

ITEM FOR ESTABLISHMENT SUBCOMMITTEE OF FINANCE COMMITTEE

NEW HEAD “SECRETARIAT, COMMISSIONER ON INTERCEPTION OF COMMUNICATIONS AND SURVEILLANCE”

HEAD 80 – JUDICIARY

Subhead 000 Operational expenses

Members are invited to recommend to Finance Committee –

(a) the creation of the following permanent posts –

(i) under Head 80 - Judiciary

2 Judge of the Court of First Instance of
the High Court

(JSPS 16) (\$190,100)

(ii) under new Head Secretariat, Commissioner
on Interception of Communications and
Surveillance

1 Principal Executive Officer

(D1) (\$92,650 - \$98,300);

(b) an increase in the ceiling placed on the total notional annual mid-point salary value of all non-directorate posts in the permanent establishment of Head 80 - Judiciary in 2006-07 from \$367,364,000 by \$1,237,920 to \$368,601,920 for creating three non-directorate posts; and

- (c) provision of establishment ceiling in 2006-07 expressed in terms of total notional annual mid-point salary value of \$5,287,260 to the new Secretariat, Commissioner on Interception of Communications and Surveillance for the creation of 16 non-directorate posts

upon the implementation of the new regime for the regulation of interception of communications and covert surveillance after the passage of the Interception of Communications and Surveillance Bill.

PROBLEM

The implementation of a new regime for the regulation of interception of communications and covert surveillance provided for under the Interception of Communications and Surveillance Bill (the Bill) after it comes into effect requires additional manpower in the Judiciary and establishment of an independent oversight authority including a secretariat.

PROPOSAL

2. We propose to –
 - (a) create two posts of Judge of the Court of First Instance (CFI) of the High Court in the Judiciary to cope with the impact of the additional responsibilities arising from the implementation of the new regime on the Judiciary;
 - (b) increase the ceiling of the total notional annual mid-point salary (NAMS) value of the Judiciary by \$1,237,920 for creating three non-directorate posts to provide administrative support for the handling of judicial authorization¹ under the new regime; and
 - (c) set up a Secretariat, Commissioner on Interception of Communications and Surveillance (the Commissioner) by creating –

/(i)

¹ At the Bills Committee scrutinising the Bill, the Administration has agreed to move Committee Stage Amendments to change the term “judicial authorization” to “judge’s authorization”. The term “judicial authorization” used in this paper should be interpreted accordingly.

- (i) one post of Principal Executive Officer (PEO) to head the Secretariat and to support the Commissioner; and
- (ii) 16 non-directorate posts involving a total NAMS value of \$5,287,260.

JUSTIFICATION

The Bill

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

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

Additional judicial resources required by the Judiciary

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

- (a) the actual time to be devoted by the appointed judges to other judicial duties;

/(b)

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

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

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

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

7. At this stage, it is not possible to forecast precisely the time that the duties of the Panel Judges would likely take. Nonetheless, taking into account the number of cases of interception of communications and covert surveillance in the last three months of 2005 (i.e. 178 and 28 cases of interception of communications and covert surveillance respectively) that would have required judicial authorization under the new regime, there is a need to provide two additional posts of the Judge of the CFI of the High Court to the Judiciary² to

/cover

2 The duty of a Judge of the CFI of the High Court is to exercise civil and criminal jurisdiction as conferred by law.

cover the impact of the work of judicial authorization as well as the Commissioner's work on judicial resources. The Judiciary considers this acceptable.

8. The above manpower requirement is worked out on the basis that the Commissioner would be a serving (instead of a retired) judge. The actual amount of judicial resources that the appointment would take up would depend on, inter alia, caseload. Our current assessment is that given the nature and estimated volume of work of the Commissioner as set out above, the duties would take up a substantial amount of the time of the judge. Once post of Judge of the CFI of the High Court is created and filled to cater for the appointment of a serving judge as Commissioner, it would not be possible to delete or freeze the post if subsequently a retired judge is appointed the Commissioner, given the security of tenure of serving judges. It is expected that, as and when this situation arises, the Judiciary would have the benefit of experience of the operation of the new regime, and would, having regard to the caseload of Panel Judges, make appropriate virement to the Secretariat to be established to pay for the remuneration for appointing a retired judge as the Commissioner.

