

立法會 *Legislative Council*

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2006年7月21日內務委員會會議文件

《截取通訊及監察條例草案》委員會報告

目的

本文件旨在匯報《截取通訊及監察條例草案》委員會的商議工作及結果。

背景

2. 與截取通訊有關的現有法例條文，分別載於《郵政署條例》(第98章)、《電訊條例》(第106章)及《截取通訊條例》(第532章)。《郵政署條例》第13條賦權政務司司長授權郵政署署長或任何或所有郵政署人員開啟和延遲處理指明郵包，或指明類別的郵包。《電訊條例》第33條賦權行政長官或獲其授權的任何公職人員，在行政長官認為為公眾利益起見而有此需要時，可命令截取或扣留或向政府披露任何訊息或任何類別的訊息。《截取通訊條例》在1997年6月獲得通過，但行政長官尚未指定其開始實施的日期。行政長官在2005年7月30日制定《執法(秘密監察程序)命令》(“行政命令”)，該命令旨在列明執法機關人員，或由他人代執法機關人員進行秘密監察時所須依循的法律程序。

3. 在2006年2月9日就古思堯及梁國雄訴香港特別行政區行政長官一案作出的判決中，原訟法庭裁定，《電訊條例》第33條在授權或容許取用或披露任何電訊訊息的內容的範圍內，屬於抵觸《基本法》第三十及三十九條，而且有違《香港人權法案》第十四條。原訟法庭並作出命令，在考慮到上述判決會造成法律真空的情況下，《電訊條例》第33條及行政命令繼續有效及具備法律效力，為期6個月。

4. 終審法院在2006年7月12日就梁國雄及古思堯訴香港特別行政區行政長官一案作出判決，並作出一項命令，宣告原訟法庭作出的臨時有效命令作廢，並以之取代有關違憲宣告暫緩生效的安排，藉以使有關宣告延遲實施，由原訟法庭於2006年2月9日作出判決當日起計延遲實施6個月。終審法院述明，“政府在上述有關宣告延遲實施的期間內，可依據已被宣告違憲的規條行事，而不違反任何實施中的宣告。然而，儘管有此延遲實施安排，政府並不能就其依據已被宣告違憲的規條行事而獲得可免為此承擔任何法律責任的保障”。

條例草案

5. 條例草案旨在透過訂明授權，藉着根據條例草案設立的截取通訊及監察事務專員(“專員”)所作的監察，以及有關的執法機關的內部定期檢討，對截取通訊行為及使用監察器材作出規管。

6. 條例草案亦建議廢除《截取通訊條例》和現行的《郵政署條例》第13條，以及修訂《電訊條例》第33條。

法案委員會

7. 在2006年3月10日內務委員會會議上，議員成立法案委員會研究此條例草案。法案委員會的委員名單載於**附錄I**。

8. 法案委員會由劉健儀議員擔任主席，曾先後與政府當局舉行了46次會議(共60個每節兩小時的會議時段)。法案委員會亦曾與10個團體及個別人士會晤，並接獲個人資料私隱專員(“私隱專員”)提交的多份意見書。有關團體及個別人士的名單載於**附錄II**。此外，法案委員會曾聽取政府當局就截取通訊、監察器材及警方的情報管理系統所作出的簡介。

法案委員會的商議工作

曾討論的主要事項

9. 法案委員會的商議工作及結果載述於本報告中有關下述事項的各個段落——

<u>事項</u>	<u>段落</u>
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條例草案的詳題

10. 條例草案的詳題訂明，條例草案旨在規管由公職人員或由他人代公職人員進行的截取通訊行為，以及規管公職人員使用或他人代公職人員使用監察器材，並就相關事宜訂定條文。部分委員認為，應在詳題訂明條例草案旨在保障《基本法》第三十條賦予香港居民的通訊自由和通訊秘密的權利。

11. 政府當局回應時表示，條例草案並非唯一可能與《基本法》第三十條相關的法例，尤其是條例草案僅旨在就公職人員的行為作出規管。因此，政府當局認為該詳題以其現有草擬方式，已能準確反映條例草案的目的，故此並無需要加入有關第三十條的提述。

