose amendments to the Bill, as explained below.

Response to issues raised

- ***To consider restricting matters which threaten public security to those which would ultimately lead to or result in serious crime, such as "terrorist act" as defined in the United Nations (Anti-Terrorism Measures) Ordinance.***

- ***To reconsider providing a definition for public security and explain what constitutes "public" in the term "public security", including whether "national security" and risks with no direct relevance to Hong Kong can be covered.***

- ***To advise on the scope of the exclusion provision for the term "public security" to be proposed by the Administration and provide the draft wording.***

4. For the reasons explained above and elaborated in previous discussions with the Security Panel and the Bills Committee (relevant

extracts of the papers are reproduced at **Annex C**), we remain of the view that a legally exact positive definition of the term "public security" would be very difficult. More specifically, the nature of public security is such that the threat may be present and has to be dealt with well in advance of any definable criminal offence taking shape or the threat materializing. Indeed, a key aim of protecting public security is to neutralize or minimize the threat before any real harm is inflicted on the community. For example, if a group of terrorists meet in Hong Kong, which is not an offence, to protect our public security we would want to monitor their activities in Hong Kong even if there is no concrete evidence that a criminal offence is being committed or is likely to be committed. It would be too late to act only after there is evidence linking their activities to some serious crime or terrorist act[1]. Also, not all threats to public security are related to terrorist activities.

5. Similarly, we do not consider it appropriate to directly borrow the concept of "national security" used in the Societies Ordinance and the Public Order Ordinance, as suggested by the Assistant Legal Adviser in her letter of 24 April 2006, because the contexts are necessarily different. The Societies Ordinance concerns the registration of societies and related matters, and the Public Order Ordinance concerns the maintenance of public order and related matters. Whilst the use of the term "national security" and the relevant definition are appropriate in the context of these ordinances, the term and the definition do not provide ready reference in the context of the present Bill.

6. The other side of the coin of the difficulty of providing a definitive positive definition of "public security" is that it would be inappropriate to attempt an exhaustive exclusion list. To do so would be little different from attempting a positive definition. In formulating our proposed amendments to the Bill, we have focused on the two areas of exclusion that have been raised by Members, in connection with –

(a) external events that have no relevance to our public security; and

(b) peaceful advocacy, protest or dissent.

[1] It should also be noted that "terrorist act" in itself is not an offence under Hong Kong law.

7. The proposed amendments are -

(a) To add to clause 2(1) the following definition :

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

This wording is used in the IOCO. It has the effect of making it explicit that “public security” should be that of Hong Kong;

(b) To replace paragraph (b)(v) of Part 1 of Schedule 3 (and similarly for paragraph (b)(vi) of Part 2 and paragraph (b)(vi)of Part 3 of that Schedule with minor adaptations) by the following new sub-paragraph:

“(v) the following information –

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

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

This requires the applicant and the approving authority to consciously consider and articulate the impact, direct or indirect, of the threat on the security of Hong Kong, the residents of Hong Kong, or other persons in Hong Kong; and

(c) To add after clause 2(5) the following new sub-clause:

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

This expressly provide that peaceful advocacy should not of itself be considered a threat to public security.

- ***To advise who would determine whether a matter would threaten public security and the criteria to be adopted in such determination.***

8. It would ultimately be for the approving authority to decide, on the basis of the information provided in the application, whether a matter would threaten public security. In accordance with clause 3 of the Bill, in his consideration of applications, the approving authority would have to apply the tests of proportionality and hence necessity in deciding whether the covert operation under application would be proportionate to the purpose sought to be furthered by carrying out the operation. With the amendments proposed in paragraph 7 above, there should be ample safeguards under the Bill to ensure that authorizations on public security grounds would only be granted where fully justified.

9. Furthermore, the Commissioner would have a role to review cases approved by the approving authority, make recommendations to the head of departments in respect of the relevant arrangements and to the Secretary for Security in respect of the Code of Practice, report any non-compliance to the heads of departments, Secretary for Justice or the Chief Executive (CE), and submit annual reports to CE, which would also be provided to LegCo. All these are safeguards against any possible abuse.

