SB Ref: ICSB 15/06

Bills Committee on
Interception of Communications and Surveillance Bill

Response to issues raised

This paper sets out the Administration's response to the issues raised by the Bills Committee.

Clause 2(1) : Definition of "data surveillance device", "listening device", "enhancement equipment", "optical device" and "surveillance device"

- ***To provide information on the functions of data surveillance devices used by law enforcement agencies of Hong Kong and consider conducting a briefing on the data surveillance devices used by law enforcement agencies of Hong Kong. (raised at the meeting on 25 May 2006)***
- ***To provide examples of enhancement equipment and explain the impact, if any, of such equipment on the health of the subject of interception of communications or surveillance. (raised at the meeting on 25 May 2006)***
- ***To consider including optical surveillance device in the Administration's paper or briefing, if any, on the data surveillance devices used by law enforcement agencies of Hong Kong. (raised at the meeting on 25 May 2006)***

2. The Administration arranged a briefing on the functions of various surveillance devices and enhancement equipment for interested Members on 15 June 2006.

- ***To consider amending the phrase "device or program" in the definition of "data surveillance device" along the lines of device, program or any other means. (raised at the meeting on 25 May 2006)***

3. The Bill provides that "data surveillance device" –

> "(a) means any **device or program** used to monitor or record the input of information into, or the output of information from, any information system; but

(b) does not include an optical surveillance device".

4. In relation to information systems, "device" refers to hardware equipment, and "program" refers to software for the processing unit to execute to perform a job or a number of tasks. These two terms fully cover the two modes of operation by (a) physically attaching or connecting a piece of hardware to monitor or record information, and (b) installing or altering a portion of the control software to duplicate or re-transmit information. There is therefore no need for the amendment proposed.

- ***To consider excluding surveillance devices involving the implantation or swallowing of such devices into a human body from the Bill. (raised at the meeting on 1 June 2006)***

5. Implanting a device without the consent of the person or without express statutory authority would be unlawful. The Bill would not constitute sufficient authority for authorizing such action. The proposed exclusion is therefore unnecessary.

- ***To consider whether the specification of additional classes of device should be prescribed by regulation as provided for in (c) of the definition of "surveillance device" or whether it should be done through amendments to the principal legislation. (raised at the meeting on June 2006)***

6. As set out in the paper prepared by the Legal Services Division of the LegCo Secretariat dated 10 June 2006 (LC Paper No. LS82/05-06), a considerable number of existing legislative provisions currently allow the amendment of the scope of certain definitions of primary legislation by way of subsidiary legislation. Our current proposal is in line with this established approach, and the effect of the arrangement would enable the provisions to be amended in the light of new technological developments. The regulations would be subject to scrutiny by the Legislative Council.

Clause 2(1) : Definition of "information system"

- ***To provide the definitions of "information system" in other local legislation and consider amending the definition of "information system", having regard to such definitions. (raised at the meeting on 25 May 2006)***

7. As explained at the Bills Committee meeting on 25 May 2006, the term "information system" is used in a number of legislative provisions in Hong Kong. Examples include the Securities and Futures Ordinance (Cap. 571), Dutiable Commodities Ordinance (Cap. 109) and Reserved Commodities Ordinance (Cap. 296). Our intention is to catch not only conventional "computers" but also other devices such as electronic personal data assistants, thus affording wide protection to the public. We understand that the definition of "information system" under the Electronic Transactions Ordinance (Cap. 553) has been drawn up having regard to the latest international developments in the field of information technology in the context in question.

8. As regards the term "computer", it is defined, for example, under section 22A of the Evidence Ordinance (Cap. 8), as any device for storing, processing or retrieving information. Section 26A of the Inland Revenue Ordinance (Cap. 112) and section 19 of the Business Registration Ordinance (Cap. 310) also defines the term similarly. The terms "computer" and "computer systems" are otherwise largely undefined in law.

9. Having regard to Members' concern, we propose to move Committee Stage amendments (CSAs) to qualify the definition of "data surveillance device" by the words "by electronic means". This should put beyond doubt that the information system refers to what is commonly understood as computers and similar electronic devices. The new definition will thus read as follows –

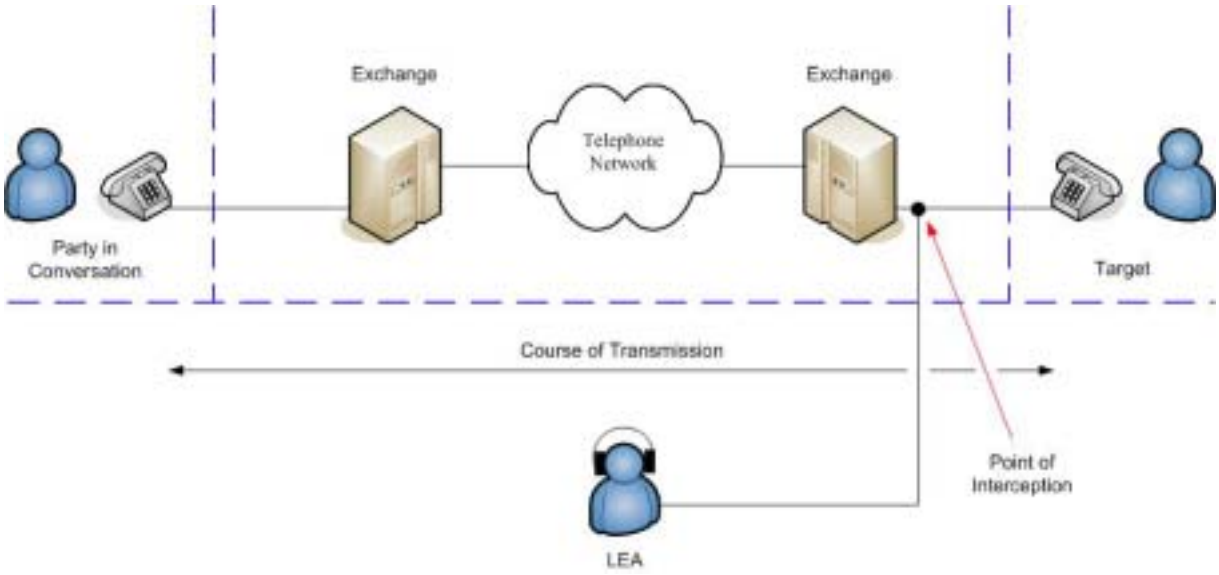
> *"(a) means any device or program used to monitor or record the input of information into, or the output of information from, any information system* ***by electronic means****; but*
>
> *(b) does not include an optical surveillance device;"*

<u>Clause 2(1) : Definition of "interception"</u>

- ***To explain the process involved in interception. (raised at the technical briefing on devices held 15 June 2006)***

10. Basically telecommunications are transmitted through a network and exchanges along the network. In theory interception can be done at any of the exchanges along the line of transmission of a communication. This is done by a facility which is triggered to pick up

the signals of the communication when they reach the exchange. An illustration is as follows –



In practice, which exchange is used depends on factors such as operational considerations.

- ***To explain the difference between covert surveillance of email messages and their interception. (raised at the meeting on 1 June 2006)***

11. Telecommunications interception refers to the obtaining of messages in the course of their transmission by a telecommunications system. When a message has already arrived at the destination, it is no longer in the course of its transmission. Depending on the circumstances, it may be possible to obtain email messages overtly by a search warrant or covertly through a data surveillance device. The installation of a data surveillance device would be Type 1 surveillance and would, like interception, require judge's authorization. The proportionality and necessity tests would have to be met.

Clause 2(1) : Definition of "listening device"

- ***To consider improving the drafting of the Chinese version of the definition of "listening device". (raised on 25 May 2006)***

12. We appreciate the Bills Committee's concern. We will move CSAs to the Chinese version of paragraph (a) of the definition of "listening device" along the following lines –

"(a) 指用以作出以下行為的任何器材：竊聽、監聽、監測或記錄任何談話或在談話中向任何人或由任何人所說的說話；但"

Clause 2(1) : Definition of "maintain"

- ***To consider deleting, qualifying or substituting the term "relocate" in the definition of "maintain". (raised at the meeting on 25 May 2006)***

13. The reference to "relocate" is intended to cover situations where it is necessary to move the device to another position after installation for various reasons (for example, for an optical device, the view from the original position is blocked by an object). To address Members' concerns, we propose to revise the definition of the term "maintain" as follows -

""maintain", in relation to a device, includes -

*(a) adjust, **reposition**, repair or service the device; and*

(b) replace the device when it is faulty."

Clause 2(1) : Definition of "postal interception"

- ***To explain whether postal interception covers opening a postal article for the purpose of forensic examination of the contents, obtaining the name and address of the sender or changing the contents of an article without reading the contents. (raised at the meeting on 25 May 2006)***

14. In the Bill, "postal interception" means the inspection of some or all of the contents of a communication in the course of its transmission by a postal service, by a person other than its sender or intended recipient. The expression "communication transmitted by a postal service" is defined under clause 2(1) to include a postal article.

15. In the context of the Bill, therefore, interception of postal communications is given a broad meaning, encompassing the inspection of communications as well as other articles in a postal packet. Getting the fingerprints or checking the identity or address of the sender covertly would therefore fall under the definition of postal interception.

16. On the other hand, postal interception of itself should not include replacing the contents of the communications.

- ***To consider providing a clearer definition for "postal service". (raised at the meeting on 25 May 2006).***

17. Under the Bill, "postal service" is currently defined under clause 2(1) to mean postal service within the meaning of the Post Office Ordinance (Cap. 98). We believe that by referring to the Post Office Ordinance, the scope of the term "postal service" should not be in doubt. For example, it would necessarily exclude courier service not provided under the Post Office Ordinance. However, to address Members' concern, we propose to further refine the definition as follows –

> *""postal service" means postal service to which the Post Office Ordinance (Cap. 98) applies;"*

Clause 2(1) : Definition of "premises"

- ***To explain whether an authorization for surveillance would cover the use of surveillance devices outside the territory of Hong Kong and the use of such devices within Hong Kong on targets outside Hong Kong . (raised on 1 June 2006)***

18. As explained at the Bills Committee meeting on 1 June 2006, the jurisdiction of our law enforcement agencies (LEAs) covers Hong Kong only. The Bill does not extend the jurisdiction of our LEAs.

19. Should devices be carried outside Hong Kong, depending on the circumstances, signals from the devices may be received by the LEAs in Hong Kong. In the same way that interception may be carried out in Hong Kong on calls to or from mobile phones roaming outside Hong Kong, the signals from such devices may legitimately be received by the LEAs.

Clause 2(1) : "public place"

- ***To consider amending "to the extent that they are intended" in the definition of "public place" along the lines of "used or intended for use" or "for the purpose of". (raised at the meeting on 1 June 2006)***

20. The Bill provides that "public place" -

"(*a*) means any premises which are a public place as defined in section 2(1) of the Summary Offences Ordinance (Cap. 228); but

(*b*) does not include any such premises ***to the extent that they are intended for use*** by members of the public as a lavatory or as a place for taking a bath or changing clothes;"

21. The phrase "to the extent that they are intended for use" under (b) seeks to put beyond doubt that it is only that part of the premises intended for the specific use that is excluded. A place which is used, but not intended for use, will not be covered. Nonetheless, taking into account Members' suggestion, we have no objection to taking out "to the extent" from the definition so that paragraph (b) of the definition of "public place" will read as follows –

"(b) does not include any such premises that are intended for use by members of the public as a lavatory or as a place for taking a bath or changing clothes;"

Clause 2(1) : "serious crime"

- ***To provide a list of offences with a maximum penalty of over 3 years and below 7 years of imprisonment. (raised at the meeting on 1 June 2006)***

22. The question was asked in the context of considering whether the LEAs could specify in an application for authorization a more serious but "related" offence in connection with an operation targeting at a lower level of offence. However, while there are some offences punishable by imprisonment for three to less than seven years by themselves with a "related" offence punishable by a maximum penalty of seven years' imprisonment or above, the number of such offences is small and additional elements (such as intention) are required before the more serious offence could be met[1]. In other cases, there is no other higher level offence[2]. We do not consider it appropriate to specify an offence

[1] Examples include the offences of : Making counterfeit notes and coins without lawful authority or excuse (s. 98(2), Crimes Ordinance (Cap. 200)); Going equipped for stealing (s.27, Theft Ordinance (Cap. 210)); Administering poison, etc. with intent to injure, etc (s.23, Offences Against the Person Ordinance (Cap. 212)).

[2] Examples are : Possession of prohibited weapons (s. 4 of the Weapons Ordinance (Cap. 217)); Offence in relation to possession of infringing copies in a copying service business (s. 119A of the

other than that which is being investigated in an application. We therefore do not consider the suggestion a viable arrangement.

Clause 2(1) : Definition of "transmitted"

- ***To consider whether there is a need for the definition of "transmitted". (raised at the meeting on 1 June 2006)***

23. We agree that the definition is not strictly necessary. We will move CSAs to delete it.

Clause 2(1) : "Type 2 surveillance"

- ***To consider excluding optical surveillance targeting bathrooms or changing rooms, or tracking devices that may be taken inside private premises, from the coverage of Type 2 surveillance. (raised at the meeting on 1 June 2006)***
- ***To consider substituting "to the extent that" with "which" in the definition of "Type 2 surveillance" and amending sub-clause (a)(i) in the same definition along the lines of "(i) who – (A) is a person privy to the conversation or the activity; or (B) is a person who is expected to be able to hear the conversation or to see the activity; or";***
- ***The definition of "Type 2 surveillance" under clause 2(1) : to simplify its drafting, particularly with respect to the references to "to the extent that", "device" and "speak the words", and to make more clear the types of action that would fall under the term "activity carried out" as provided for in sub-clause (a). (raised at the meeting on 1 June 2006)***

24. Taking into account Members' suggestions, we propose to move CSAs to simplify the definition of Type 2 surveillance along the following lines –

> *"Type 2 surveillance" (第2類監察), subject to subsections (3) and (3A), means any covert surveillance that –*
>
> *(a) is carried out with the use of a listening device or an optical surveillance device by any person for the purpose of listening to, monitoring or recording*

Copyright Ordinance (Cap. 528)); Access to computer with criminal or dishonest intent (s. 161 of the Crimes Ordinance (Cap. 200)).

words spoken or activity carried out by any other person, if the person using the device –

(i) is a person by whom the other person intends, or should reasonably expect, the words or activity to be heard or seen; or

(ii) listens to, monitors or records the words or activity with the consent, express or implied, of a person described in subparagraph (i); or

….. "

25. We believe that the revised definition is appropriate even where bathrooms or changing rooms are involved. If the use of the optical surveillance device involves entry onto premises without permission or interference with the interior of any object without permission, the surveillance would be Type 1 surveillance. Otherwise it should remain as Type 2 surveillance. A person should be expected to undertake reasonable measures, e.g., closing the window and door when using a bathroom or changing room.