秘密監察的定義

12. 根據條例草案，秘密監察 ——

“(a) 指為任何特定調查或行動的目的而使用任何監察器材進行的、符合以下說明的任何有系統監察 ——

(i) 該等監察是在屬其目標人物的任何人有權對享有私隱有合理期望的情況下進行的；

(ii) 該等監察的進行方式，是旨在確保該人不察覺該等監察正在或可能正在進行；及

(iii) 該等監察相當可能導致取得關於該人的任何隱私資料；但

(b) 在任何該等有系統監察構成本條例所指的截取的範圍內，不包括該等有系統監察。”

13. 條例草案第2(2)條規定，在公眾地方進行任何活動的人，不得就該活動而視為屬秘密監察的定義所指的有權對享有私隱有合理期望。

14. 委員詢問為何在上述定義中加入“有系統”一詞。部分委員詢問秘密監察的範圍是否包括執法機關進行的臥底行動。此等委員關注到有任何無系統或未經計劃的監察行動未為條例草案涵蓋。他們並認為，沒有使用監察器材的臥底行動可以是高度侵擾性的行動，應該受到規管。

15. 部分其他委員問及“對享有私隱有合理期望”的定義及驗證準則。此等委員關注到，條例草案第2(2)條的意思似乎是，對於任何在街上使用流動電話與他人交談或在餐廳內與友人傾談的人，執法人員可無需任何授權而作出秘密監察及進行錄音。

16. 政府當局解釋，加入“有系統”一詞是為了豁除因應運作情況而作出的即時反應，或屬於執法人員例行工作(如巡邏公眾地方)一部分的粗略檢查。為釋除委員的疑慮，政府當局同意刪除秘密監察定義中“有系統”一詞，並對該定義(b)段作出修正，使秘密監察並不包括對沒有預見的事件或情況作出的當場反應，以及任何構成條例草案制定成為法例後所指的截取的該類監察。政府當局亦同意就條例草案第2(2)條提出委員會審議階段修正案，澄清該款不會影響某人就他在公眾地方所說的說話或所寫或所讀的字句而享有的權利。

17. 關於沒有使用監察器材的臥底行動，政府當局解釋，條例草案只涵蓋使用器材進行的秘密監察行動。將有關法例局限於規管使用器材的行動，是普通法司法管轄區的普遍做法。澳洲及美國並無規定

須就臥底行動取得法定授權，而在香港進行的此類行動，則須受執法機關的相關內部指引所規管。

18. 政府當局進一步解釋，若受到監察的活動是在公眾可進入的地方進行，不使用器材的監察應不會引起任何有關私隱的問題。當活動是在私人處所進行時，執法機關若在沒有合法授權的情況下進入處所，將須就普通法中擅闖他人處所的行為，以及他們可能在該處所作出的任何非法行為承擔法律責任。

19. 吳靄儀議員會就截取作為的定義提出委員會審議階段修正案，規定執法機關的臥底人員須受條例草案規限。吳靄儀議員亦會提出委員會審議階段修正案，刪除在秘密監察的定義中有關“對享有私隱有合理期望”的提述。

20. 涂謹申議員會就秘密監察的定義提出委員會審議階段修正案，規定執法機關的臥底人員，或根據執法機關的指示行事或由執法機關控制的任何人士，須受條例草案規限。

秘密監察的兩級授權機制

21. 條例草案建議就秘密監察訂定兩級授權機制。第2類監察指由參與相關活動的一方使用監察器材進行的任何秘密監察，或使用視光監察器材或追蹤器材進行的任何秘密監察，而有關器材的使用並不涉及 ——