- ***To consider providing an exclusion provision for the term "serious crime" in the Bill.***

10. The suggestion of making an exclusion provision in respect of "public security" has stemmed from the difficulty to express in legally exact terms a threshold above which interception or covert surveillance operation for the purpose of protection of security may be considered. There is no such corresponding consideration for the prevention and

detection of serious crime. The term “serious crime” is defined in clause 2(2) as –

“ any offence punishable –

(a) in relation to the issue or renewal, or the continuance, of a prescribed authorization for interception, by a maximum penalty that is or includes a term of imprisonment of not less than 7 years; or

(b) in relation to the issue or renewal, or the continuance, of a prescribed authorization for covert surveillance, by a maximum penalty that is or includes –

(i) a term of imprisonment of not less than 3 years; or

(ii) a fine of not less than $1,000,000”.

This approach of setting the threshold by reference to the maximum penalty for the offence is similar to that adopted in the 1996 LRC report, the 1997 White Bill and the IOCO, as well as the practice in such jurisdictions as the UK and Australia. As such, we do not consider it necessary or appropriate to attempt an exclusion provision for the term “serious crime”.

11. It must be stressed that the threshold is only an initial screen and is not the determining factor. In all cases, authorization would only be given if the tests of proportionality and necessity are satisfied. The relevant factors in considering the balancing test, as detailed in the Bill, include the immediacy and gravity of the matter, the likely value and relevance of the information to be obtained and the intrusiveness of the operation.

Security Bureau
April 2006

Annex A

[Annexes A1, A2 and A3 to SB Ref: ICSB 02/06]

Definition of "security" in Australian legislation

Australian Security Intelligence Organisation Act 1979

"Security " is defined under section 4 of the Act as follows -

"(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:

(i) espionage;

(ii) sabotage;

(iii) politically motivated violence;

(iv) promotion of communal violence;

(v) attacks on Australia's defence system; or

(vi) acts of foreign interference;

whether directed from, or committed within, Australia or not; and

(b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a). "

<u>Definition of "threat to the security of Canada" in Canadian legislation</u>

Canadian Security Intelligence Service Act (Chapter C-23)

The Act allows the granting of a warrant to enable the Security Service to investigate "a threat to the security of Canada". Section 2 of the Act defines "threats to the security of Canada" as meaning:

"(a) espionage or sabotage that is against Canada or is detrimental to the interests of Canada or activities directed toward or in support of such espionage or sabotage,

(b) foreign influenced activities within or relating to Canada that are detrimental to the interests of Canada and are clandestine or deceptive or involve a threat to any person,

(c) activities within or relating to Canada directed toward or in support of the threat or use of acts of serious violence against persons or property for the purpose of achieving a political, religious or ideological objective within Canada or a foreign state, and

(d) activities directed toward undermining by covert unlawful acts, or directed toward or intended ultimately to lead to the destruction or overthrow by violence of, the constitutionally established system of government in Canada,

but does not include lawful advocacy, protest or dissent, unless carried on in conjunction with any of the activities referred to in paragraphs (a) to (d)."

Definition of "security" in New Zealand legislation

New Zealand Security Intelligence Service Act 1969

Section 2 of the Act (as amended)[1] defines "security" as follows:

"(a) The protection of New Zealand from acts of espionage, sabotage, terrorism, and subversion, whether or not they are directed from or intended to be committed within New Zealand;

(b) The identification of foreign capabilities, intentions, or activities within or relating to New Zealand that impact on New Zealand's international well-being or economic well-being;

(c) The protection of New Zealand from activities within or relating to New Zealand that -

(i) Are influenced by any foreign organisation or any foreign person; and

(ii) Are clandestine or deceptive, or threaten the safety of any person; and

(iii) Impact adversely on New Zealand's international well-being or economic well-being;

(d) the prevention of any terrorist act and of any activity relating to the carrying out or facilitating of any terrorist act."

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[1] See New Zealand Security Intelligence Service Amendment Act (No. 2) 1999 and New Zealand Security Intelligence Service Amendment Act 2003.