26. As a related issue, in view of some Members' concern about clause 2(2), for the avoidance of doubt, we shall introduce a CSA to the clause to make it clear that "activity" does not include conversations. The clause, as amended, will read as follows –

"(2) For the purposes of this Ordinance, a person is not regarded as being entitled to a reasonable expectation of privacy within the meaning of paragraph (a)(i) of the definition of "covert surveillance" in subsection (1) in relation to any activity carried out by him in a public place, but, for the avoidance of doubt, nothing in this subsection affects such entitlement of the person in relation to words spoken by him in a public place."

Clause 2(1) : "Type 1 surveillance" and "Type 2 surveillance"

- ***To advise whether the more stringent authorization would be required when more than one type of device / operation is involved. (raised at the meeting on 1 June 2006)***

27. The level of authorization required for a particular operation

would depend on the circumstances. If an operation involves the use of more than one device in circumstances that would require Type 1 authorization, judge's authorization would be sought. To put this beyond doubt, we shall introduce a CSA to add a new provision to clause 2, as follows –

> *"(3A) An officer of a department may apply for the issue or renewal of a prescribed authorization for any Type 2 surveillance as if the Type 2 surveillance were Type 1 surveillance, and the provisions of this Ordinance relating to the application and the prescribed authorization apply to the Type 2 surveillance as if it were Type 1 surveillance."*

Clause 2(3)

- ***To consider amending the wording of clause 2(3) : along the formulation of "…… is regarded as Type 1 surveillance which would likely obtain information subject to legal professional privilege". (raised at the meeting on 1 June 2006)***

28. Having reviewed the provisions generally adopted in the Bill, we prefer the present formula for better consistency within the Bill.

Clause 2(4)

- ***To consider the need for subclause 2(4)(b). (raised at the meeting on 1 June 2006)***

29. The subclause is necessary to make clear that a communication transmitted by a telecommunications system is no longer in the course of its transmission once it has reached its destination. Otherwise there could be arguments as to whether, for example, the intended recipient of an email has to click it open before the transmission is considered to have been completed. This is analogous to postal packets where the transmission is considered complete once the packets reach the "mailbox" of the intended recipient.

Clause 2(5)

- ***To explain the scope of "data produced in association with the communication", including whether it includes data to be attached to the communication. (raised at the meeting on 2 June 2006)***

30. The data produced in association with the communication

includes what is commonly known as traffic data. This would include, for example, the originating telephone number of a call / fax, the source / destination address of an email, or the data which is found at the beginning of each packet in a packet switch network that indicates which communications data attaches to which communication. The definition in clause 2(5) has the effect of ensuring that the capturing of such information without accessing the actual message of the communication would still be regarded as interception and, hence, require judge's authorization.

31. Attachments to the communication are part of the message of the communication and hence are not data produced in association with the communication.

Clause 2(5A)

- ***To consider if the threshold of "likely" is appropriate under clause 2(5A). (raised at the meeting on 3 June 2006)***

32. The proposed clause 2(5A) provides -

> *"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."*

33. We have carefully considered the threshold of "likely", having regard to the context that it is used (i.e. to provide for an exclusion regarding the circumstances under which advocacy, protest or dissent might be regarded as a threat to public security). We consider that it is an appropriate test. It may not be possible to ascertain beforehand whether such advocacy, protest etc will be carried out by violent means before it is carried out. Thus only an assessment as to the likelihood may be carried out.

Clause 2(6)

- ***To consider amending clause 2(6) to provide a reference to all the means intended to be covered under oral applications, including "in person". (raised at the meeting on 2 June 2006)***

34. Taking into account Members' suggestion, we shall introduce CSAs to amend the clause to read as follows –

"*(a) an application is regarded as being made orally if it is made* ***orally in person*** *or made by telephone, video conferencing or other electronic means by which words spoken can be heard (whether or not any part of the application is made in writing);"*

Similar amendments apply to paragraphs (b) and (c) in the same clause.

Clause 3

- ***To consider including the test of "reasonable suspicion" in the conditions for authorization provided for under clause 3. (raised at the meeting on 2 June 2006)***
- ***To consider whether the proportionality test is too restrictive and whether it allows the authorizing authority to give sufficient consideration to the human rights implications. (raised at the meeting on 2 June 2006)***
- ***To consider, in the context of considering the drafting of clause 3, stating explicitly the necessity test by adding "necessary and" before "proportionate". (raised at the meeting on 3 June 2006)***
- ***To move CSAs to clause 3 to improve the flow of the clause and in conjunction with other parts of the Bill. (raised at the meeting on 3 June 2006)***

35. In view of the various comments made by Members on clause 3, we have carefully reviewed the provision and will move CSAs to amend the clause so that it would read as follows –

After (a), add the following -

"(aa) there is reasonable suspicion that any person has been, is, or is likely to be, involved in –

(i) where the purpose sought to be furthered by carrying out the interception or covert surveillance concerned is that specified in subsection (1)(a)(i), the serious crime to be prevented or detected; or

(ii) where the purpose sought to be furthered by carrying out the interception or covert surveillance concerned is that specified in

subsection (1)(a)(ii), any activity which constitutes or would constitute the particular threat to public security; and"

To amend (b) as follows –

"(b) the interception or covert surveillance is ***necessary for****, and proportionate to, the purpose sought to be furthered by carrying it out, upon –*

(i) balancing the relevant factors against the intrusiveness of the interception or covert surveillance on any person who is to be the subject of or may be affected by the interception or covert surveillance;

(ii) considering whether the purpose sought to be furthered by carrying out the interception or covert surveillance can reasonably be furthered by other less intrusive means; and

(iii) ***considering such other matters that are relevant in the circumstances****."*

- ***To advise, after liaison with the relevant policy bureau, on the timetable for taking forward the suggestion of the Law Reform Commission (LRC) reports on the creation of general criminal offences on unauthorized interception and covert surveillance. (raised at the meeting on 5 June 2006)***

36. We have consulted the Home Affairs Bureau. They have advised that they would in due course carefully and thoroughly assess the impact of the LRC's recommendations, having regard to overseas experience and consulting relevant stakeholders, and then map out the way forward. There is no pre-determined timetable at present.

Clause 4

- ***To provide information on the other enactments coming under clause 4(2)(c) permitting/requiring the carrying out of interception operations. (raised at the meeting on 5 June 2006)***

37. As explained at the meeting on 5 June 2006, the relevant enactments include the following –

- Bankruptcy Ordinance (Cap. 6) – section 28
- Post Office Ordinance (Cap. 98) – section 12
- Import and Export Ordinance (Cap. 60) – section 35(3)
- Mental Health Regulations (Cap. 136, sub. leg. A)
- Prisons Rules (Cap. 234, sub. leg. A) – rules 47A, 47B and 47C
- Legal Practitioners Ordinance (Cap. 159) – section 8 of Schedule 2

38. These other enactments are applicable in their own specific contexts. It is more appropriate for these operations to be subject to their own regime, having regard to the specific circumstances. The present exercise is concerned with interception for law enforcement purposes. This approach is also in line with that of the LRC in its report on interception of communications in 1996.

Clauses 4 and 5

- ***To consider moving Committee Stage amendment to amend Clause 4(1) of the Bill to the following effect - "no public officer shall directly or indirectly (including through any other person), carry out any interception." (raised at the meeting on 6 June 2006)***

39. We have no objection to the proposed amendment. We shall move CSAs so that the clause will read as follows –

> *"4(1) …… no public officer shall, directly or indirectly (whether through any other person or otherwise), carry out an interception."*

Similar changes will be proposed to clause 5(1).

Clauses 7 and 11(3)

- ***To consider raising the level of approving authority for executive authorization to Chief Superintendent of Police. (raised at the meeting on 8 June 2006)***
- ***To provide the number of D1 officers in LEAs, and consider raising the level of the officer for approving the making of applications for judge's authorization. (raised at the meeting on 10 June 2006)***
- ***To provide information on the ranking of the head of different crime formations in the Police, and consider prohibiting officers of the***

same crime formation from being the approving authority for executive authorization. (raised at the meeting on 8 June 2006)

- ***To stipulate that the approving officer is not directly involved in the investigation. (raised at the meeting on 16 June 2006)***

40. The number of officers at Directorate rank Point 1 (D1) of the civil service pay scale (or equivalent) in the Police, Customs and Excise Department and Immigration Department are 48, 3 and 2 respectively. As regards the ICAC, the lowest directorate rank in their hierarchy is D2-equivalent (i.e. the Assistant Commissioners), and there are 4 officers at that rank.

41. Having regard to the circumstances of the individual departments, we have no objection, as a matter of practice, to raise the level of authorizing officers in the case of the Police, Customs and Excise Department and Immigration Department to D1-equivalent (i.e. Chief Superintendent or equivalent) or above, while in the case of the ICAC, the level should remain at Principal Investigator or above. We shall stipulate this arrangement in the code of practice.

42. The heads of crime formations are usually Chief Superintendents of Police. At the macro level, many officers in the department may be "involved" in an investigation, and the degree of involvement may increase should the case is of a particularly serious nature. For example, the head of the LEAs may be said to be involved in all investigations. As a general principle, it is our intention that the approving officer should not be directly involved in the investigation of the case, and we will spell this out in the code of practice.

<u>Clause 8</u>

- ***To consider explicitly providing that the applications to be made under clause 8(2) should be in writing. (raised at the meeting on 8 June 2006)***

43. This requirement is already reflected in clause 8(2)(a).

- ***To consider providing expressly that the officer giving the approval for making the application for judge's authorization and the officer conducting the review under clause 54, should not be the same. (raised at the meeting on 10 June 2006)***

44. The role of an endorsing officer is to consider whether

applications for judge's authorization are appropriate. A reviewing officer conducting reviews under clause 54, on the other hand, is to keep under regular review the compliance by officers of the LEA with the relevant requirements under the Bill. There is no conflict between these two roles and we do not see a need to expressly provide in the law that officers performing the two roles should not be the same. In practice, however, they will not be the same person. We shall spell this out in the code of practice.

Clause 10

- ***To provide the Privy Council judgment regarding the meaning of the term "period", and consider whether it is necessary to amend clause 10(b) to make it clear that an authorization would have to cease to have effect upon a specified event. (raised at the meeting on 13 June 2006)***

45. The relevant judgment is at **Annex A**.

46. Having regard to case law, we consider that it is not necessary to amend clause 10(b) to refer to specified events.

Clause 11

- ***To consider amending clause 11(2)(b)(ii) along the line of "a copy of every affidavit …" to make it clear that all previous affidavits should be provided. (raised at the meeting on 13 June 2006)***

47. Clause 11(2)(b)(ii) of the Bill currently reads as "*a copy of* ***any*** *affidavit provided under this Part …*". The reference to "any affidavit" already includes all affidavits for previous applications/renewals related to the application for renewal. However, to address Members' concern, we have no objection to amending "any affidavit" to "all affidavits" in clause 11(2)(b)(ii) and "any statement" to "all statements" in clause 17(2)(b)(ii).

Clause 12

- ***To consider providing information on the average and maximum durations of previous covert operations. (raised at the meeting on 13 June 2006)***

48. The relevant records are destroyed some time after a case is closed. In particular, with telecommunications interceptions, the records

are destroyed within a short time. The information is therefore not available. In any case, past experience in this regard is not a good guide of future needs.

- ***To consider specifying under clause 12 that the number of previous renewals should be a factor in considering an application for renewal. (raised at the meeting on 13 June 2006)***

49. Part 4 of Schedule 3 already requires that information on each occasion on which the authorization has been renewed previously should be provided. The authorizing authority would no doubt take this factor into account in considering applications for renewal. We do not consider it necessary to amend clause 12 for the purpose.

- ***To consider providing that applications for renewal of judicial authorizations should be considered by two panel judges instead of one. (raised at the meeting on 13 June 2006)***

50. The authorizing authority should be able to make a determination on the basis of the information and justifications provided. We do not consider it appropriate to require two judges to consider renewal applications.

Clauses 14 to 16

- ***To advise on the rank of officers who may make applications for covert applications currently. (raised at the meeting on 15 June 2006)***
- ***To consider requiring the officer in charge of a case to make the application. (raised at the meeting on 15 June 2006)***
- ***To explain whether authorizations would be given to the applicant or the officers in charge of the case, the working relationship between them, and who will make the application for renewal. (raised at the meeting on 16 June 2006)***

51. The rank of officers who may make applications may vary depending on the circumstances of the case. The current practice among LEAs is that the rank of such officers is no lower than inspector of police or equivalent. We intend to continue with this practice under the new regime.

52. An application for authorization or renewal is made by the officer in charge or someone of the same or higher rank. These officers

are senior officers who are sufficiently familiar with the background to the cases.

53. An authorization/renewal covers a proposed operation, and to whom it is given would not affect its effect. In normal circumstances, it would be returned to the applicant. However, the terms of authorization may cover conduct which may be carried out by someone other than the applicant (e.g. under clause 29(5) and 30(g)), and hence such individuals may need to be shown a copy of the authorization, as appropriate, as well.

- ***To consider providing in the Bill that the applying officer cannot be the same person as the authorizing officer. (raised at the meeting on 16 June 2006)***

54. The applying officer would of course not be the same person as the authorizing officer. We do not consider it necessary to spell this out in the Bill.

- ***To explain what the panel judge could do if he considers that a previously approved Type 2 authorization should have been Type 1 instead. (raised at the meeting on 16 June 2006)***

55. There are very clear and objective criteria on what constitutes Type 1 and Type 2 surveillance. The likelihood of a mistake is therefore low. Nonetheless, should an authorizing authority discover any irregularity, he may make his views known in delivering his determination of the application. This would certainly be drawn to the attention of the head of the department concerned. The head of department has an obligation under clause 52 to report to the Commissioner on any non-compliance.

- ***To elaborate in the code of practice the difference between Type 1 and Type 2 surveillance. (raised at the meeting on 16 June 2006)***

56. On the basis of the statutory scheme, we will provide more guidance on the difference between Type 1 and Type 2 surveillance in the code of practice.