(a) 未經准許而進入任何處所；或

(b) 未經准許而干擾任何運輸工具或物體的內部。

第2類監察由有關的執法機關的首長所指明，而職級不低於等同高級警司職級的人員授權進行(請參閱下文第97段)。

22. 根據條例草案的規定，第1類監察指不屬第2類監察的任何秘密監察。授權進行第1類監察的權力，將由一名小組法官行使(請參閱下文第63段)。

23. 政府當局解釋，秘密監察行動屬第1類(即“侵擾程度較高”)還是第2類(即“侵擾程度較低”)行動，主要視乎監察行動是否由參與相關通訊的一方進行。一般而言，涉及使用器材的行動會被視為侵擾程度較高。另一方面，若在器材使用方面涉及參與相關通訊的一方(例如臥底人員)，有關行動則被視為侵擾程度較低，因為參與有關通訊的其他人士均知道該名人士在場，而且該名人士本來便可以在事後把談話內容告知他人。

24. 委員詢問如涉及多於一類監察器材或行動，有關方面將會申請授權進行第1類還是第2類監察。部分委員認為，以浴室或更衣室作為監察目標的視光監察，或可被帶進私人處所的追蹤器材，應豁除於

第2類監察的涵蓋範圍以外。部分委員認為，任何涉及使用監察器材的監察活動均應屬於第1類監察，因而須由小組法官作出授權。

25. 政府當局回應時表示，需要就某項特定的行動申請何種級別的授權，將視乎有關情況而定。若該項行動同時涉及第1類及第2類監察，將須向小組法官申請作出授權。為確保此點清楚無疑，政府當局同意加入新訂條文，明確訂明有關的政策目的。

26. 政府當局並表示，若視光監察器材的使用涉及未經准許而進入處所或未經准許而干擾任何物體的內部，該項監察即屬第1類監察。在處所外使用視光器材，對處所內的人的私隱造成影響的程度，應該輕微得多，而當處所內的人甚至期望享有更多私隱時，他們可以為此採取進一步措施，而且付諸實行，例如在使用浴室或更衣室時關上門窗。為釋除此方面的疑慮，政府當局同意在實務守則中訂明，若所策劃的行動涉及敏感的處所或情況，須要加倍小心行事。

27. 吳靄儀議員會提出委員會審議階段修正案，藉以作出下述規定：第1類監察指使用任何監察器材或追蹤器材進行的任何秘密監察；或涉及未經准許而進入任何處所，或未經准許而干擾任何運輸工具或物體的內部的任何秘密監察。第2類監察指不屬第1類監察的任何秘密監察。

監察器材

28. 部分委員建議在條例草案中豁除涉及植入人體或吞入人體內的監察器材。此等委員同時關注到監察器材對目標人物的健康所構成的不良影響。涂謹申議員建議監察器材的安全，須經衛生署或其他司法管轄區衛生當局核證。

29. 政府當局回應時表示，未經有關人士同意或未有明示的法定授權而把器材植入人體，屬於違法。根據條例草案作出的授權不會構成授權進行上述行動的足夠權限。無論如何，執法機關不會以此種方式使用監察器材。建議的豁除規定並無必要。然而，鑒於部分委員對此感到關注，政府當局同意提出委員會審議階段修正案，藉以清楚無疑地規定，訂明授權並不授權在沒有某人的同意下，將任何器材植入或置入該人體內。

30. 關於使用有損健康的監察器材，政府當局解釋其並不知悉有任何採用現今科技的監察器材會有損健康，而政府當局的政策是不使用任何已知會損害健康的器材。執法機關在採購新監察器材時的一貫做法是小心行事，以確保有關器材無論對監察行動目標人物或執法人員，都不會構成有害健康的影響。政府當局會在保安局局長根據條例草案第59條發出的實務守則中，提醒執法機關在首次使用某種監察器材之前，須先行評估該器材對健康可能造成的影響。

31. 委員詢問就進行監察作出的授權，是否涵蓋授權在香港境外使用監察器材，以及授權在香港境內對身處香港境外的目標人物使用該等器材。

32. 政府當局解釋，執法機關的管轄權只涵蓋香港，而條例草案並未把執法機關的管轄範圍擴大。若把監察器材攜帶出香港境外，執法機關將視乎情況而可能在香港接收得到有關器材所發出的訊號。正如執法機關可在香港對香港境外使用漫游服務的流動電話所接收或撥出的通話進行截取，香港的執法機關同樣可以合法接收上述器材發出的訊號。