Annex B

[Annex A to SB Ref: ICSB 05/06]

Sample cases on threats to public security

I. Counter-proliferation of strategic commodities

Intelligence suggested that a person living in Hong Kong and belonging to a clandestine network of Country X, was actively involved in smuggling strategic commodities into that country for its military development programme. The person had close connections with companies suspected to be involved in weapon proliferation activities for that country. However, the intelligence did not suggest that an offence would necessarily be committed in Hong Kong.

2. As a member of the international community, Hong Kong has an obligation to contribute to the effort of combating the proliferation of strategic commodities, which would affect global security. In addition, failure to cooperate with our counterparts in this crucial area might result in our counterparts not sharing with us other intelligence that might more directly impact on Hong Kong's public security.

3. The person's activities in Hong Kong therefore had to be kept under close surveillance on public security grounds. Covert operations were carried out on him.

II. Movement of terrorists

4. Intelligence suggested that a few members of an international terrorist organization were visiting Hong Kong. No criminal element was directly involved, but there was reasonable suspicion that the individuals could be planning some terrorist activities in the region. We were requested by an overseas counterpart to help monitor the activities of the persons concerned during their stay in Hong Kong.

5. It is in the interest of Hong Kong's own public security to contribute towards the effort to combat international terrorism and to take preventive actions when terrorists show some form of interest in Hong Kong, in order to minimize any possible threat to Hong Kong itself. It is also important to maintain close cooperation with our counterparts to

ensure that they would continue to share intelligence that might impinge on Hong Kong's public security. There were therefore strong justifications for monitoring the movement of the suspected terrorists whilst in Hong Kong. Interception of communications and covert surveillance operations were conducted on them and their local contact while they were in Hong Kong.

III. Human trafficking

6. Large-scale human trafficking has become a serious public security concern of many countries. At issue is not just the trafficking of the people concerned. The people being trafficked are subject to much risk during the hazardous journeys and continued exploitation after their entry into the destination countries. Their presence is also a potential source of social conflicts in the recipient communities. Moreover, such trafficking is usually underpinned by organized criminal syndicates operating on a transnational basis. Fed by the profits from human trafficking, these syndicates branch into various serious crimes affecting all sectors of the community. If not kept under control, their activities could be a destabilizing force. There is therefore consensus in the international community that combating human trafficking is a public security issue that should be accorded priority.

7. Given these considerations, Hong Kong has been participating in efforts to combat international human trafficking so as to ensure that human trafficking would continue to be contained and would not become a major public security threat to Hong Kong. In some cases, the intelligence gathered may not pinpoint any person committing an offence in Hong Kong as such. For example, it is unlikely to be an offence in Hong Kong to make arrangements in Hong Kong for the trafficking of people from Country X to Country Y through Country Z. However, it would be irresponsible for Hong Kong to turn a blind eye to such activities.

8. In some cases, the intelligence gathered also leads to criminals being caught in Hong Kong. For example, the covert monitoring of a human trafficking syndicate specializing in smuggling people from Country X to the Country Y by containers yielded intelligence that this time the human cargo would be shipped to Country Y via Hong Kong. Acting on further intelligence gathered through covert operations, the Police intercepted a container loaded with 12 illegal migrants and arrested 20 persons, including the mastermind, involved in the criminal plot. It was also revealed that the mastermind was active in other forms of illicit

activities such as smuggling of vehicles, cigarettes, and arranging illegal entry into a South American country.

IV. Drugs for missiles

9. The Federal Bureau of Investigation of the United States (US) requested the Hong Kong Police to provide assistance to foil an attempt to exchange drugs for four Stinger anti-aircraft missiles and cash. The exchange would be made outside Hong Kong (with the drugs to be smuggled from Pakistan to the US and the Stinger missiles to be provided outside Hong Kong). The Police mounted a covert surveillance operation on the suspects when they were in Hong Kong. The suspects were later arrested for extradition to the US.

10. Given the extradition procedures involved, the case details have been reported in public. However, it is obviously incumbent on us to act on similar cases even if no criminal offence in Hong Kong is immediately involved. Failure to do so could make Hong Kong an attractive base for terrorists and transnational criminal elements, ultimately affecting our own public security.