Additional supporting staff required by the Judiciary

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

Staffing resources required by the Secretariat for the Commissioner

Directorate support

10. The heavy and sensitive duties of the Commissioner as set out in paragraph 6 above call for a strong team of supporting staff. In particular, much coordination work with the LEAs is anticipated to ensure the smooth functioning of the review and complaint handling systems, while strong analytical support is required to assist the Commissioner in assessing the compliance of LEAs in individual cases and making recommendations on the code of practice and arrangements of the LEAs on covert operations. Solid coordination support is also needed for the compilation of the annual reports to CE and other reports that the Commissioner may prepare from time to time in carrying out his functions under the Bill.

11. In the light of the above, we need an officer (the Secretary) with strong organisational skills at a sufficiently senior level to head the Secretariat. The Secretary will be the head of the Secretariat responsible for overseeing the day-to-day operation of the Secretariat. He/She will also be the Controlling Officer of the new Head of Expenditure to be created. In addition, the Secretary will need to assist the Commissioner in carrying out complex reviews and examinations as set out in paragraph 6 above. Much liaison with the LEAs and other parties concerned is envisaged in order to ensure the smooth operation of the review and complaint-handling systems. Moreover, given the sensitive nature of the materials involved and the important role played by the Commissioner as one of the key safeguards for the new regime proposed, the Secretary's work is expected to be complex and sensitive. Only a sufficiently senior and experienced officer could meet the requirements. We consider it necessary to rank the Secretary of the Secretariat at PEO level (D1). A job description of the proposed Secretary post is at Enclosure 2.

Encl. 2

Other supporting staff

12. Apart from the PEO post for heading the Secretariat proposed in paragraph 11 above, we need other supporting staff for the Secretariat. In particular, to build up expertise in examining cases involving different LEAs so that more effective and efficient review and complaint handling functions could be performed, we intend to set up two dedicated teams, each to be headed by one Senior Executive Officer and supported by two EOIs, plus clerical and logistical support for the Secretariat as a whole (including two COs, four Assistant Clerical Officers, one Senior Personal Secretary, one Personal Secretary II, one Chauffeur and one Office Assistant). A proposed organisation chart of the Secretariat of the Commissioner is at Enclosure 3.

Encl. 3

Timing for implementation

13. The Bills Committee is still scrutinising the Bill. We intend to put the new statutory regime in place as soon as possible once the Bill is passed. There is general consensus that the Administration should provide the Judiciary with sufficient resources to implement the new regime in order not to affect the current waiting time for other judicial services. Subject to Members' approval, the proposal in paragraph 2 above and other relevant arrangements will take effect upon the implementation of the new regime after the passage of the Bill.

/FINANCIAL

FINANCIAL IMPLICATIONS

14. The proposed creation of three directorate posts will bring about an additional NAMS value of \$5,706,600, broken down as follows –

	NAMS \$	No. of posts
Judge of the CFI of the High Court (JSPS 16)	4,562,400	2
PEO (D1)	1,144,200	1
Total	5,706,600	3

The additional full annual average staff cost, including salaries and staff on-cost, is \$9,468,000.

15. The proposed creation of the 19 non-directorate posts (three in the Judiciary and 16 in the Secretariat) will entail an additional NAMS value of \$6,525,180 and an additional full annual average staff cost of \$9,339,000.

16. We shall submit a paper to Finance Committee (FC) on 7 July 2006 to seek approval for the changes to the 2006-07 Estimates, including the creation of the new Head of Expenditure for the Secretariat and the supplementary provision for meeting the staffing proposals as detailed in this submission and other expenses of the Secretariat, if necessary.