- ***To consider providing the number of cases involving participant monitoring in respect of figures provided for Type 2 surveillance for the period 20 February to 19 May 2006. (raised at the meetings on 15 and 17 June 2006)***

57. According to the Bill, an operation would be Type 2

surveillance if the operation involves participant monitoring (sub-clause (a) of the definition), or in the case of optical surveillance or tracking devices, would not involve entry onto premises or interference with the interior of any conveyance or object without permission (sub-clause (b)). Operations involving participant monitoring cover many different situations. For example, they may involve undercover officers, victims or informants. To protect the confidentiality of the modus operandi of these covert operations, we do not consider it desirable to provide too detailed a breakdown of the different types of operations. Indeed, we are not aware of other comparable overseas jurisdictions providing such information.

Clause 23

- ***To consider making it clear that clause 23(3) is a penalty clause rather than an option, along the lines of, for example, "where the officer has failed to make an application for confirmation within the period of 48 hours...". (raised at the meeting on 17 June 2006)***

58. We consider that our current formula can achieve the effect suggested by a Member, but taking into account that Member's concern, we have no objection to amending clause 23(3) to read as follows :

> *"(3) In default of any application being made for confirmation of the emergency authorization within the period...."*

By the same token, CSA will also be proposed to clause 26(3) concerning oral applications to the same effect. The clause, as amended, will read as :

> *"(3) In default of any application being made for confirmation of the prescribed authorization or renewal within the period...."*

- ***To consider preventing the information destroyed to be used in other contexts (such as in affirmations of officers as source of information), by stipulating that there should be no direct or indirect use of the information. (raised at the meeting on 17 June 2006)***

59. We do not consider such a provision enforceable. While we could ensure the destruction of the recorded information, it would not be possible for the LEAs to control the use of information already in the

memory of their officers. It is also not always possible for the officers to truthfully say when, for example, making a affidavit, whether a particular piece of information that he uses has come from which source.

- ***To consider stipulating that even if after failure of reporting back to a panel judge within 48 hours after emergency authorization, a report should still be made to the judge. (raised at the meeting on 17 June 2006)***

60. The role of the panel judge in the confirmation procedure is to consider applications for such confirmation. Where a department fails to apply for a confirmation within 48 hours, the question of confirming the emergency authorization would no longer arise. The question then becomes why the LEA has failed to comply with the requirement. It turns mostly on the facts of the case and is one that is more appropriate to be considered by the Commissioner. Moreover, there are other provisions in the Bill that provide various channels for the Commissioner to take follow up action as he thinks fit. As such, we consider it more appropriate for the head of departments to report to the Commissioner, rather than the panel judges, in such cases.

- ***Instead of destroying all information obtained in an emergency authorization that is not confirmed as provided under clause 23(3)(a), to consider stipulating that the information should be preserved for the sole purpose of investigations by the Commissioner. (raised at the meeting on 17 June 2006)***

61. The policy of the proposed regime, as reflected in clause 56, is that products obtained from operations under the Bill would be destroyed when they are no longer necessary for the relevant purpose of a prescribed authorization. Following this principle, the destruction arrangements for information obtained from emergency authorizations (and oral authorizations) are to ensure that information obtained pursuant to a prescribed authorization should, in a case where the authorization is not confirmed, be destroyed. We do not consider it appropriate, bearing in mind the privacy of the subject of such operations, for the information to be preserved for the purpose of investigations by the Commissioner. In any event, as stipulated in clause 23(3)(b), the head of department would include in the report to the Commissioner details of the case which would facilitate his review.

Clauses 23 and 26

- ***To consider stipulating that the Commissioner must investigate into the failure of seeking a confirmation from a panel judge within 48 hours of an emergency authorization or an oral application. (raised at the meeting on 17 June 2006)***

62. We envisage that after receiving such reports on failure of seeking confirmation from the head of departments under clauses 23(3)(b) and 26(3)(b)(ii), the Commissioner would naturally review the reports to examine the cases. We have no objection to setting this out explicitly in the Bill. For the purpose, we shall introduce CSA to expand clause 40, as follows –

> *"(1A) Without limiting the generality of subsection (1), the Commissioner shall conduct reviews on cases in respect of which a report has been submitted to him under section 23(3)(b), 26(3)(b)(ii) or 52."*

Clauses 23, 24, 26 and 27

- ***To consider whether the reference to "to the extent that it could not have been obtained without carrying out the interception or Type 1 surveillance" under clauses 23(3)(a) and 26(3)(a) is necessary. (raised at the meeting on 17 June 2006)***

- ***For clause 24(3)(b)(ii), to consider providing that the information should be destroyed, instead of giving the discretion to the panel judge. (raised at the meeting on 17 June 2006)***

- ***To consider similar amendments to clauses 26(3) / 27(3) in line with those suggested for clauses 23 / 24. (raised at the meeting on 17 June 2006)***

63. We agree to the suggestion to delete "to the extent that it could not have been obtained without carrying out the interception or Type 1 surveillance" under clauses 23(3)(a) and 26(3)(b)(i). The amended clauses will read as follows –

> *Clause 23(3)*
>
> *"(a) cause the immediate destruction of any information obtained by carrying out the interception or Type 1*

surveillance concerned; and"

Clause 26(3)(b)

" (i) cause the immediate destruction of any information obtained by carrying out the interception or covert surveillance concerned; and"

64. We also propose to make similar amendments to clauses 24(3)(b) and 27(3)(b), along the following lines –

"(b) in any case whether or not the emergency authorization still has effect at the time of the determination, an order that the head of the department concerned shall cause the immediate destruction of –

(i) subject to subparagraph (ii), any information obtained by carrying out the interception or Type 1 surveillance concerned; or

(ii) where paragraph (a)(ii) applies, any information obtained by carrying out the interception or Type 1 surveillance concerned that is specified in the order."

Clause 24

- ***To provide that once a confirmation is not approved, the emergency authorization should be considered void, and immunity should be extended to officers in respect of criminal liability only. (raised at the meeting on 17 June 2006)***

65. It would not be desirable for operations which have been conducted in good faith following an authorization to be rendered unlawful afterwards. As such, it would not be appropriate for emergency authorizations to be considered void when a confirmation is subsequently not granted. It is reasonable to provide immunity against both civil and criminal liability as provided under clause 61 to officers for such acts performed under the emergency authorization.

Clauses 25 to 28

- ***To stipulate in the code of practice that written records would be made on the additional information provided to the authorizing***

officer in respect of an application for executive authorization. (raised at the meeting on 17 June 2006)

66. This is indeed what we envisage, and this requirement will be made clear in the code of practice.

- ***To consider providing, in the code of practice, that notes made by the approving authority during oral applications have to be put on the case file. (raised at the meeting on 17 June 2006)***

- ***To consider (in consultation with the Judiciary) whether arrangements could be made for recording of oral applications (by the panel judges or by the applicants) for judge's authorization. (raised at the meeting on 17 June 2006)***

- ***To specify that oral applications for executive authorizations should be tape recorded. (raised at the meeting on 17 June 2006)***

67. Under our current thinking, oral applications made to the panel judges would be audio-taped as far as practicable. In cases where recording is not practicable, the panel judges would make a written record. In the case of executive authorization, the approving authority will make a written record of the application. In any event, the applicant would need to submit a written application within 48 hours, with the supporting affidavit/affirmation and documents setting out the facts presented to the authorizing authority at the time of the oral application, for application for confirmation.

Clause 29

- ***To set out in the code of practice procedures for the addition of phone numbers etc. for named persons authorizations such as why the numbers are believed to be "likely to be used" by the subject of the covert operation. (raised at the meeting on 17 June 2006)***

68. We will set out in the code of practice the relevant procedures.

- ***To consider tightening up the wording of clause 29(6)(c). (raised at the meeting on 19 June 2006)***

69. Taking into account Members' views, we will move CSAs to amend the clause as follows –

> *"(c) the* ***incidental*** *interception of any communication which*

necessarily arises from the interception of *the communications authorized under the prescribed authorization; and"*

- ***To consider explicitly providing that sub-clauses (a)(ii), (b)(ii) and (c)(ii) under clause 29(7) which authorize entry by force could not be approved by executive authorization. (raised at the meeting on 19 June 2006)***

70. We agree with the suggestion. We shall specify that the provision authorizing the entry will only be applicable to Type 1 surveillance. The following CSAs will be proposed in respect of the three sub-clauses –

"(a) where subsection (2)(a) is applicable –

……

(ii) ***in the case of Type 1 surveillance,*** *the entry, by* ***the use of reasonable*** *force if necessary, …… ;*

(b) where subsection (2)(b) is applicable –

……

(ii) ***in the case of Type 1 surveillance,*** *the entry, by* ***the use of reasonable force*** *if necessary, …… ; and*

(c) where subsection (2)(c) is applicable –

……

(ii) ***in the case of Type 1 surveillance****, the entry, by* ***the use of reasonable force*** *if necessary, …… ."*

- ***To consider making it clear that "any person" under clause 29(6)(d) refers to persons other than the officers of the LEAs. (raised at the meeting on 19 June 2006)***

71. Clause 29(6)(d) authorizes, ***for the execution of a prescribed authorization***, the provision of the particulars of addresses, numbers, etc that are used for identifying the communications of the particular target specified on the authorization. The clause is intended for the provision of such addresses or numbers to the persons assisting in the operation in order to identify the communications to be intercepted. The scope of the authorization under this provision is already very tightly limited, and we do not consider it necessary to amend it as suggested.

- ***To explain the consequences for persons not providing the***

assistance required under clause 29, and whether it would amount to committing an offence of obstructing a police officer in carrying out his duties. (raised at the meeting on 17 June 2006)

72. As confirmed at the meetings on 19 and 20 June 2006, the failure of a person to provide assistance to LEAs as required under clause 29 would not attract criminal liability. In particular, such refusal would not amount to the contravention of various legislative provisions in respect of the obstruction caused or failure to assist when a public officer is in execution of his duty.

Clauses 29 and 30

- ***To consider whether the terms "also" / "further" should be used in clauses 29 and 30. (raised at the meeting on 17 June 2006)***

73. We have no objection to changing the reference to "further" in clause 30 to "also", and will introduce a CSA accordingly.

- ***To consider providing that only "minimal force" should be used wherever "by force if necessary" is referred to. (raised at the meeting on 17 June 2006)***

74. The term "by force if necessary" has a well-established meaning to refer to the force that is no more that necessary. Given the covert nature of the operations, any force used will be the minimum required. However, we appreciate Members' concern and have no objection to introducing a CSA so that various references to "by force if necessary" in clauses 29 and 30 will read as "by the use of reasonable force if necessary".

- ***To consider whether the existing mechanism for compensation for damage caused to property during law enforcement operations would be sufficient for compensating for damage to property incurred in carrying out covert operations, and whether a special compensation mechanism would be necessary. (raised at the meeting on 17 June 2006)***

- ***To consider stipulating, either in the Bill or in the code of practice, that LEAs should normally retrieve the device after the covert operation as soon as reasonably practicable. (raised at the meeting on 17 June 2006)***

75. The covert nature of the operations covered by the Bill necessarily places a limit on the extent of interference with property. Any interference would only be sanctioned with the express authorization by a panel judge under clause 29(4). We envisage that the interference in the vast majority of cases would not result in any damage at all. Should there be any damage, it would be minimal. As a matter of policy, we will make good any damage caused, and will specify this in the code of practice.

76. It is indeed our policy to try and retrieve surveillance devices after use as soon as reasonably practicable. We will so specify in the code of practice.

77. Given the nature of covert operations, it may not be practicable to introduce a compensation mechanism in the Bill. To offer compensation to the owner of the property being interfered with would blow the cover of the operation and might jeopardize the operation. Similarly, in some cases, it may not be practicable to retrieve a surveillance device after an operation. Retrieving the device might expose the covert operation or endanger the safety of the LEA officers concerned. It is also possible that the target has already discovered the device, and the need to retrieve the device does not arise then.

78. Nonetheless, taking into account Members' concern, we propose to require that the LEAs should report to the Commissioner all instances of interference of property in the course of carrying out authorized operations under the Bill should there be any damage to the property concerned. They will also have to report to the Commissioner the remedial action that they have taken to make good the damage and, if the damage cannot be made good, the reasons. The Commissioner may then review the adequacy of the measures taken by the LEAs in this regard and, if he deems it appropriate, make reports to the CE under clause 48 or recommendations to the LEAs under clause 50.

79. The same system covers the retrieval of devices after the expiry of a prescribed authorization. The LEAs should report to the Commissioner all instances where they have not applied for a device retrieval warrant for devices not yet retrieved and the reasons for not doing so. Again the Commissioner may then review the information provided and reasons advanced by the LEAs and, if he deems it appropriate, make reports to the CE under clause 48 or recommendations

to the LEAs under clause 50.

Clauses 30 and 36

- ***To consider stipulating clearly that clause 30 only covers incidental conduct. (raised at the meeting on 19 June 2006)***

80. We agree with the suggestion. The proposed amendments are as follows –

> "*Clause 30*
>
> *A prescribed authorization* ***also*** *authorizes the undertaking of conduct****, including the following conduct, that*** *is necessary* ***for and incidental to the carrying out of*** *what is authorized or required to be carried out under the prescribed authorization …"*

In the same vein, amendments to clause 36 will also be introduced, as follows –

> *"Clause 36*
>
> *A device retrieval warrant* ***also*** *authorizes the undertaking of conduct****, including the following conduct, that*** *is necessary* ***for and incidental to the carrying out of*** *what is authorized to be carried out under the warrant …".*

Clause 30A

- ***To consider amending "ordinarily used by lawyers" as "known or reasonably believed / expected by the law enforcement agency to be ordinarily used by lawyers" under Clause 30A. (raised at the meeting on 10 June 2006)***

81. While we consider that the present formulation of "ordinarily used by a lawyer" under the proposed clause 30A(1)(a)(ii) (as proposed in our earlier paper SB Ref: ICSB 11/06) is sufficiently clear, we have no objection to amending it to "known or reasonably expected to be known by the applicant to be ordinarily used by a lawyer".

- ***To consider extending the proposed protection to lawyers under clause 30A to paralegals working in law firms. (raised at the meeting on 10 June 2006)***

82. Insofar as paralegals work in the same premises as lawyers, including their offices and the premises used by the lawyers to give advice, they are already protected by the proposed regime. We consider the protection sufficient.

- ***To consider amending the drafting of the definition of "other relevant premises" under clause 30A in order to include some non-exhaustive examples such as interview rooms of prison and courts. (raised at the meeting on 10 June 2006)***

83. Under the proposed clause 30A(1), the term "other relevant premises" is defined as "in relation to a lawyer, means any premises, other than an office of a lawyer, that are ordinarily used by the lawyer and by other lawyers for the purpose of providing legal advice to clients". Given that lawyers do provide legal advice to their clients in interview rooms of prison and courts, these premises are already covered under the definition. We do not consider it appropriate to include these premises as examples in the statutory definition. However, we will include them as examples in the code of practice to be issued under the Bill.