V. Preventing violent disturbance

11. A person with a track record of organizing violent attacks on law enforcement agents, causing criminal damage and generally causing disturbance during international conferences, had arrived in Hong Kong just prior to the holding of a major international conference here. Although when she entered Hong Kong there was no evidence implicating her in any specific offence, intelligence indicated that she would organize some “radical action” resulting in considerable disturbance. It was therefore necessary to conduct covert operations on her.

Annex C

Interception of Communications and Surveillance Bill

Public Security

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

Item 1 : To clarify whether the protection of public security includes the protection of national security.

2. The question was asked in relation to Article 23 of the Basic Law (BL23). As the Secretary for Security indicated at the meeting of the Panel on Security on 7 February 2006, the present exercise is unrelated to the BL23 exercise. No interception of communications or covert surveillance would be carried out for offences under BL23 that have yet to be created.

3. We have referred to "public security" in our proposals as it is the term used in Article 30 of the Basic Law. As can be seen from the 1996 Law Reform Commission (LRC) Report on interception of communications (the 1996 LRC report), the 1997 White Bill on Interception of Communications and the 1997 Interception of Communications Ordinance (IOCO), the approach generally is to leave the term "public security" undefined so that security cases are considered and justified on their own individual circumstances. All applications must satisfy the tests set out in the law. All interceptions and more intrusive covert surveillance operations would have to be approved by a member of the panel of judges. In addition, all such operations would be subject to oversight by the proposed Commissioner on Interception of Communications and Surveillance (the Commissioner).

Relevant extracts from the Information Paper SB Ref: ICSB 2/06

Issue 1 : To provide information on the definition of "public security" in other jurisdictions.

2. Clause 3 of the Bill sets out the conditions for issue, renewal or continuance of a prescribed authorization for interception of

communications or covert surveillance. Among other things, the purpose of the proposed authorization has to be either of the following –

(a) preventing or detecting serious crime; or

(b) protecting public security.

This follows closely the wording of Article 30 of the Basic Law, which reads –

> "…the relevant authorities may inspect communication in accordance with legal procedures *to meet the needs of public security* or of investigation into criminal offences" (emphasis added).

3. The Bill does not define the term "public security". This approach is consistent with that adopted in the 1996 Law Reform Commission report on interception of communications, the 1997 White Bill on Interception of Communications and the 1997 Interception of Communications Ordinance.

4. Security protection is a usual ground for authorizing interception of communications and covert surveillance by the law enforcement agencies in other jurisdictions. For the five jurisdictions the legislation of which we have taken into account in drawing up our legislative proposals (i.e., the United Kingdom (UK), Australia, the United States (US), Canada and New Zealand), the situation is as follows –

- UK : Under the Regulation of Investigatory Powers Act (RIPA) 2000, an interception warrant or an authorization for covert surveillance may be issued or granted if the warrant or authorization is necessary, inter alia, "in the interests of national security".

- Australia : Obtaining intelligence relating to "security" is a ground for carrying out interception of communications under the Telecommunications (Interception) Act (TIA) 1979 and covert surveillance under the Australian Security Intelligence Organisation Act (ASIOA) 1979.

- US : Acquisition of "foreign intelligence information" is one of the grounds for conducting "electronic surveillance"

under the Foreign Intelligence Surveillance Act (FISA). "Foreign intelligence information" is defined as including "information with respect to a foreign power or foreign territory that relates to ... the national defense or the security of the United States".

- Canada : Investigation into "a threat to the security of Canada" is one of the grounds for conducting interception of communications or "obtain[ing] any information, record, document or thing" under the Canadian Security Intelligence Service Act (CSISA).

- New Zealand : "Detection of activities prejudicial to security" and "gathering [of] foreign intelligence information essential to security" are grounds to "intercept or seize any communication, document, or thing" under the New Zealand Security Intelligence Service Act (NZSISA) 1969. The protection or advancement of the "security" of New Zealand is also a ground to intercept communications with an interception device under the Government Communications Security Bureau Act (GCSBA) 2003.

5. The practice as to whether terms like "security" or "national security" are defined in the respective legislation varies –

- UK : The RIPA does not provide for a definition of the term "national security".