17. In November 2005, the Administration reported to the Establishment Subcommittee (ESC) an overview of the directorate establishment position and informed Members of the planned creation and deletion of civil service directorate posts in the 2005-06 legislative sessions vide Information Note ECI(2005-06)6 on “Overall directorate establishment position”. As reflected in the information note, the Administration has proposed to the ESC/FC a net deletion of 71 permanent and 33 supernumerary directorate posts since January 2002. Since our current legislative proposals were only at a formative stage in late 2005, we could not have drawn up a definitive proposal on the staffing needs arising from the legislative proposals at that time. Hence, the current staffing proposals have not been included in the forecast of civil service directorate proposals attached to that paper.

/CONSULTATION

CONSULTATION WITH LEGISLATIVE COUNCIL PANEL

18. The LegCo Panels on Administration of Justice and Legal Services and Security were consulted on the proposal at a joint meeting held on 22 May 2006. Members generally had no objection to the proposal. However, there was concern as to whether the additional manpower proposed to be provided to the Judiciary would be sufficient to cater for the actual caseload after the regime came into operation. We assured Members that the situation would be closely monitored, and any additional resources required would be acquired in accordance with the normal procedures. Some Members were also concerned about the independence of the Secretariat, with a Member suggesting that the Secretariat should be filled by non-civil service staff. We explained that given the nature of the Secretariat's work and other factors, it was appropriate for it to be staffed by civil servants.

BACKGROUND

19. The Interception of Communications and Surveillance Bill was gazetted on 3 March 2006 and introduced into LegCo for first and second readings on 8 March 2006. It is being scrutinised by a Bills Committee.

ESTABLISHMENT CHANGES

20. The establishment changes in the Judiciary for the last two years are as follows –

Establishment (Note)	Number of posts		
	Existing (as at 1 April 2006)	As at 1 April 2005	As at 1 April 2004
A	175* [^]	175*	175*
B	147 [#]	147 [#]	168 [#]
C	1 267	1 312	1 404
Total	1 589	1 634	1 747

Note:

A – ranks in the directorate pay scale or equivalent

B – non-directorate ranks the maximum pay point of which is above MPS Point 33 or equivalent

C – non-directorate ranks the maximum pay point of which is at or below MPS Point 33 or equivalent

* including 170 Judges and Judicial Officer (JJO) posts

including 11 Special Magistrate posts

[^] As at 1 April 2006, there were 26 unfilled directorate posts

CIVIL SERVICE BUREAU COMMENTS

21. Noting the manpower implications of the new legislative regime on judicial resources and the need for dedicated support at the directorate level for the Commissioner upon the passage of the Bill and having regard to the reasons detailed in the paper, the Civil Service Bureau considers the proposal justified, and the grading and ranking of the proposed posts appropriate.

ADVICE OF THE STANDING COMMITTEES ON JUDICIAL AND DIRECTORATE SALARIES AND CONDITIONS OF SERVICE

22. The Standing Committee on Judicial Salaries and Conditions of Service and the Standing Committee on Directorate Salaries and Conditions of Service have advised respectively that the grading proposed for the two posts of Judge of the CFI of the High Court and the PEO post would be appropriate if the proposal were to be implemented.

Security Bureau
June 2006

Additional Judicial Resources : Considerations

Authorization

Under the Interception of Communications and Surveillance Bill (the Bill), the authority for authorizing (i) all interception of communications and (ii) the more intrusive covert surveillance operations would be vested in one of a Panel of Judges, consisting of three to six Judges of the Court of First Instance (CFI) of the High Court. Authorization should only be given where the tests of proportionality and necessity are met, taking into account the gravity and immediacy of the case and whether the purpose sought cannot reasonably be furthered by other less intrusive means. The Panel Judge would have to give careful consideration to the relevant factors as required under the Bill in determining whether to issue authorization for carrying out the operations.