Clause 38

- ***To provide a CSA to make clear that the reappointment of the Commissioner would be made by the Chief Executive (CE) on the Chief Justice's recommendation. (raised at the meeting on 17 June 2006)***

84. The CSA will be as follows –

> *"Clause 38*
>
> *(5A) A person previously appointed as the Commissioner may from time to time be further appointed as such in accordance with the provisions of this Ordinance that apply to the appointment of the Commissioner."*

- ***To reconsider whether it would be more appropriate to restrict the pool of eligible candidates for the Commissioner post to retired judges, and whether it is appropriate for the Commissioner to work on a part-time basis. (raised at the meeting on 17 June 2006)***

85. To allow a wider pool of candidates, we consider it appropriate to include both serving and retired judges as eligible judges for appointment as the Commissioner under the Bill. As a matter of fact,

there are many instances of serving judges appointed to statutory positions[3], and we do not consider any impropriety with the arrangements. We also understand form the Judiciary that the pool of retired judges resident in Hong Kong is very limited, and they may not be willing to take on the work. And as explained separately in the staffing proposal submitted to the Establishment Subcommittee on the creation of, inter alia, two Court of First Instance judges posts in the Judiciary to cope with the impact of the additional responsibilities arising from the implementation of the new regime on the Judiciary, it has been pointed out that given the nature and estimated volume of work of the Commissioner, our assessment is that the duties would take up a substantial amount of the time of the judge. We have consulted the Judiciary on the suggestion that a serving judge appointed as the Commissioner should not be assigned to hear any cases during the term of his appointment as the Commissioner. The Judiciary has no objection to this suggestion.

- ***To consider providing in the Bill that the Commissioner should be appointed by the CE with the endorsement of the Legislative Council. (raised at the meeting on 25 April 2006)***

86. Under the Bill, CE would appoint the Commissioner on recommendation of the Chief Justice. As the Commissioner would be a former or serving judge at the High Court level or above, we consider that the proposed arrangement under the Bill is appropriate. This is also in line with the appointment arrangement for many other statutory offices, e.g., the Ombudsman and the Privacy Commissioner.

- ***To consider establishing a committee to review the work of the Commissioner. (raised at the meeting on 25 April 2006)***

87. As explained to the Panel of Security at its meeting on 16 February 2006 (see Annex A8 to SB Ref. : ICSB 1/06), appointing a single person as a statutory authority is a common practice whether in Hong Kong or overseas. For example, in Hong Kong the Ombudsman and the Privacy Commissioner are statutory authorities. In the United Kingdom (UK), the oversight authority for interception of

[3] Examples include the chairmanship of the following : the Securities and Futures Appeals Tribunal under Cap. 571; the Long-term Prison Sentences Review Board under Cap. 524; the Release Under Supervision Board under Cap. 325; the Market Misconduct Tribunal under Cap. 571; the Electoral Affairs Commission under Cap. 541; and the Clearing and Settlement Systems Appeals Tribunal under Cap. 584.

communications under the Regulation of Investigatory Powers Act 2000 is the Interception of Communications Commissioner. In Australia, the Ombudsman performs the oversight function in respect of interception of communications for the investigation of crime.

88. The Commissioner would be provided with adequate support to facilitate the performance of his functions under the Bill. He would also be given wide powers under the Bill to demand information. His annual reports would be tabled at the Legislative Council. We see little purpose to create another committee to oversee the Commissioner's work. There are also no such arrangements in respect of other statutory authorities, e.g., the Ombudsman and the Privacy Commissioner.

- ***To consider providing that the Commissioner is appointed in his personal capacity. (raised at the meeting on 21 June 2006)***

89. Insofar as only eligible judges may be appointed as Commissioner, it may be misleading to provide that they are appointed entirely in their personal capacity. We therefore do not consider it appropriate to adopt the proposed amendment.

Clause 39

- ***To consider expanding the purview of the Commissioner to oversee the compliance by the Government as a whole, including officers from departments which are not covered under the Bill. (raised at the meeting on 19 June 2006)***
- ***To confirm in writing that the power of CE to direct the head of the law enforcement agencies would not override the provisions of the Bill. (raised at the meeting on 19 June 2006)***
- ***To consider explicitly providing that clause 39(a) should also cover CE. (raised at the meeting on 19 June 2006)***

90. As explained to Members, only officers from the LEAs specified in Schedule 1 may carry out interception of communications or covert surveillance under the Bill. In carrying out such operations, they must comply with the relevant requirements set out in the Bill. Officers in other departments are prohibited from undertaking such operations, and if they were to do so they would be acting unlawfully. The detailed provisions of the Bill regarding application for authorization, safeguards of products, record-keeping etc. do not apply to them. Given the difference in applicability of the Bill to the officers of the specified LEAs

and those of other departments, the oversight required would naturally be different.

91. We consider that departments not specified in Schedule 1 should be responsible for ensuring that their officers carry out their duties in accordance with the law. Any breaches could be dealt with under as the Personal Data (Privacy) Ordinance (Cap. 486) and the Hong Kong Bill of Rights. We therefore remain of the view that the scope of the Commissioner's purview is appropriate.

92. As we confirmed at the meeting of 19 June 2006, the power of CE to direct the head of the LEAs would not override the provisions of the Bill, including those imposing an obligation on the departments to destroy products of the covert operations.

93. We have explained the applicability of the Bill to CE in our paper SB Ref. : ICSB 14/06. We do not propose to amend clause 39(a) as suggested.

- ***To reconsider whether the reference to "examine" and "review" are appropriate, and whether to adopt a unified term (檢審 in Chinese) for both reviews and examinations to be conducted by the Commissioner. (raised at the meeting on 19 June 2006)***

94. We explained the meanings of "examination" and "review" under the Bill at the meeting of 20 June 2006. In short, "reviews" are more wide-ranging and comprehensive than "examinations" which may only be conducted under the defined circumstances using the prescribed principles. As we consider it preferable to adopt different terminologies for the two sets of procedure, we consider the present expressions appropriate.

- ***To consider explicitly providing that the specific functions of the Commissioner as set out in sub-clause 39(b) (in particular item (iv)) are within the scope of the general functions as set out in sub-clause (a). (raised at the meeting on 19 June 2006)***

95. Under the present formulation in the Bill, the functions of the Commissioner as set out under clause 39(b), including clause 39(b)(iv), would already have to be within the scope of (a). There is no need for amendments in this regard.

- ***For clause 39(b)(iv), to consider changing the reference to "further functions" to read as "further duties". (raised at the meeting on 19***

June 2006)

96. As explained at the meeting, "function" is, as in a number of other ordinances, defined to include "duty" and thus the reference is appropriate in the context.

Clauses 40 and 41

- ***To consider whether the purview of Commissioner's review should include the panel judges. (raised at the meeting on 20 June 2006)***
- ***To consider stating explicitly that the Commissioner can report his findings to the panel judges. (raised at the meeting on 20 June 2006)***

97. As explained at the meeting of 20 June 2006, under the regime under the Bill, the role of the Commissioner is to provide an oversight of the LEAs. However, we agree that in some cases, the findings, determinations and recommendations of the Commissioner in the course of carrying out his duties could have some reference value to the panel judges. We would therefore propose CSAs to provide that the Commissioner may report to, besides the CE and the Secretary for Justice, the panel judges under sections 41(3), 46(3) and 50(3), as he thinks fit. The proposed CSAs would make the clauses read as follows –

> "*Clause 41*
>
> *(3)…… the Commissioner may…… refer the findings and any other matters he thinks fit to the Chief Executive, the Secretary for Justice* ***or any panel judge or any or all of them****."*

Similar changes will be made to clauses 46 and 50.

Clause 41

- ***To consider stipulating expressly that the measures taken by the department under Clause 41 should include any disciplinary actions. (raised at the meeting on 20 June 2006)***

98. We agree with the suggestion. The proposed CSAs are as follows –

> *"(2) On being notified of the findings of the Commissioner under subsection (1), the head of the department shall submit to the Commissioner a report with details of any measures taken*

by the department ***(including any disciplinary action taken in respect of any officer)*** *to address any issues identified in the findings, as soon as reasonably practicable after the notification or, where the Commissioner has specified any period for submission of the report when giving the notification, within that period."*

Similar amendments will also be made to similar provisions in clauses 46(2) and 50(2) respectively.

Clause 42

- ***To consider changing the threshold for application to "suspect" instead of "believe". (raised at the meeting on 20 June 2006)***

99. We agree to the suggestion. A CSA to that effect will be introduced.

Clause 43

- ***For clause 43(1)(a), to consider extending the scope of the operations to be examined beyond alleged operations to include operations not reported but revealed during the examination. (raised at the meeting on 20 June 2006)***
- ***To advise who counts as the subject of the operation to whom the notification / compensation mechanism would be applicable. (raised at the meeting on 20 June 2006)***
- ***To consider whether the Commissioner should be given the power to order destruction of information obtained from lawful operations, after affording LEAs a chance to make representation. (raised at the meeting on 20 June 2006)***

100. We have proposed to adopt a notification mechanism in our paper SB Ref: ICSB 14/06. Under the mechanism, if the Commissioner notices a "wrongful" operation, notification would also be made.

101. In the vast majority of cases, the subject of an operation is the person named or otherwise identified in the authorizaton. In other cases, the subject of the operation may not be the person named in the authorization or may not be readily identifiable for the authorization. In these cases, the Commissioner will identify the person most directly affected, if any. In the case of an application for examination under

clause 42, however, the Commissioner may find in the applicant's favour whether or not he is the "subject" as long as it can be established that he has been subject to an operation not covered by a properly authorized operation.

102. Under clause 46, the Commissioner shall notify the head of the department of his determination when he finds in favour of an applicant for examination. On being so notified, the head of department has to submit to the Commissioner a report with details of any measures taken by the department to address any issues arising from the determination. We envisage that such measures shall include the handling of any product that has been obtained from the interception or covert surveillance. The Commisioner, if he thinks fit, may make recommendations to the head of department or refer the matter to the CE, Secretary of Justice or panel judges.

Clause 45

- ***To consider making it clear that the examination under clause 45(1)(b) may be carried out on the basis of information obtained under clause 51. (raised at the meeting on 20 June 2006)***

103. The Commissioner may invoke clause 51 ***for the purpose of performing any of his functions*** under the Bill. Since carrying out an examination is one of the Commissioner's functions, it is clear that he may invoke clause 51 in relation to examinations as well. We therefore do not consider the suggested amendment necessary.

- ***To consider the introduction of a special advocate system. (raised at the meeting on 20 June 2006)***

104. Under the proposed regime, the Commissioner is established as an independent oversight authority with wide powers to look into compliance by the LEAs with the relevant requirements. He would surely take into account the rights of the subject of the operations in carrying out his functions under the Bill, including during examinations of applications. The safeguards provided in the Bill are already very strong. No comparable jurisdictions have the same level of protection and checks and balances at the various stages of authorization, implementation, and review and redress in the post-implementation period. As such we do not consider it necessary to introduce a further layer by way of a special advocate system.

Clause 47

- ***To include in the list of information for the Commissioner's annual report the following –***

  (a) breakdown by the types of surveillance (Type 1 / Type 2);
  (b) breakdown by crime / public security cases and / or major categories of public security cases;
  (c) the duration of renewals;
  (d) number of positive notification cases;
  (e) number of cases involving information subject to legal professional privilege; and
  (f) number of oral applications and authorizations.

  (raised at the meeting on 20 June 2006)

- ***To consider providing in the Commissioner's annual report the follow up actions taken by LEAs in relation to disciplinary actions arising from non-compliance by LEA officers. (raised at the meeting on 20 June 2006)***

105. Having regard to Members' suggestion, we agree that the list of information should be expanded to include the following new items – breakdown by the types of surveillance (Type 1 / Type 2); number of positive notification cases; and number of oral applications and authorizations. For renewals, apart from the number of renewal applications, we will also provide the number of cases that have been renewed for more than 5 times. We also agree that the number of cases involving information subject to legal professional privilege (LPP) reported to the Commissioner should be provided. For reasons explained previously in papers SB Ref. : ICSB 5/06 and ICSB 12/06, it is difficult to provide a breakdown by crime and public security cases. Similar difficulties apply to providing the major categories of public security cases.

106. Under clause 47(d), one of the items to be provided for in the annual reports of the Commissioner is the summary of reviews conducted by the Commissioner under clause 40. We have separately suggested to include a CSA to make clear that such reviews would include those conducted on the various reports submitted by head of departments under the law. We envisage that any actions undertaken by LEAs in relation to disciplinary actions arising from non-compliance by LEA officers

would be included in such reports. Nonetheless, in view of Members' suggestion, we have no objection to providing for this expressly.

107. The CSAs in respect of clause 47 to reflect the changes proposed above are as follows –

"*Clause 47(2)(a)*

(a) a list showing –

*(i) the **respective** number**s** of **judge's authorizations, executive authorizations and emergency authorizations** issued under this Ordinance during the report period, and the average duration of the **respective** prescribed authorizations;*

(similar amendments in respect of items (ii), (iii) and (iv))

(iia) the respective numbers of judge's authorizations, executive authorizations and emergency authorizations issued as a result of an oral application under this Ordinance during the report period, and the average duration of the respective prescribed authorizations;

(iib) the respective numbers of judge's authorizations and executive authorizations renewed as a result of an oral application under this Ordinance during the report period, and the average duration of the respective renewals;

(iic) the respective numbers of judge's authorizations and executive authorizations that have been renewed under this Ordinance during the report period further to 5 or more previous renewals;

...

(iva) the respective numbers of oral applications for the issue of judge's authorizations, executive authorizations and emergency authorizations made under this Ordinance that have been refused during the report period; and

(ivb) the respective numbers of oral applications for the renewal of judge's authorizations and executive authorizations made under this Ordinance that have been refused during the report period;"

"*Clause 47(2)(d)*

(d) a list showing –

...

(iva) the number of cases in which a notice has been given by the Commissioner under section 46A during the report period;

...

(va) the number of cases in which information subject to legal professional privilege has been obtained in consequence of any interception or covert surveillance carried out pursuant to a prescribed authorization; and

(vb) the broad nature of any disciplinary action which has been taken in respect of any officer of a department according to any report submitted to the Commissioner under section 41, 46 or 50; and

..."

- ***To consider providing information on the expenditure on covert operations in the context of the 2007-08 Estimates. (raised at the meeting on 20 June 2006)***

108. During the examination of the annual Estimates of Expenditure there have been suggestions for the Administration to provide various types of information quantifying our interception of telecommunications operations, and we have said that we would consider providing such information in the context of our proposed legislation. In the current Bill, the Commissioner will be providing many types of such information in his annual report which will be tabled at the Legislative Council. We will consider how to reflect such information in the 2007/08 Estimates.