- Australia : The TIA follows the same definition as "security" as in the ASIOA. The latter definition is reproduced at **Annex A1**. *see Annex A*

- US : "Security" is not defined in the FISA.

- Canada : The definition of "threats to the security of Canada" is provided for in the CSISA, reproduced at **Annex A2**. *see Annex A*

- New Zealand : The definition of "security" is provided for in the NZSISA (but not GCSBA), reproduced at **Annex A3**. *see Annex A*

6. In summary, while all five jurisdictions allow covert operations on the ground of security, only three of them provide a statutory definition of the concept. Where terms like "security" or "national

security" are defined in legislation providing for interception of communications and covert surveillance, the definitions tend to be broad. More generally, the jurisprudence in this area also indicates that a legal definition of the term is not a necessity. In the *Esbester*[1] case, the European Commission of Human Rights stated that the term "national security" is not amenable to exhaustive definition. The Bill's current approach of not defining the term "public security" is consistent with the approach taken in previous discussions on the subject, taking into account the general difficulty to list out exhaustively the circumstances under which public security would be threatened in legislative terms.

7. We must reiterate that the purpose is only one of the first hurdles in obtaining authorizations for interception and covert surveillance operations. The approving authority needs to be satisfied that the tests regarding proportionality and necessity are met before an authorization for interception of communications or covert surveillance may be granted. Also, operations conducted under the Bill would be subject to other safeguards in our proposed regime.

<u>Relevant extracts from the Information Paper SB Ref: ICSB 3/06</u>

Issue 2 : Public security

- ***To provide information, if available, on why a definition for "public security" was not proposed in the 1996 Law Report Commission report on interception of communications and the 1997 White Bill on Interception of Communications.***

7. As far as we are aware, no explanations were provided at the time as to why the term was not defined.

- ***To consider providing a definition for the term "public security" in the Bill or stating the exclusions from it.***

8. The Administration has explained in its paper for the meeting held on 25 March 2006 (SB Ref: ICSB 2/06) and at the meeting the difficulty of giving the term "public security" an exhaustive definition.

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[1] *Esbester v United Kingdom* (1993) 18 EHRR CD 72.

9. As for the proposal for the Bill to stipulate exclusions, we reiterated at the meeting on 25 March 2006 that the public security ground would not be used for political purposes, nor for suppressing the guaranteed right of freedom of expression or peaceful advocacy. Members also discussed the provisions in some jurisdictions defining such exclusions, and noted the difficulties arising from such provisions. Having said that, we note the advice from Members that we should try to formulate an exclusion provision. We will now work actively to see if we could come up with a provision that we could recommend to Members. We shall revert to Members on the outcome of our work.

<u>Relevant extracts from the Information Paper SB Ref: ICSB 5/06</u>

Issue 1 : Public Security

- ***To explain the difference between "public security" and "public safety".***

2. "Public safety" (variously rendered as "公眾安全", "公共安全" or "公共安寧" in Chinese) is not a concept used in our Bill. However, it is a term referred to in a number of provisions of the International Covenant on Civil and Political Rights (ICCPR) as one of the permissible grounds for restricting the exercise of rights and freedoms. There is no single authoritative interpretation of the term, but reference may be drawn from the literature on ICCPR.

3. For example, in Manfred Nowak's *UN Covenant on Civil and Political Rights – CCPR Commentary* (1993), when commenting on the permissible restrictions on the freedom of association and trade unions on the ground of public safety, it was pointed out that "*the protected public safety interest …… refers to those threats to the security of persons (i.e., their lives, physical integrity or health) or things that do not assume the proportions of a threat to the State.*"

4. The term "public safety" refers generally to protection against dangers or threats to the security or safety of persons (i.e. their lives, physical integrity or health) or things. For example, ensuring the safety of building works is a public safety issue; so is the prevention of landslides.

5. The term "public security"（公共安全）used in the Bill corresponds to that used in Article 30 of the Basic Law[2]. Although the Chinese wording of this term may be the same as that for the term "public safety" in some instances, it necessarily has a broader meaning than that of the term "public safety". "Public security" refers generally to the collective security of a community, and not the safety of individuals per se. For example, terrorism is a public security issue.