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

- (a) The Panel Judge on duty would have to be available to deal with applications for judicial authorizations on an urgent basis when they arise. This means that long and heavy cases cannot be listed before him. Short cases would have to be listed with room for flexibility in his or her diary.
- (b) All CFI Judges have to act in rotation as duty judge for dealing with urgent CFI business, such as the granting of urgent injunctions. The duty judge carries a pager and must be available at any time, including outside normal working hours. The Panel Judges by rotation have to be on duty in a similar way for dealing with judicial authorizations. Thus the Panel Judges may have to be taken out of the roster for duty judge for CFI business. And if they are, this will impact on the workload of other CFI Judges.
- (c) A judicial authorization is obtained in the course of investigation by a law enforcement agency. Where eventually the case is brought to court, the Panel Judge concerned obviously would not be able to try the case in question. This is because the judge would have been involved in the investigation process and would have been privy to investigatory materials. Related cases may be brought and the Panel Judge concerned equally would not be able to try them. It is

/extremely

extremely likely that all Panel Judges will be excluded from any case which is brought as a result of investigations in the course of which a judicial authorization has been obtained. This is because Panel Judges would act in rotation. Where a judicial authorization with X as the target has been obtained from Judge A, it is extremely likely that Judges B and C when on duty would have dealt with (i) matters arising out of the initial authorization, such as, renewal, and/or (ii) judicial authorizations with Y and Z as target arising out of the same investigation.

- (d) Further to (c), to avoid any possible problems and to ensure that justice is seen to be done, all Panel Judges should be excluded from hearing cases where in the course of investigation a judicial authorization has been obtained.
- (e) The Panel Judges would have to conduct their own legal research and to keep pace with developments in other jurisdictions. Other jurisdictions would have adopted the same or similar tests as the tests in the proposed legislation.
- (f) The decisions of the Panel Judges may be subject to judicial review. The case will have to be heard by a bench of two CFI Judges in accordance with established practice. This is because it is unsatisfactory for a single CFI Judge to entertain an application for judicial review of a decision of another CFI Judge since they are both at the same level.

3. Further, it should be noted that there are substantial areas of work which must be done by substantive CFI Judges and not by Deputy Judges. These include murder and manslaughter trials, heavy criminal trials (including complex commercial crime), heavy civil cases, all judicial review cases, and sitting in the Court of Appeal.

Job Description

Post Title : Secretary, Secretariat, Commissioner on Interception of Communications and Surveillance

Rank : Principal Executive Officer (D1)