- ***To advise the types of information included in reports in other***

comparable jurisdictions similar to the Commissioner's annual report. (raised at the meeting on 20 June 2006)

109. The approach in different jurisdictions varies. In the UK, the Regulation of Investigatory Powers Act 2000 does not list out the information to be included in the report of the Commissioners. It merely requires that the Commissioner must make an annual report to the Prime Minister with respect to the carrying out of his functions.

110. In the United States (US), the Federal Wiretap Act provides that the Administrative Office of the US Courts should submit to the Congress an annual report concerning the number of applications for orders authorizing or approving the interception, and the number of orders and extensions granted or denied during the year, and a summary and analysis of the data.

111. In Australia, the annual reports prepared by the Minister under the Telecommunications (Interception) Act 1979 set out statistics about applications for warrants, telephone applications, renewal applications, categories of serious offences, particulars about duration of warrants, information about effectiveness of warrants, etc..

112. In Canada, for criminal cases under the Criminal Code, the annual report prepared by the Solicitor General of Canada has to set out the number of applications made for authorizations and renewals that were granted or refused, average period for which authorizations or renewals were granted, number of notifications, statistics on offences for which authorization were given, number of persons arrested, number of proceedings in which communications obtained by interception were adduced in evidence, number of convictions, number of investigations in which information obtained from interception was used, a general assessment of the importance of interception in the investigation, detection, prevention and prosecution of offences, etc..

113. We believe that the list of information proposed to be included in the Commissioner's annual report is at least comparable to, if not more comprehensive than, that in these other jurisdictions.

- ***To consider establishing a mechanism to keep the Legislative Council informed of any disagreement between the Commissioner and the Chief Executive on matters to be excluded from the copy of the Commissioner's annual report to be laid on the table of the***

Legislative Council under clause 47(5) of the Bill. (raised at the meeting on 25 April 2006)

114. We see no objection to providing that where CE has exercised his power to exclude certain matters from the Commissioner's report for tabling at LegCo, a reference to this may be made. To this effect, we shall move a CSA to amend clause 47(4) to read as follows –

> *"The Chief Executive shall cause to be laid on the table of the Legislative Council a copy of the report, together with a statement as to whether any matter has been excluded from that copy under subsection (5) without the agreement of the Commissioner."*

Clause 49

- ***Under clause 49(2), where the Commissioner makes any recommendation to Secretary for Security for revision of the code, is the Secretary obliged to implement them or would the Secretary be only required to notify the Commissioner if he implements them? (raised by the Assistant Legal Advisor in her letter of 24 April 2006)***

115. As stipulated in clause 59(1) of the Bill, the power to issue to the code of practice rests with Secretary for Security. While there is no express provision that Secretary for Security is obliged under the Bill to do so, Secretary for Security would no doubt take into account the Commissioner's recommendations regarding the code. We also envisage that if Secretary for Security does not adopt the Commissioner's recommendations, he would explain the reasons to the Commissioner. If the Commissioner is not satisfied, he may report to CE and / or include the fact in his annual report.

Clause 51

- ***To consider providing explicitly that the Commissioner has the power to administer his support staff. (raised at the meeting on 20 June 2006)***

116. It is implicit in the Commissioner's functions under the Bill that he may administer any staff to assist him to perform his functions. Nonetheless, we shall make this clear to the Commissioner on his appointment.

Clause 52

- ***To consider making it explicit that the LEAs will report to the Commissioner not only on non-compliance but also on mistakes. (raised at the meeting on 20 June 2006)***

117. A mistake by, for example, providing the wrong information, constitutes non-compliance already. Nonetheless, in view of Members' suggestion, we have no objection to making this clear by referring to "irregularities or errors" in clause 47(2)(d). We shall introduce a CSA to amend item (ii) under clause 47(2)(d), as follows –

> *"(ii) the number and broad nature of any cases of irregularities* ***or errors*** *identified in the reviews during the report period;"*

Clause 55A

- ***To consider adding a clause near clause 55 to the effect that "any authorization shall cease to be in effect if there are significant changes, including changes in the likelihood of LPP or target's right of silence being infringed". (raised at the meeting on 10 June 2006)***

118. In view of Members' suggestion, we propose to introduce an additional clause after clause 55 to require an assessment of the effect of an arrest on the likelihood that any information which may be subject to LPP by continuing the interception or covert surveillance. The assessment should be submitted to the relevant authorizing authority as soon as reasonably practicable after the arrest. The authority shall revoke the authorization if he is satisfied that the conditions for the continuance of the operation are not longer met. The necessary CSAs are as follows –

> ***"55A. Reports to relevant authority following arrests***
>
> *(1) Where, further to the issue or renewal of a prescribed authorization under this Ordinance, the officer of the department concerned who is for the time being in charge of the interception or covert surveillance concerned becomes aware that the subject of the interception or covert surveillance has been arrested, the officer shall, as soon as reasonably practicable after he becomes aware of the matter, cause to be provided to the relevant authority by whom the prescribed*

authorization has been issued or renewed a report assessing the effect of the arrest on the likelihood that any information which may be subject to legal professional privilege will be obtained by continuing the interception or covert surveillance.

(2) Where the relevant authority receives a report under subsection (1), he shall revoke the prescribed authorization if he considers that the conditions for the continuance of the prescribed authorization under section 3 are not met.

(3) Where the prescribed authorization is revoked under subsection (2), the prescribed authorization is, notwithstanding the relevant duration provision, to cease to have effect from the time of the revocation.

(4) If, at the time of the provision of a report to the relevant authority under subsection (1), the relevant authority is no longer holding his office or performing the relevant functions of his office -

(a) without prejudice to section 54 of the Interpretation and General Clauses Ordinance (Cap. 1), the reference to relevant authority in that subsection includes the person for the time being appointed as a panel judge or authorizing officer (as the case may be) lawfully performing the relevant functions of the office of that relevant authority; and

(b) the provisions of this section are to apply accordingly.

(5) In this section, "relevant duration provision" (有關時限條文) means section 10(b), 13(b), 16(b), 19(b) or 22(1)(b) (as the case may be)."

119. Separately, with the CSA to delete clause 2(7) previously proposed, we will introduce CSAs similar to sub-clause 55A(4) above to clauses 26 and 55.

Clause 59

- ***To clarify the status of the code of practice having regard to the***

fact that "relevant requirement" as defined in Clause 2 includes any applicable requirement under the code of practice, and the compliance of "relevant requirement" by the LEAs is subject to the review and examination regime under the Commissioner. (raised by the Assistant Legal Advisor in her letter of 24 April 2006)

- ***To advise whether the Administration would make any distinction between a breach of a provision in the Bill, a breach of the code of practice and a condition in a prescribed authorization or device retrieval warrant. (raised by the Assistant Legal Advisor in her letter of 24 April 2006)***

120. As explained to Members previously (see SB Ref: ICSB 3/06), LEA officers who fail to comply with the new legislation, as well as the code of practice or conditions set out in the authorization concerned, would be subject to disciplinary action or, depending on the cases, the common law offence of misconduct in public office, in addition to continuing to be subject to the full range of existing law. The seriousness of any breach of the above-mentioned requirements, and hence the level of disciplinary actions (or criminal action) called for, would depend on the actual circumstances of the case, having regard to the severity of the breach rather than the type of relevant requirement (i.e. the Bill, the code or the authorization) that has been breached.

- ***To explain how the code would be published and made public? There is no express provision in Clause 59. Clause 59(3) provides for revision of the whole or part by the Secretary for Security in a manner consistent with his power to issue the Code, but the manner has not been specified in Clause 59(1). (raised by the Assistant Legal Advisor in her letter of 24 April 2006)***

121. As pointed out in the paper presented to the Security Panel for discussion at its meeting on 16 February 2006, it is our intention that the code would be published and hence subject to public scrutiny. In accordance with the general practice of the Administration, this could be done through either physical or electronic means or both.

122. The reference to ***in a manner consistent with his power to issue the code under this section*** refers to the fact that Secretary for Security should only issue a code for the purpose of providing practical guidance to LEA officers. In other words, he cannot issue a code under the Bill for an unrelated purpose.

- ***To consider providing the latest draft of the code of practice before the resumption of the Second Reading of the Bill. (raised at the meeting on 10 June 2006)***

123. The drafting of the code of practice has to take into account changes to the Bill, and may therefore be finalized only after all the changes have been decided. Nonetheless, we will endeavour to provide the latest draft of the code to Members prior to the resumption of the second reading of the Bill.

Clause 62

- ***To consider subjecting regulations to be made under clause 62 of the Bill in respect of the inclusion of new types of surveillance devices to the positive vetting procedure. (raised at the meeting on 1 June 2006)***

124. The making of all subsidiary legislation is subject to the scrutiny of the Legislative Council. However, given the concerns of some Members, we agree that the regulations made under clause 62 should be subject to the positive vetting procedure. The necessary CSA to clause 62 is as follows –

> *To add ", subject to the approval of the Legislative Council," to the clause so that it would read "The Chief Executive in Council may, subject to the approval of the Legislative Council, make regulation for –…"*

We will make similar amendments to clause 63, as follows -

> *To add ", subject to the approval of the Legislative Council," to the clause so that it would read "The Chief Executive in Council may, subject to the approval of the Legislative Council, amend Schedules 1, 2, 3 and 4 by notice published in the Gazette, …".*

Schedule 2

- ***To consider expressly providing that LEAs would not resubmit an application on the basis of exactly the same information if such application has already been turned down by a panel judge. (raised at the meeting on 6 June 2006)***

125. As explained previously, we do not envisage that the LEAs will submit exactly the same application for authorization after it has been refused. However, after a previous application has been refused, they

may make a fresh application for entirely legitimate reasons, e.g., the circumstances may have changed or new information is available. Since the LEAs will have to provide information about their previous applications in making an application, the panel judge will take that into account. We will also make clear in the code of practice to be issued under the Bill that a refused application should not be re-submitted unless there are new circumstances or additional information.

- ***To provide examples of other legislation with reference to the term "in private" (clause 1(1) of Schedule 2). (raised at the meeting on 6 June 2006)***

126. The expression "in private" appears generally in the Laws of Hong Kong as the equivalent of "in camera". For example, it appears in Order 46 rule 5, Order 52 rule 6 of the Rules of High Court (Cap. 4 sub.leg.A), section 18 of the Labour Tribunal Ordinance (Cap. 25) and rule 4 of the Adoption Rules (Cap. 290 sub.leg.A). The expression is also used in reports issued by the Judiciary, such as Mr. Justice Nazareth, *Report of the Working Party on Civil Proceedings Conducted in Private* (Hong Kong Judiciary, 1997). We believe that it is sufficiently clear.

- ***To consider adopting a more direct drafting approach for clause 3(6) of Schedule 2. (raised at the meeting on 8 June 2006)***

127. Having reviewed the provisions, we prefer the present formulation for better consistency within the Bill.

- ***To consider whether parties other than LEAs should also be covered in clause 3(5) of Schedule 2 so that copies of the relevant documents could also be provided to them. (raised at the meeting on 8 June 2006)***

128. Under the regime proposed in the Bill, the documents to be kept by the panel judges are solely for purposes related to their functions as the authorizing authority. The sealed packets are not meant to be opened for other unrelated purposes. The arrangements provided for in the Bill already allow for a copy of the documents arising from authorizations to be kept by the respective LEAs so that any other party could approach them for the documents if necessary. We do not consider it necessary to amend clause 3(5) of the Schedule to provide that parties other than LEAs and (after CSAs separately proposed) the Commissioner should be provided with copies of the relevant documents.

- ***To consider moving clauses 1, 2 and 4 of schedule 2 to the main legislation. (raised at the meeting on 6 June 2006)***

129. The present drafting approach seeks to provide for procedures and ancillary matters in the Schedules. In view of the suggestion of Members, we have no objection to moving the substance of clause 4 to the main body of the Bill as they deal with the broader issues of the status and powers of the panel judges. On the other hand, we consider it more appropriate for clauses 1, 2 and 3 to remain in Schedule 2, because they concern administrative procedures.

130. The CSAs that we will move to effect the above changes for clause 6 are as follows –

> *"(3A) In performing any of his functions under this Ordinance, a panel judge –*
>
> *(a) is not regarded as a court or a member of a court; but*
>
> *(b) has the same powers, protection and immunities as a judge of the Court of First Instance has in relation to proceedings in that Court."*

- ***To explain the "powers, protection and immunities" of the panel judges as provided for in clause 4 of Schedule 2. (raised at the meeting on 6 June 2006)***

131. Clause 4 of Schedule 2 to the Bill provides that in performing any of his functions under the Bill, a panel judge would have the same powers, protection and immunities as a judge of the Court or First Instance has in relation to proceedings in that Court. A judge of the Court of First Instance has both statutory and common law powers. His statutory powers are those set out in the High Court Ordinance and the Rules of the High Court.

132. The protection and privilege of the judges and proceedings of the Court of First Instance are common law ones. Court of First Instance judges enjoy protection from all liability from all civil action for anything done or said by them in the course of performing their functions. That protection extends to analogous tribunals other than courts of law.[4]

133. Apart from moving the provision to the body of the Bill, we

[4] Halsbury's Laws Vol 1(1) paras 197-202

have also deleted the reference to "act judicially". As explained to Members, this reference is intended to clarify that a panel judge is not regarded as a court when he performs functions under the Bill. In view of the concern of some Members, we agree that this reference is not strictly necessary.

- ***To consider providing explicitly in the Bill that the Commissioner has the power to ask the panel judges to open sealed packets for the Commissioner's examination. (raised at the meeting on 8 June 2006)***
- ***To consider providing that the Commissioner, in addition to the panel judges, may open and seal the packets sealed under clause 3 of schedule 2. (raised at the meeting on 8 June 2006)***

134. Clause 57 of the Bill imposes a duty on the LEAs to keep a proper record in respect of specified matters, including matters relating to applications for the issue or renewal of prescribed authorizations or device retrieval warrants, and other matters provided for in the Bill. The purpose of this arrangement, inter alia, is to enable the Commissioner to obtain the necessary information in order to properly conduct his reviews on the LEAs' compliance with the Bill, and the requirements under the Code of Practice and any prescribed authorization. Given that copies of the documents and records relating to judge's authorizations kept by the LEAs would be certified by the panel judges under clause 3(2)(a) of Schedule 2, the authenticity of the documents kept by the LEAs should not be in doubt. More importantly, the LEAs will have to keep **other** documents and records to facilitate the Commissioner's performance of his duties. The need for the Commissioner to access the sealed packets kept by the panel judges should therefore be minimal. In the rare circumstances that the Commissioner finds it necessary to access the documents kept by the panel judges, the Commissioner may approach the panel judges for the documents. In view of Members' concern, we propose to include an express provision that a panel judge shall, upon request by the Commissioner, provide him with access to the documents kept by him. The corresponding CSA is as follows –

> *"Clause 51*
>
> *(1A) For the purpose of performing any of his functions under this Ordinance, the Commissioner may request a panel judge to provide him with access to any documents or records kept*

under section 3 of Schedule 2."