- ***To advise what acts would threaten the public security of Hong Kong but would not be a crime in Hong Kong, and whether all of them warrant interception / covert surveillance; if not, how the threshold should be determined.***

6. The question turns on the interpretation of the term "public security". As the Administration has previously explained, there are difficulties in giving this and similar terms an exhaustive definition. This view is shared by some other jurisdictions. In his book *National Security and the European Convention on Human Rights* (2000), Iain Cameron has pointed out that "*[The European Commission and Court of Human Rights] are reluctant to give abstract definitions of Convention terms, and this has also been the case with national security. Indeed, the Commission has expressed the view that national security cannot be defined exhaustively.*[3]"

7. Nonetheless, some overseas studies regarding the coverage of the term national security may be instructive. For example, a report of the European Committee on Crime Problems[4] provides some useful pointers on the general coverage of the term "security". It lists some examples of threats to national security recognized by the European Court of Human Rights and these include espionage, terrorism and incitement to / approval of terrorism. The report also considers that the following matters may be considered threats to national security : external threats to the economic well-being of the state; money laundering on a scale likely to undermine the banking and monetary system; interference with electronic data relating to defence, foreign

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[2] Article 30 of the Basic Law reads, inter alia, that "…except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of ***public security*** or of investigation into criminal offences" (emphasis added). The corresponding Chinese version is "除因***公共安全***和追查刑事犯罪的需要，由有關機關依照法律程序對通訊進行檢查外…".

[3] *Esbester v. UK*, No. 18601/91, 18 EHRR CD 72 (1993). In this case, the European Commission of Human Rights stated that the term "national security" is not amenable to exhaustive definition.

[4] CDPC(2003)09 Addendum IV, Strasbourg, 4 July 2003.

affairs or other matters affecting the vital interests of the State; and organized crime on a scale that may affect the security or well-being of the public or a substantial section of it. More importantly, the report emphasizes that these are only examples and not an exhaustive list. It also notes that what amounts to threats to national security will change from time to time and will vary from country to country.

8. Some sample cases involving threats to public security which may not necessarily be a crime in Hong Kong are at **Annex A**. Given the need to protect the source of intelligence and other sensitive details, the description is necessarily broad-brushed. Nonetheless, we believe that these examples should provide some indication of some of the issues that may be involved.

see Annex B

9. The Senior Assistant Legal Adviser to the Bills Committee has asked whether the Administration considers the drafting approach in the definition of “terrorist act” in the United Nations (Anti-Terrorism Measures) Ordinance would assist the concern of Members for a clear definition of the term “public security”. Given that “public security” is necessarily wider in scope than “terrorist act”, however, we do not consider that the latter definition, whether in substance or approach, would be an ideal reference.

10. The Administration remains of the view that a legally exact positive definition of the term “public security” would be very difficult. However, we are working actively to see if we could come up with an exclusion provision for the term in the Bill to make clear that the public security ground would not be used for political purposes, nor for suppressing the guaranteed right to freedom of expression or peaceful advocacy or the other rights guaranteed under Article 27 of the Basic Law[5].

11. On actual operation, unlike the situation in respect of criminal investigation, it is not possible to express in quantitative terms the threshold beyond which interception or covert surveillance operation for the purpose of protection of public security would be allowed under the Bill. However, in accordance with Clause 3 of the Bill, in his consideration of applications under this limb, the approving authority would have to apply the tests of proportionality and hence necessity in

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[5] Article 27 of the Basic Law reads – “Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike.”

deciding whether the proposed operation (be that interception of communications or covert surveillance) is proportionate to the purpose sought to be furthered by carrying out the operation. The proportionality test requires the balancing of the immediacy and gravity of the threat to public security and the likely value and relevance of the information likely to be obtained against the intrusiveness of the operation; as well as considering whether the purpose can reasonably be furthered by other less intrusive means. We believe that with the full range of safeguards at every stage of the covert operations provided for under the Bill, there are sufficient guarantees under our proposed regime governing the applications for and granting of authorizations on public security grounds.