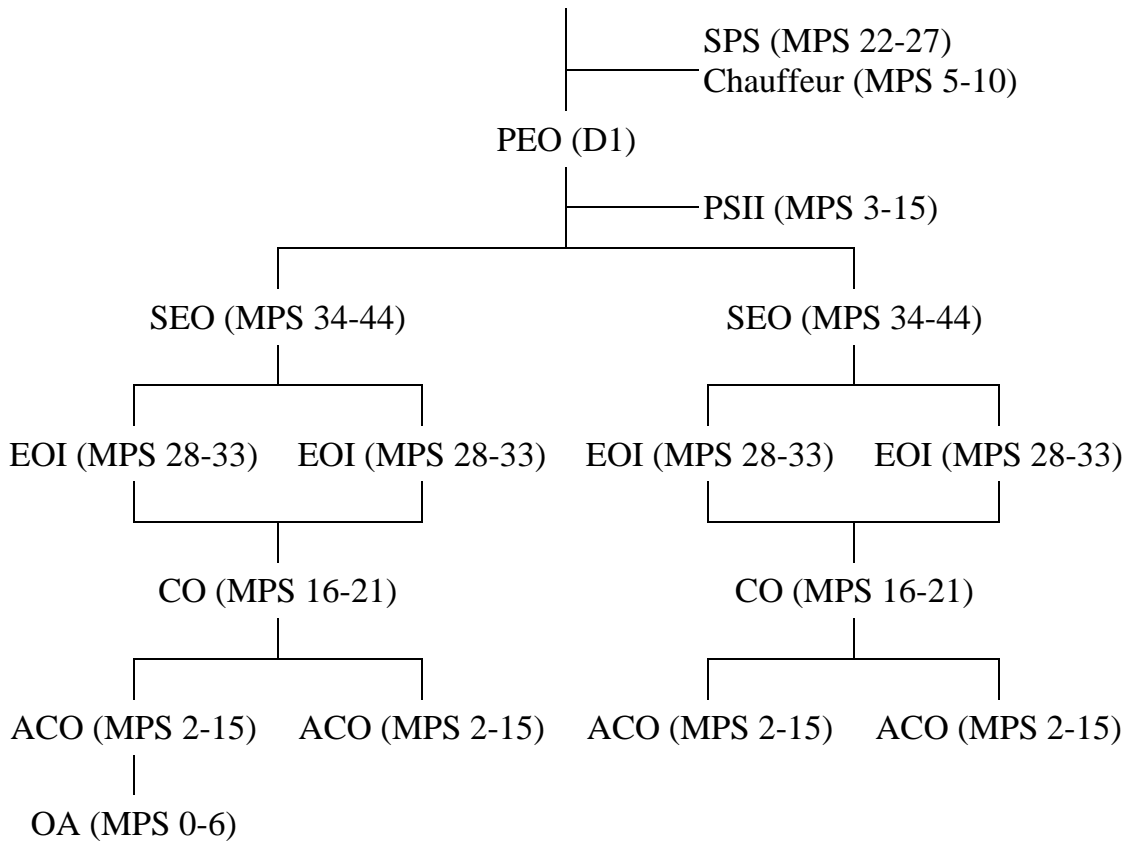
Responsible to : Commissioner on Interception of Communications and Surveillance

Main Duties and Responsibilities –

- (1) To supervise and scrutinise the overall work of the Secretariat in assisting the Commissioner in carrying out his review and examination functions – including conducting reviews and investigations, preparation of examination reports, notification of the complaints and compensation arrangements.
- (2) To liaise with the law enforcement departments and other parties concerned with the carrying out of the Commissioner's functions to ensure the smooth operation of the review and complaint-handling systems under the interception of communications and covert surveillance authorization regime.
- (3) To supervise the compilation of draft annual reports, other reports to the Chief Executive or Secretary for Justice, and recommendations to the departments, and the return of the departments in response to the recommendations.
- (4) To recommend to the Commissioner policies in relation to the functioning of the Secretariat, including reviews and examinations carried out by the Commissioner, and making recommendations on the Code of Practice and the arrangements of the law enforcement agencies, arising from, inter alia, irregularities identified or reported, or application for examinations.
- (5) To oversee the day-to-day operation of the Secretariat, including general management and personnel matters.
- (6) To act as Controlling Officer of the Head of Expenditure for the Secretariat; to answer queries from Legislative Council including Finance Committee and Security Panel regarding the Secretariat.

Proposed Organisation Chart of the Secretariat, Commissioner on Interception of Communications and Surveillance

Commissioner on Interception of Communications and Surveillance
(see Note 2)



- Note: (1) Figures in brackets indicate Government Directorate/Master Pay Scales
- (2) The Commissioner could be -
- (a) a serving or former Justice of Appeal of the Court of Appeal of the High Court;
 - (b) a serving or former Judge of the CFI of the High Court; or
 - (c) a former permanent Judge, Court of Final Appeal.

Legend

- PEO Principal Executive Officer
- SEO Senior Executive Officer
- EO I Executive Officer I
- SPS Senior Personal Secretary
- PSII Personal Secretary II
- CO Clerical Officer
- ACO Assistant Clerical Officer
- OA Office Assistant