135. Correspondingly, the following should be appended to clause 3(3)(b) of Schedule 2 -

"(including those related to the compliance by him with any request made by the Commissioner under section 51(1A))."

- ***To explain the significance of a panel judge affixing his seal to a packet sealed by his order, and whether every panel judge has his own seal. (raised by the Assistant Legal Advisor in her letter of 24 April 2006)***

136. The two requirements of a panel judge to cause a copy of each of the documents or records to be certified by affixing his seal to it and signing on it (clause 3(2)(a) of Schedule 2), and cause the documents to be kept in a packet sealed by his order (clause 3(1) and 3(4)(b) of Schedule 2) is proposed in the Bill as an additional security safeguard.

Schedule 3

- ***To advise if Parts 1 and 2 of Schedule 3 already reflect the various conditions for authorization as provided for in clause 3. (raised at the meeting on 8 June 2006)***
- ***To consider requiring that the applying officer should confirm in the affidavit that the facts as presented therein are to the best of his knowledge correct. (raised at the meeting on 8 June 2006)***
- ***To consider requiring the applicant to provide information, if known, on previous applications to / refusals by panel judges in the affidavit. (raised at the meeting on 10 June 2006)***
- ***To consider stating which directorate officer has approved the application in the affidavit. (raised at the meeting on 10 June 2006)***
- ***To consider stating the grounds for reasonable suspicion in the affidavit. (raised at the meeting on 10 June 2006)***
- ***To consider requiring an assessment of the likelihood of any journalistic material being obtained in the affidavit. (raised at the meeting on 10 June 2006)***
- ***To consider the suggestions of the LRC for the types of information required to be included in the affidavit. (raised at the meeting on 10 June 2006)***

- ***To consider the following - (a) changing "if known" under Part 1(b)(ii) and (iii) to "to the best of the knowledge / information"; (b) changing "other persons" under item (vii) to "the person or other persons"; (c) under Part 1(c), including the position of the officer (besides his name and rank). (raised at the meeting on 10 June 2006)***
- ***To explain whether there is a duty to make full disclosure in applications to panel judges. (raised at the meeting on 10 June 2006)***
- ***To consider amending Part 4 (a)(iii) of Schedule 3 to ensure full disclosure, e.g. by substituting "value" with "assessment". (raised at the meeting on 13 June 2006)***
- ***To consider amending sub-clause (b)(iii) of Part 1 of Schedule 3 to tally with the wording of clause 29(1)(b)(ii) (i.e. "using or is likely to use"). (raised at the meeting on 19 June 2006)***

137. We have reviewed Parts 1, 2 and 3 of Schedule 3, and consider that they already reflect the various conditions for authorization as provided for in clause 3 as drafted.

138. We agree that there is a duty on the part of the applicant to disclose matters relevant to the factors that the panel judge should take into account when reaching his decision. It is our intention that the LEAs should indicate in an application all relevant previous applications and we agree to make this requirement explicit in Schedule 3. We propose to tie this with the minimum duration that the record of authorizations would have to be kept by the LEAs under the Bill (two years). We also have no problem with Members' suggestion to amend Part 4 (a)(iii) of Schedule 3 (regarding application for renewal) by substituting "value" with "assessment".

139. As regards journalistic material, we believe that an assessment of intrusion would necessarily take all factors into account. Nonetheless, we have no objection to providing expressly that there be an assessment of the likelihood of journalistic material being obtained.

140. Clause 3, to be amended as separately proposed, will expressly refer to reasonable suspicion already. There is no need to separately provide for this in Schedule 3 of the Bill. Similarly, we believe that the current formulations "if known" and "other persons" to be sufficiently clear, and do not propose amendments to them.

141. We have examined the information proposed in the LRC report on "Privacy : The Regulation of Covert Surveillance" published in March 2006 for inclusion in applications for covert surveillance. The items are broadly similar to those in Schedule 3.

142. Having regard to discussions at the Bills Committee, we will introduce CSAs to these parts of Schedule 3 to provide that the following additional information should be provided –

(a) information on previous applications made;

(b) the post of the officer making the application;

(c) an assessment of the likelihood of journalistic material being obtained; and

(d) the identity of the directorate officer having approved the making of the application for interception or Type 1 surveillance authorization.

143. The changes required to Part 1 of Schedule 3 to reflect the above proposal at paragraph 141(a) will be along the following lines –

"(x) if known, whether, during the preceding 2 years, there has been any application for the issue or renewal of a prescribed authorization in which the person referred to in subparagraph (ii) has been identified as the subject of the interception or covert surveillance concerned, and if so, particulars of such application;"

144. The changes required for Part 1 of Schedule 3 to reflect the above proposal at paragraph 141(b) and (d) will be along the following lines –

"(c) identify by name, rank and post the applicant and any officer of the department concerned approving the making of the application."

145. The changes required for Part 1 of Schedule 3 to reflect the above proposal at paragraph 141(c) will be along the following lines –

"(viii) the likelihood that any information which may be subject to legal professional privilege, or may be journalistic material, will be obtained by carrying out the

interception;"

Similar amendments will be made to relevant provisions in Schedules 3 and 4.

146. By making the affidavit/statement in support of the application for authorization, the applying officer is necessarily confirming that the facts as presented therein are to the best of his knowledge correct.

147. We will also amend Part 4 (a)(iii) of Schedule 3 along the following lines :

"(iii) an assessment of the value of the information so far obtained pursuant to the judge's authorization or executive authorization;"

- ***To illustrate, using past cases, the type of information in Schedule 3 to the Bill that would be provided to a panel judge when an application was made for judicial authorization of interception of communications or surveillance. (raised at the meeting on 25 April 2006)***
- ***To explain in detail, by way of mock-ups, the types of information to be provided in the affidavits. (raised at the meeting on 8 June 2006)***
- ***To provide a sample of application under the Bill. (raised at the meeting on 10 June 2006)***

148. Two examples of application under the Bill are provided at **Annex B**.

Security Bureau
June 2006

1988 WL 624537 (Privy Council), [1988] 1 W.L.R. 919, [1989] 1 HKLR 233, (1988) 85(31) L.S.G. 35, (1988) 132 S.J. 1118, [1988] HKLY 13, [1988] HKLY 532, [1989] HKLY 27, [1989] HKLY 597
(Cite as: [1988] 1 W.L.R. 919)

*919 Elvira Vergara and Another v. Attorney-General of Hong Kong

Privy Council
PC (HK)
Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Brightman, Lord Griffiths and Lord Ackner
1988 May 24, 25; June 27
[Appeal from the Court of Appeal of Hong Kong]

Hong Kong--Immigration--Foreign domestic helpers--"Limit of stay"--Permission to land or remain in Hong Kong until specified date or two weeks after termination of employment contract whichever earlier--Validity of condition limiting stay--Immigration Ordinance (Laws of Hong Kong, 1987 ed., c. 115), ss. 2(1), 11(2)(a)--Immigration Regulations (Laws of Hong Kong, 1980 rev., c. 115, s. 59), reg. 2(2), (5)

[FN1] [FN2]

FN1 Immigration Ordinance, s. 2(1): see post, p. 926E. S. 11(2)(a): see post, p. 922B.

FN2 Immigration Regulations, reg. 2(2) and (5): see post, p. 927E-F. Vergara v. A.-G. of Hong Kong (P.C.)

Foreign nationals were permitted to stay in Hong Kong for a limited period to work as foreign domestic helpers for a particular employer under an approved contract of employment. Permission was required for a change of employer. The two applicants were Philippine nationals working as foreign domestic helpers each having originally been granted permission to remain for a specific six-month period after which extensions of stay for further specified periods were granted. In March 1987 modification of immigration policy applicable to foreign domestic helpers was announced whereby those landing or applying for an extension of stay would be subject to a new condition limiting their stay to a particular period or two weeks after termination of their contracts, whichever was the shorter time. Thereafter when each applicant applied for an extension of stay an officer of the immigration department acting pursuant to section 11(2)(a) of the Immigration Ordinance stamped an endorsement on her passport stating that permission to remain was extended until a stated date or two weeks after termination of her contract, whichever was earlier. The applicants applied by notice of motion to the High Court of Hong Kong for judicial review seeking, inter alia, a declaration that the permission granted in so far as it included the condition limiting the stay to two weeks after termination of the employment contract if earlier than the specified date was ultra vires the powers given to the officer of the immigration department under the Immigration Ordinance. The judge dismissed the motion and the Court of Appeal upheld that decision.

On the applicants' appeal to the Judicial Committee:--

Held, dismissing the appeal, (1) that "limit of stay" in section 2(1) of the Immigration Ordinance was not restricted to a stay of a specific duration but, even if the subsection was ambiguous, the contemporaneous Immigration Regulations made it plain that section 11(2)(a) of the Immigration Ordinance empowered an immigration officer or immigration assistant, where permission was given to a person to land or remain in Hong Kong, to impose a condition of stay limiting the period by reference not only to a specified date but also to a contingent ***920** event or to the earlier of two events which were both bound to occur (post, pp. 926F-G, H, 927D-E).

Hanlon v. The Law Society [1981] A.C. 124, H.L.(E.) applied.

(2) That, although imposition of the condition limiting the stay of foreign domestic helpers to two weeks after termination of their contracts if earlier than the stated period otherwise permitted increased their vulnerability and on rare occasions the actual date on which a contract of employment terminated might be uncertain, the condition of stay was not so unreasonable as to be an abuse of power and thus ultra vires; and that, therefore, the limit of stay imposed on giving the applicants permission to remain was valid (post, pp. 929A, E-F, H-930A).

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223, C.A. considered.

Decision of the Court of Appeal of Hong Kong affirmed.

The following cases are referred to in the judgment of their Lordships:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374; [1984] 3 W.L.R. 1174; [1984] 3 All E.R. 935, H.L.(E.)

Hanlon v. The Law Society [1981] A.C. 124; [1980] 2 W.L.R. 756; [1980] 2 All E.R. 199, H.L.(E.)

The following additional cases were cited in argument:

Gunton v. Richmond-upon-Thames London Borough Council [1981] Ch. 448; [1980] 3 W.L.R. 714; [1980] 3 All E.R. 577, C.A.

Hall & Co. Ltd. v. Shoreham-by-Sea Urban District Council [1964] 1 W.L.R. 240; [1964] 1 All E.R. 1, C.A.

Jackson v. Hall [1980] A.C. 854; [1980] 2 W.L.R. 118; [1980] 1 All E.R. 177, H.L.(E.)

London Transport Executive v. Clarke [1981] I.C.R. 355, C.A.

Mixnam's Properties Ltd. v. Chertsey Urban District Council [1964] 1 Q.B. 214; [1963] 3 W.L.R. 38; [1963] 2 All E.R. 787, C.A.; [1965] A.C. 735; [1964] 2 W.L.R. 1210; [1964] 2 All E.R. 627, H.L.(E.)

Neill v. Glacier Metal Co. Ltd. [1965] 1 Q.B. 16; [1964] 2 W.L.R. 55; [1963] 3 All E.R. 477

Rigby v. Ferodo Ltd. [1988] I.C.R. 29, H.L.(E.)

APPEAL (No. 50 of 1987) with leave of the Court of Appeal of Hong Kong by the applicants, Elvira Vergara and Gwenn Arcilla, from the judgment of the Court of Appeal of Hong Kong (Roberts C.J., Silke V.-P. and Addison J.) given on 14 October 1987> dismissing an appeal by the applicants from the judgment of Jones J. in the High Court of Hong Kong on 17 August 1987, whereby he dismissed the applicant's notice of motion applying for judicial review.

The facts are stated in the judgment of their Lordships.

Representation

Anthony Scrivener Q.C. and Johnny Mok (of the Hong Kong Bar) for the applicants.

Michael Thomas Q.C. (of the English and Hong Kong Bars) and Bernard Whaley, Senior Crown Counsel, Hong Kong, for the Attorney-General.

Cur. adv. vult.

LORD ACKNER

27 June. The judgment of their Lordships was delivered by LORD ACKNER.

***921** The applicants are two Philippine nationals who came to work in Hong Kong as domestic workers. Foreign domestic helpers ("F.D.H.") constitute a special category of full-time live-in contract workers who are only admitted into Hong Kong for a limited period at a time, in order to work for a nominated employer under an approved contract of employment. Since the early 1970s there has been a greatly increased demand for F.D.H., their numbers having risen from a few thousand to the current figure of 38,000. Most of them are Philippine nationals, who have left the Philippines because of unemployment or low wages. Many of them are in great need of reasonable salaries, so that they can support their family or relatives at home through regular remittances.

Each of the applicants had separately been given permission to reside in Hong Kong following approved procedures which their Lordships will describe later. On 24 March 1987, when the applicants were lawfully in Hong Kong, modification of the immigration policy was announced, which applied to all F.D.H. who thereafter sought permission to land or remain in Hong Kong. It was implemented with effect from 21 April 1987.

Application for judicial review

On 10 July 1987, the first and second applicants, together with two other F.D.H., obtained leave from Jones J. to apply to the High Court for judicial review. At the beginning of the substantive hearing on 30 July 1987, leave was obtained to amend the relief sought which, in so far as it concerned the applicants, was:

> "1. A declaration that the first applicant was under no legal obligation to leave Hong Kong after 14 days from the termination of her employment with Mrs. Mirpuri and that she can lawfully remain in Hong Kong thereafter until 16 September 1987 ...
> "5. A declaration that the permission granted by an officer of the immigration department to the [second applicant] to remain in Hong Kong until 26 December 1987, in so far as it includes the condition 'or two weeks after termination of contract, whichever is earlier,' is ultra vires the powers given to the said officer under the Immigration Ordinance, c. 115.
> "6. A declaration that the [second applicant] was under no legal obligation to leave Hong Kong after 14 days from the termination of her employment with Madam Ng Man. Chi and that she can lawfully remain in Hong Kong thereafter until 26 December 1987."

This motion was dismissed by the judge, and his decision was upheld on appeal by the Court of Appeal of Hong Kong (Roberts C.J., Silke V.-P. and Addison J.) in judgments delivered on 14 October 1987. Leave to appeal to Her Majesty in Council was given by the Court of Appeal of Hong

Kong on 19 November 1987.