- ***To provide the number of cases of interception / covert surveillance, broken down by crime and public security, in past three years, and examples of issues involved in past public security cases.***

12. On 25 February 2006, we provided Members with the number of cases of interception of communications and covert surveillance in the last three months of 2005. We have also undertaken to count, assuming the implementation of the regime under the Bill, the number of cases for the three months starting 20 February 2006. We believe these should provide useful background information for the purpose of considering the Bill.

13. The provision of any further breakdowns of the numbers would need to be considered with great care in order not to inadvertently disclose the operational details and/or capabilities of the law enforcement agencies (LEAs) to the benefit of criminals. Balancing this against the need for increased transparency, we have already provided in the Bill that the Commissioner on Interception of Communications and Surveillance (the Commissioner) should in his annual report set out a list of information covering various issues such as the number of prescribed authorizations issued, the number of renewals, the number of applications refused, the major categories of offences and a summary of reviews ***by interception of communications and covert surveillance respectively***. (For details, please see clause 47 of the Bill.)

14. Given the sensitivity of public security cases, it would not be appropriate for the statistics to be subdivided into public security and criminal cases. We understand that comparable jurisdictions like the United Kingdom (UK) and Australia also do not disclose such breakdowns. In the United States (US), although there is a statutory

requirement for the statistics to be published in respect of authorizations given by the judges of the Foreign Intelligence Surveillance Court (FISC), the statutory requirement in this aspect is not as comprehensive as what we propose to include in the Commissioner's report in the Bill, in the following ways –

- while we propose to report statistics on both judicially and executively authorized cases, the US statutory requirement under the Foreign Intelligence Surveillance Act (FISA) covers judicially authorized cases, and not executively authorized cases;

- there are no statutory requirements to publish statistics regarding authorizations under section 1802 of the FISA given by the President without court orders in respect of operations that are directed at communications between foreign powers;

- there are also no statutory requirements to publish statistics on interception of wire, oral and electronic communications involving a consenting party, which under US law does not require judicial authorization.

In addition, there are no statutory requirements in the US to differentiate between physical search and electronic surveillance for the statistics published in respect of the FISC.

15. Indeed, in the UK, the Interception of Communications Commissioner specifically pointed out in his 2004 Report that while there was no serious risk in the publication of the total number of warrants issued by the Home Secretary (as the total included not only warrants issued in the interest of national security, but also for the prevention and detection of serious crime), he was of the view that the disclosure of the number of warrants issued by the Foreign Secretary and the Secretary of State for Northern Ireland (i.e. foreign intelligence and national security cases) would be prejudicial to the public interest. In particular, the Interception Commissioner pointed out that the views expressed in respect of the disclosure of number of warrants issued in the 1957 Report of the Committee of Privy Councillors appointed to inquire into the interception of communications ("the Birkett Report")[6] should

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[6] The Privy Councillors were appointed on 29 June 1957 "to consider and report upon the exercise by the Secretary of State of the executive power to intercept communications and, in particular, under what authority, to what extent and for what purposes this power has been exercised and to what use information so obtained has been put; and to recommend whether, how and subject to

still apply. The relevant paragraph of the Birkett Report is reproduced below —

> *"121. We are strongly of the opinion that it would be wrong for figures to be disclosed by the Secretary of State at regular or irregular intervals in the future. It would greatly aid the operation of agencies hostile to the State if they were able to estimate even approximately the extent of the interceptions of communications for security purposes."*

We believe that in Hong Kong's context, the general underlying principle of not disclosing the breakdown of the number of cases of interception / covert surveillance by crime and public security as outlined above also applies. In this regard, we note that in its recent report on the regulation of covert surveillance, the Hong Kong Law Reform Commission has also not recommended the provision of breakdowns in respect of the grounds for the issue of warrants in the annual reports to be furnished by the supervisory authority to the Legislative Council. The Commission envisages that the material contained in the annual reports will consist only of aggregate statistics and information.

16. The sample cases involving threats to public security are at **Annex A**.

see Annex B

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what safeguards, this power should be exercised and in what circumstances information obtained by such means should be properly used or disclosed." Their report was presented to the UK Parliament by the Prime Minister in October 1957.