The relevant statutory provisions

These are to be found in the Immigration Ordinance (c. 115) as amended and the Immigration Regulations which are made thereunder. It is common ground that by virtue of section 7(1) the applicants were not lawfully able to land in Hong Kong without the permission of an immigration officer or assistant.

Section 11 is the principal section dealing with the grant of permission to land and the following subsections are of relevance to this appeal: ***922**

> "(1) An immigration officer or immigration assistant may, on the examination under section 4(1)(*a*) of a person who by virtue of section 7(1) may not land in Hong Kong without the permission of an immigration officer or immigration assistant, give such person permission to land in Hong Kong but an immigration officer only may refuse him such permission.
> (1A) An immigration officer or immigration assistant may, on the examination under section 4(1)(*b*) of a person who by virtue of section 7(2) may not remain in Hong Kong without the permission of an immigration officer or immigration assistant, give such person permission to remain in Hong Kong but an immigration officer only may refuse him such permission.
> (2) Where permission is given to a person to land or remain in Hong Kong, an immigration officer or immigration assistant may impose --
> (a) a limit of stay; and
> (b) such other conditions of stay as an immigration officer or immigration assistant thinks fit, being conditions of stay authorised by the Director, either generally or in a particular case.
> (3) Subject to subsection (9), the permission given to a person to land or remain in Hong Kong shall be deemed to be subject to the prescribed conditions of stay in addition to any conditions of stay imposed under subsection (2) ....
> (5A) An immigration officer may at any time by notice in writing to any person other than a person who enjoys the right of abode in Hong Kong, or has the right to land in Hong Kong by virtue of section 8(1) --
>
> (a) cancel any condition of stay in force in respect of such person;
> (b) vary any condition of stay (other than a limit of stay) in force in respect of such person if the condition as varied could properly be imposed by an immigration officer (other than the Director) under subsection (2)(b);
> (c) vary any limit of stay in force in respect of such person by enlarging the period during which such person may remain in Hong Kong.
> (6) The Governor may at any time vary any limit of stay in force in respect of any person by curtailing the period during which such person may remain in Hong Kong, and the Director shall in writing notify such person of any such variation.
> (7) The Governor may by order applying to all persons or to any class or description of persons, other than persons who enjoy the right of abode in Hong Kong, or have the right to land in Hong Kong by virtue of section 8(1) --
> (a) cancel or vary any condition of stay in force in respect of such persons;
> (b) impose any condition of stay (other than a limit of stay) in respect of such

> persons ....
> (9) The Director of Immigration may exempt any person or any class or description of persons from compliance with all or any of the prescribed conditions of stay.
> (10) Any permission given to a person to land or remain in Hong Kong shall, if in force on the day that person departs from Hong Kong, expire immediately after his departure."

Reference should also be made to two other sections of the Ordinance. Section 51 empowers the Governor to give directions to any public officer with respect to the exercise or performance by him of his functions, powers or duties under the Ordinance. It was under this section that the Governor acted when instructing the Director of Immigration to give effect to the new policy decided upon in March 1987 by the Governor in Council. Section 52 empowers the Director of Immigration, in his turn, to give directions to immigration officers and ***923** immigration assistants with respect to the exercise or performance by them of any of their powers, functions or duties under the Ordinance.

The policy of the immigration department at the time that the applicants were granted permission to enter

Before a F.D.H. can land in Hong Kong she must have entered into a contract of employment with her prospective employer. The contract and other relevant documents, which include a medical certificate and testimonials, are required to be submitted to the Immigration Department through the overseas British visa post in the country of the helper's domicile. If the documents are in order, the Immigration Department will authorise the overseas visa post to issue to the helper an employment visa which reads:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Until 21 April 1987, F.D.H. were normally admitted for the purpose of performing the approved contract of employment for an initial period of six months. Thereafter, extensions of stay were normally granted for further periods of six months provided that the contract of employment was still continuing. The endorsements on the passport would read:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

After a F.D.H. had ceased employment she was permitted to stay in Hong Kong until the end of the current six-month period of stay. The Immigration Department did not consider that, by virtue of the termination of the contract of employment, it was necessary to apply to the Governor for curtailment of stay under section 11(6) of the Ordinance. Unless there had been a breach of condition of stay, it was not the policy to seek a removal order under section 19. Applications to change an employer were normally approved where the contract was ***924** terminated during the second year of employment provided that all other conditions of stay had been satisfied. However, they would not normally be approved where the termination occurred during the first year of employment, although approval had been given in exceptional cases.

The new policy

Although in theory the policy outlined above should have given rise to no problems, in practice it proved defective and was publicly criticised. Some F.D.H. were deliberately breaking their contracts early in the six-month period in order to work in other part-time or full-time jobs until the period of

stay had expired, or in order to find another employer. This gave rise to complaints by the employer who had made all the arrangements to bring the F.D.H. to Hong Kong and had paid the travel expenses. It also gave rise to complaints by local people who wished to secure employment as part-time domestic helpers and who found themselves in competition with F.D.H. who had only been admitted to work full-time. Moreover it resulted in some cases in the employment of F.D.H. in jobs for which, under general policy, foreign nationals were not admitted, for example, bars and clubs.

Accordingly, on 24 March 1987, the Acting Governor, on the advice of the Executive Council, ordered that in future all F.D.H. landing in Hong Kong, or subsequently applying for extension of stay in Hong Kong, should ordinarily be subject to a new condition of stay to the effect that they would be allowed to remain in Hong Kong for the remainder of their current six-month limit of stay or *for two weeks after the termination of their contract, whichever is the shorter period.* The Director of Immigration was however at liberty to make provision to suit the particular circumstances of a particular case. Furthermore, a change of employer would not normally be allowed, either in the first or second year of the contract, save in exceptional circumstances.

Thereafter, whenever F.D.H. landed in Hong Kong in order to take up an approved contract of employment, a stamped endorsement was placed in their passport at the port of entry by an immigration officer or assistant in these terms:

> "EMPLOYMENT -- Permitted to remain until ...
> or two weeks after termination of contract, whichever is earlier. For
> employment with Mr./Mrs. ....
> D.H. Contract No ....
> CHANGE OF EMPLOYER IS NOT PERMITTED."

Whenever F.D.H. applied for and were granted extensions of stay during the subsistence of an approved contract of employment, a stamped endorsement was placed in their passport by an immigration officer or assistant at the offices of the Immigration Department in these terms:

> "EMPLOYMENT" -- Permission to remain extended until ...
> ... or two weeks after termination of
> contract, whichever is earlier.
> For employment with Mr./Mrs. ...
> D.H. Contract No ...
>
> CHANGE OF EMPLOYER IS NOT PERMITTED."

***925** In each case, the first blank was ordinarily filled by inserting a date six months after the expiration of the previous six-month period. The name of the employer and the contract number were also written in.

Immigration officers, in applying the new policy, did pay regard to the need to adapt it to meet exceptional or extenuating circumstances and F.D.H. have been granted extensions of stay beyond the two-week period following the termination of their employment. There have been cases where they have been permitted to change their employers without leaving Hong Kong, as indeed occurred in this case.

The circumstances of the applicants

1. *The first applicant.* She had first landed in Hong Kong on 16 March 1986. Subsequently her stay in Hong Kong had been extended. At the date when leave was given to bring proceedings for ju-

dicial review (10 July 1987), she was in Hong Kong with permission to remain in Hong Kong until 16 September 1987 for the purpose of employment with Mrs. Bina Mirpuri. This permission to remain for six months was granted on 12 March 1987 under the former policy and expired the day before the Court of Apeal began to hear the appeal.

She stated on oath that for some months previously she had in fact been working for the mother of her ostensible employer, that as a result of injury she had been advised by a doctor not to work, that this led to disputes with her employers, that she had complained to the labour department, and that on 29 June 1987 she had been forced to leave the premises where she was employed. She maintained that the contract had not been validly terminated and that she was owed wages. The Department of Immigration was unaware of these matters until after proceedings had been instituted.

Since these proceedings were instituted she has been permitted to remain in Hong Kong, to change her approved employment and to remain until 15 August 1988 or two weeks after termination of her contract, whichever is earlier.

2. *The second applicant.* She had first landed in Hong Kong on 16 August 1985. Subsequently her stay in Hong Kong had been twice extended. Following notification of termination of her employment she had been permitted to remain as a visitor for two months. She then left Hong Kong with a re-entry visa for employment purposes, and returned on 26 April 1987 to resume employment with Madam Ng Man. Chi. On landing she was given permission to stay for only two months because her passport was then due to expire. After she had produced a new passport, her stay in Hong Kong was further extended on 3 June 1987. At the date when leave was given to bring proceedings for judicial review, she was in Hong Kong with permission to remain until 26 December 1987 or two weeks after termination of her contract of employment with Madam Ng Man Chi, whichever was the earlier. This was granted on 3 June 1987 under the modified policy.

She stated on oath that on 15 June she was forced to leave her place of employment by her employer who claimed that she (Miss Arcilla) had been absent from work without permission and that the contract was terminated. Later, on 21 July 1987, after the commencement of these proceedings, she attended at the offices of the Department of Immigration seeking permission to change her employer. Subsequently she was permitted to remain in Hong Kong and to change her authorised ***926** employment and thereafter to remain until 2 May 1988 or two weeks after termination of her contract, whichever was earlier.

Relief now claimed

It is common ground that the new policy, which after due publicity came into effect on 21 April 1987, has thereafter operated to the exclusion of the original policy. Having regard to this fact, and the change in the applicants' circumstances since these proceedings were launched, the first and sixth of the declarations sought from Jones J. are now wholly academic. Accordingly it was common ground that their Lordships should only be concerned with the application for the fifth declaration, with the necessary alteration of the tense, having regard to the passage of time. The live issue which falls to be determined remains, namely whether the imposition of the condition now stamped ("the chop") on the passport on the grant or the extension of the permission "or two weeks after termination of contract, whichever is earlier" is ultra vires the powers given to the officer under section 11(2) of the Ordinance.

The applicants based their contention that the condition is ultra vires on two grounds. These are

(1) that on the true construction of the Ordinance, the officer has no power to impose such a condition. This submission was rejected by the Court of Appeal. (2) That the condition was Wednesbury unreasonable: Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223. This point was not taken either before Jones J. or the Court of Appeal.

1. Section 11(2) -- its true construction

Under this section, where permission is given to a person to land or remain in Hong Kong, an immigration officer or immigration assistant may impose a "limit of stay." The words "limit of stay" are defined in section 2(1) of the Ordinance as meaning "a condition of stay limiting the period during which a person may remain in Hong Kong." The applicants' contention is that this condition can only limit the period during which a person may remain in Hong Kong by specifying a specific date. In their Lordships' view this is too narrow an interpretation of the definition. A permitted period may not only be limited by reference to a stated date, but by reference to a contingent event or by reference to the earlier in time of two events, each of which is certain to happen. Such conditions "limit the period during which a person may remain" and there is nothing in the Ordinance which would suggest that such conditions are excluded from the definition. On the contrary having regard to the subject matter of the legislation, namely the control of immigration, it is to be expected that the power to impose conditions limiting the stay would be flexible rather than rigid, as the applicants' interpretation would suggest.

However, if the correct view is that the definition is ambiguous, then their Lordships are entitled, in ascertaining its true meaning, to have regard to the Immigration Regulations which came into force on 1 April 1972, contemporaneously with the Ordinance.

In expressing their readiness to use these regulations, if necessary, as an aid to construction of the Ordinance their Lordships are pleased to follow the decision of the House of Lords in Hanlon v. The Law Society [1981] A.C. 124. In his speech, which was concurred in by all the other ***927** members of the Appellate Committee, Lord Lowry said, at pp. 193-194:

> "A study of the cases and of the leading textbooks ... appears to me to warrant the formulation of the following propositions: (1) Subordinate legislation may be used in order to construe the parent Act, but only where power is given to amend the Act by regulations or where the meaning of the Act is ambiguous ... (3) Regulations which are consistent with a certain interpretation of the Act tend to confirm that interpretation. (4) Where the Act provides a framework built on by contemporaneously prepared regulations, the latter may be a reliable guide to the meaning of the former."

The power to make regulations is given to the Governor in Council inter alia for the purpose of "providing for any matter or thing which is to be or may be prescribed under this Ordinance:" see section 59(a) of the Immigration Ordinance. It will be recalled that section 11(3) provides that, subject to any exemptions that the Director of Immigration may grant, permission given to a person to land or remain in Hong Kong shall be deemed to be subject to the prescribed conditions of stay, in addition to any conditions of stay imposed under section 11(2). Regulation 2 of the Immigration Regulations provides for these mandatory conditions of stay. Thus regulation 2(4) makes specific provision, where permission is given to a person to land in Hong Hong for employment. Such permission "shall be subject to the condition of stay that he shall only take such employment or establish or join in such business as may be approved by the Director." Significantly regulations 2(2) and 2(5), in prescribing conditions of stay, limit the period of stay by reference respectively to a contingent event or two alternative periods.

Regulation 2(2) provides:

> "Permission given to a person to land in Hong Kong in transit shall be subject to the condition of stay that he shall not remain in Hong Kong after the departure of the ship on which he arrived in Hong Kong."

Regulation 2(5) provides:

> "Permission given to a person to land in Hong Kong as a contract seaman shall be subject to the condition of stay that he shall not remain in Hong Kong after the departure of a specified ship or later than 14 days after the date of landing, whichever is earlier."

It is not suggested on behalf of the applicants that these regulations are ultra vires and yet "condition of stay" is not used in the restricted sense for which they contend.

2. "Wednesbury unreasonableness"

To succeed under this heading, the applicants must establish that the decision to impose the new condition was

> "so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it:" *per* Lord Diplock in Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374, 410.

If the decision was so irrational or so perverse, it is surprising that this point was not taken either at first instance or in the Court of Appeal in ***928** Hong Kong. The basis of the attack is not that the abuse by F.D.H. of their permission to land or remain in Hong Kong, as described earlier, did not take place or did not necessitate greater regulation or control of the F.D.H. The Attorney-General's evidence of the urgent need for more effective restrictions was not challenged. Mr. Scrivener, on behalf of the applicants, based his submission essentially on two separate contentions which can conveniently be considered under the following headings.

Additional vulnerability

Mr. Scrivener contended that the new "chop" imposed a wholly unreasonable increase in the vulnerability of the F.D.H. In order to assess the strength of this submission it is important to contrast the vulnerability of these women under the new style approval with the old style approval. The gist of the judgments at first instance, and in the Court of Appeal, is that the first applicant had permission to remain in Hong Kong and that such permission was subject to an implied limit of stay, namely the period during which her contract of employment subsisted. Jones J. also held that the implied condition governed the original permission to enter. The suggestion that such a limit existed was contrary to the submission of the Attorney-General made before Jones J. Although counsel for the Attorney-General in the Court of Appeal adopted the judgment of Jones J., Mr. Michael Thomas, appearing before their Lordships, did not seek to argue for such an implication. He submitted that the express words of the chop "Employment -- Permission to remain until (six-month period)" did not suggest any such implication -- quite the contrary. Moreover no such limit was mentioned in the application form or the explanatory notes issued to the F.D.H. in the Philippines, and no such limit was ever enforced. In their Lordships' judgment, under the old style permission, if the F.D.H.'s employment ceased prior to the expiration of the stated limit of stay, the F.D.H. was entitled to remain in Hong Kong for the balance of the period. However by virtue of regulation 2(4) she was not entitled

to take any new employment unless and until it was approved by the Director. Since these women were encouraged to (see clause 5(*d*) of their contract of employment) and did remit part of their salary to their family or dependents in the Philippines, it was most unlikely, if their employment was terminated during the period of their stay, that they would financially be in a position to remain unemployed for the balance of the permitted stay. Accordingly, particularly as the date of the expiration of the six-month period approached, these women were in a vulnerable situation vis-a-vis a ruthless employer. Moreover, if the contract terminated after the initial six-month period had expired and her limit of stay had been enlarged for a second or subsequent period of six months, although the F.D.H. would be permitted to find a new employer, she would have to obtain a "release letter" from her former employer, confirming that he/she did not object to her change of employment. Indeed in the applicants' written case it was conceded that even under the old policy the F.D.H. were vulnerable to abuses on the part of their employers:

> "F.D.H.s in their isolation are always at risk of physical and even sexual abuses, and may be afraid to complain to the authorities because they cannot afford to lose their jobs or prejudice their prospect of future employment in Hong Kong."

***929** It is certainly true that the F.D.H.'s vulnerability, vis-a-vis her employer, was increased by the change of policy, because although the termination of her employment did not ipso facto render her continued residence in Hong Kong illegal, it provided her with a very limited period in which either to return to the Philippines or to explain her problems to the immigration authorities with a view to their approving her obtaining other employment. It has not been suggested that the period of 14 days in which to leave the Philippines was too short, or that the women were unaware of their entitlement to seek help from the immigration authorities, or that there was a lack of understanding or ability to assist by the immigration authorities, when they were thus contacted. Indeed the situation of these two applicants, as described above, establishes the sympathetic treatment which they in fact received. Their Lordships' attention was drawn by Mr. Scrivener to an undated letter written by the second applicant and received by the Director of Immigration on 17 June 1987, two days after she alleged she had been summarily dismissed by her employer. In the final paragraph of this letter she maintains a claim for one month's salary in lieu of notice, cost of her passage home and the travelling allowance as stipulated in her contract and seeks the assistance of the Director. This letter was in fact exhibited to the affirmation of Peggy Dee, acting principal immigration officer. She stated that the second applicant's employer had not by then notified the Immigration Department of the termination of the contract and that, before an officer of the Immigration Department had had the opportunity to investigate the case in order to discover the second applicant's intentions and circumstances in which the contract had been terminated, she had in fact made her application for judicial review. Miss Dee further stated that upon receipt of that letter the department was ready and willing to consider the circumstances of the second applicant's case, and indeed has since done so with the result described above.

Bearing in mind the clear and undisputed need to deal with the abuses by the F.D.H. described above, their Lordships are quite unable to accept that the new policy, because it involved this increase in the women's vulnerability, can be categorised as so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the problem would have made such a decision.

Uncertainty

The two-week period during which the F.D.H. must either pack up and leave Hong Kong, or alternatively enlist the assistance of the immigration authorities, as the two applicant's successfully did,

begins to run "after the termination of the contract." Mr. Scrivener submitted that it might on occasions be very difficult to establish when the contract terminated and therefore the girl would not know when she was at peril of committing a criminal offence: see section 41 which provides that any person who contravenes a condition of stay in force in respect of him shall be guilty of an offence and shall be liable on conviction to a fine of $5,000 and to imprisonment for two years. Their Lordships consider that there is an air of unreality about this contention. These contracts of employment, generally speaking, terminate by effluxion of time, as a result of a notice of termination being given, by mutual agreement or by the woman walking out of her employment or being shown the door. Of course, the principles of the law of contract concerning discharge by ***930** breach may permit of nice questions which have yet to be finally resolved as to the effect of unaccepted acts of wrongful repudiation involving the relationship of master and servant. While making due allowance for the existence of such cases, in practice they will arise extremely rarely. The uncertainty which they are capable of creating cannot have the effect of rendering the new policy so unreasonable as to amount to an abuse of power and therefore ultra vires. From a practical point of view the immigration authorities can reasonably be expected to deal sympathetically with such cases. Moreover the F.D.H., who finds herself in this rarefied realm of uncertainty, can take comfort from the knowledge that the burden will lie upon the prosecution, if the authorities are minded to prosecute, to establish beyond a reasonable doubt that she has remained for longer than two weeks in Kong Kong after "the termination of the contract."

For the reasons stated above their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

Representation

Solicitors: Philip Conway Thomas & Co.; Macfarlanes.

S. S.

END OF DOCUMENT

Annex B

AFFIDAVIT / AFFIRMATION
s. 8(1) Application for an Authorization

ICSO No. of

INTERCEPTION OF COMMUNICATIONS AND

SURVEILLANCE ORDINANCE

(Chapter XXX)

(Section 8(1))

APPLICATION FOR AN AUTHORIZATION FOR

~~INTERCEPTION~~ / TYPE 1 SURVEILLANCE*

~~AFFIDAVIT~~ / AFFIRMATION* OF AAA

I, *[AAA, Chief Inspector of Police]* of the Hong Kong Police Force, ~~make oath and say~~ / do solemnly and sincerely affirm* as follows :

2. I am an officer of the Hong Kong Police Force, namely a ***[Chief Inspector of Police]*** attached to the ***[Criminal Intelligence Bureau of the Hong Kong Police]***, and by virtue of such am eligible to apply for an authorization for Type 1 surveillance pursuant to the Interception of Communications and Surveillance Ordinance, Cap. XXX ("the Ordinance"). I ~~swear~~ / affirm* this ~~Affidavit~~ / Affirmation* in support of an application for an authorization pursuant to section 8(1) of the Ordinance. The making of this application has been approved by ***[Chief Superintendent of Criminal Intelligence Bureau]***, a directorate officer of the Hong Kong Police Force. The contents of this affidavit/affirmation are true to the best of my knowledge, information and belief in that the facts and matters deposed to in it are either within my personal knowledge or are based upon information supplied to me by colleagues who are involved in this investigation and which I verily believe to be true.

---

* Delete as appropriate.

The Purpose of the Application and the Investigation to Which it Relates

3. The purpose of this application for Type 1 surveillance is for preventing or detecting serious crime / ~~protecting public security~~*. By reason of the foregoing facts and other information, I have reasonable grounds to suspect that BBB as well as other office bearers of CCC are going to commit the offences of 'Attending a Meeting of a Triad Society' and 'Managing a Triad Society' contravening Section 20(2) and 19(2), Cap. 151 Society Ordinance with maximum penalty of 3 years and 15 years imprisonment respectively.

4. This application relates to ***[BBB 陳大文 HKIC No. 123456(7)]*** in respect of Ho Ho Restaurant at Flat A, 2/F., Chung King Mansion, 36-44 Nathan Road, Kowloon. This is the second application made under the Ordinance on ***[BBB],*** the last application was endorsed by Chief Superintendent of Criminal Intelligence Bureau on 2006-01-01 covering the period 2006-01-02 to 2006-03-31.

5. It is based on the following facts and grounds.

6. Information has been received that BBB is the Dragon Head of CCC Triad Society and he will hold a number of triad meetings with other top office bearers to discuss matters in relation to the upcoming election of his successor between 2006-06-01 and 2006-06-06. There is evidence to indicate CCC Triad Society has been very active in international drug trafficking and human smuggling activities.

The Form, Location and Duration of the Type 1 Surveillance

7. The form of Type 1 surveillance intended to be used is optical and listening devices to enable the identification of the subject triad members and the monitoring of their conversation inside private room of the restaurant believed to be the meeting place. According to intelligence, the meeting is going to take place between 1st June 2006 and 6th June 2006. I have considered that the purpose sought to be furthered cannot be achieved by other less intrusive means.

---

* Delete as appropriate.

The Benefits Likely to be Obtained by Carrying Out the Type 1 Surveillance

8. I believe that Type 1 surveillance is likely to provide identifications of all top office bearers who would attend the triad meeting and the details of their conversations relating to the upcoming election and their organized drug trafficking and human smuggling activities to assist in the investigation of the case in which BBB and his accomplices are involved.

The Impact of the Type 1 Surveillance on the Privacy of Persons Affected by it

9. The likelihood of the privacy of the subject and any other person or persons affected by Type 1 surveillance has been minimized to the extent necessary to obtain evidence and information in respect of the investigation. It is unlikely that the information obtained may be subject to legal professional privilege or involve any journalistic material.

The Availability of Less Intrusive Means to Further the Investigation

10. The type of conduct in which the suspects are engaged takes place in secret and normal less intrusive methods of investigation are unable to penetrate the wall of secrecy that the participants create in order to protect themselves from law enforcement investigation. The participants are very alert.

11. I therefore make this ~~Affidavit~~ / Affirmation* in support of my application for an authorization for Type 1 surveillance under section 8(1) of the Ordinance.

~~Sworn~~ / Affirmed* at the Court of First Instance)
Hong Kong SAR)
On the 27th day of May 2006)

Signed

[AAA , CIP Criminal Intelligence Bureau]

Hong Kong Police

* Delete as appropriate.

before me

_____

(Commissioner for Oaths)

JUDICIARY

AFFIDAVIT / AFFIRMATION
s. 8(1) Application for an Authorization

ICSO No. of

INTERCEPTION OF COMMUNICATIONS AND

SURVEILLANCE ORDINANCE

(Chapter XXX)

(Section 8(1))

APPLICATION FOR AN AUTHORIZATION FOR

INTERCEPTION / ~~TYPE 1 SURVEILLANCE~~*

~~AFFIDAVIT~~ / AFFIRMATION* OF AAA

I, *[AAA, Principal Investigator]* of the Independent Commission Against Corruption (ICAC), ~~make oath and say~~ / do solemnly and sincerely affirm* as follows:

2. I am an officer of the ICAC, namely a Principal Investigator of the ICAC, and by virtue of such am eligible to apply for an authorization for Interception pursuant to the Interception of Communications and Surveillance Ordinance, Cap. XXX ("the Ordinance"). I ~~swear~~ / affirm* this ~~Affidavit~~ / Affirmation* in support of an application for an authorization pursuant to section 8(1) of the Ordinance. The making of this application has been approved by *[Mr XXX]*, an Assistant Director of the Operations Department, a directorate officer of the ICAC. The contents of this ~~affidavit~~/affirmation are true to the best of my knowledge, information and belief in that the facts and matters deposed to in it are either within my

* Delete as appropriate.

personal knowledge or are based upon information supplied to me by colleagues who are involved in this investigation and which I verily believe to be true.

The Purpose of the Application and the Investigation to Which it Relates

3. The purpose of this application for Interception is for preventing or detecting serious crime / ~~protecting public security~~*, namely offences of accepting or offering an advantage suspected to have been committed by a senior executive of a listed company and financial analysts of two fund houses, contrary to section 9 of the Prevention of Bribery Ordinance (POBO).

4. It is based on the following facts and grounds.

5. The subject of the investigation is Mr X, Hong Kong Identity Card No. [ ], who is a senior executive of ABC Pty Ltd, a company listed on the Hong Kong Stock Exchange. The ICAC has information which provides a reasonable suspicion that Mr X is intending to bribe or has already offered to bribe two financial analysts of two fund houses based in Hong Kong as a reward for their writing favourable reports on the profitability of the stock of the listed company. Intelligence reveals that the amount of the bribes is in the region of several millions payable in cash and under the disguise of share options. Initial enquiries reveal that the listed company is contemplating raising funds through a share placement and in order to make the placement attractive to the market it is essential that the price of the stock remain above a certain level. The financial analysts, whose identities are not yet known, have agreed to cooperate in this share price manipulation fraud but wish to meet with the senior executive to discuss the scheme. There are strong reasons to believe that they will meet with each other in the next two weeks but the details of the place and time of their meeting are not known. This application for a prescribed authorization for interception is in respect of the communications of the senior executive of the listed company.

6. I am not aware of any previous application having been made in respect of the subject or any of the persons mentioned in this my application.

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* Delete as appropriate.

The Duration of the Interception and the Communications to be Intercepted

7. Interception is sought of the following communication services used by the senior executive:

(i) office phone number [ ] located at [ ] premises

(ii) mobile phone number [ ].

The criminal conduct of the participants must occur before the placement of the shares which is expected to occur on [ ]. The authorization is therefore sought for the period up to and one week beyond the date of the share placement.

The Benefits Likely to be Obtained by Carrying Out the Interception

8. It is likely that from the interception intelligence on the suspects' corrupt activities will be obtained. This should include the revelation of the identity of all those involved in the fraud, the details of the role of each participant and the payment to be received from the senior executive in return for their corrupt cooperation.

The Impact of the Interception on Persons Affected by it

9. The telephone line is solely used by the senior executive. The facility is known to be used by the subject for the conduct of his business but may also be used for personal matters. It is likely that apart from between the senior executive and the suspected financial analysts, other communications between the subject and his business contacts, whose identities are not known, may be intercepted.

10. I have no reason to believe that obtaining information subject to LPP through the covert operations is likely.

11. I have no reason to believe that obtaining journalistic material through the covert operations is likely.

The Availability of Less Intrusive Means to Further the Investigation

12. Initial enquiries have commenced and failed to produce further leads to establish when and where the senior executive is going to meet with the financial analysts and the

identities of those analysts. There is no other less intrusive means available to the investigator to further the purposes sought.

13. I therefore make this ~~Affidavit~~ / Affirmation* in support of my application for an authorization for Interception under section 8(1) of the Ordinance.

~~Sworn~~ / Affirmed* at the Court of First Instance)
Hong Kong SAR)
On the *[14th]*day of *[June] [2006]*)

Signed
[XXX], Principal Investigator
ICAC

before me

_____
(Commissioner for Oaths)
JUDICIARY

* Delete as appropriate.