郵件截取的定義

33. 根據條例草案，“郵件截取”指截取任何藉郵政服務傳送的通訊。委員詢問郵件截取是否涵蓋為了就內容進行科學鑒證的目的而開啟郵遞品、取得寄件人的姓名及地址、在不閱讀有關內容的情況下更改郵包的內容，或在郵包置入外來的內容。

34. 政府當局解釋，在條例草案中，截取郵遞通訊獲賦予廣泛的涵義，包括檢查郵件通訊及郵包內的其他物品。因此，秘密套取指紋或查證寄件人的身份或地址，亦屬郵件截取定義的範圍內。另一方面，郵件截取本身並不包括更換通訊的內容或在郵包加入外來的內容。鑒於部分委員對此感到關注，保安局局長承諾在條例草案恢復二讀辯論時，在其發言中說明此點。

發出訂明授權、將訂明授權續期或訂明授權持續有效的先決條件

條例草案所提出的建議

35. 條例草案第3條規定，只有在為了防止或偵測嚴重罪行或保障公共安全的目的，才可授權進行截取通訊及秘密監察。除了上述特定的目的外，只有在符合有關相稱性的驗證準則時才可作出授權，並須考慮有關個案的逼切及嚴重程度，以及謀求達到的目的能否合理地藉其他侵擾程度較低的手段達到。

公共安全的定義

36. 部分委員質疑“公共安全”一詞是否包括國家安全，以及是否限於香港的安全。他們關注到，在未有訂定公共安全的定義的情況下，該詞可能會被用作達致政治目的，或用以壓制發表意見的自由或和平集會的權利。他們亦關注到當局會否就《基本法》第二十三條所禁止的行為進行截取通訊或秘密監察。第二十三條訂明，香港特別行政區（“香港特區”）應自行立法禁止任何叛國、分裂國家、煽動叛亂、顛覆中央人民政府及竊取國家機密的行為，禁止外國的政治性組織或團體在香港特區進行政治活動，禁止香港特區的政治性組織或團體與外國的政治性組織或團體建立聯繫。此等委員指出，澳洲、加拿大和新西蘭

的類似法例均有就“安全”一詞作出界定。他們要求政府當局考慮訂定“公共安全”一詞的定義。

37. 政府當局回應時表示，英國及美國的相關法例並沒有就安全或國家安全等用詞作出界定。儘管澳洲、加拿大和新西蘭均有就“安全”一詞作出界定，但有關的定義傾向作出廣義的界定。在香港，法律改革委員會（“法改會”）於1996年發表的有關規管截取通訊活動的報告書、在1997年6月制定的《截取通訊條例》，以及法改會於2006年發表的有關規管秘密監察的報告書，均沒有就“公共安全”一詞作出界定。條例草案是依循該做法。

38. 政府當局進一步解釋，公共安全不能局限於對香港帶來直接威脅的事宜。作為國際社會負責任的一員，香港有責任協助監察對其他司法管轄區構成的威脅，例如針對另一城市的炸彈襲擊。如香港協助其他地方解除對安全構成的威脅，在香港受到威脅時將有較大可能會獲得他們提供的協助。政府當局向委員保證，對於《基本法》第二十三條所禁止而當局尚未進行立法的行為，當局不會進行截取通訊或秘密監察。政府當局並向委員保證，當局不會利用公共安全作為理由以達致政治目的，亦不會將之用以壓制發表意見的自由或和平集會的權利，而條例草案與《基本法》第二十三條禁止的行為並無關係。保安局局長承諾在條例草案恢復二讀辯論時，在其發言中申明該項保證。

39. 經考慮委員的意見後，政府當局同意提出委員會審議階段修正案，把公共安全界定為香港的公共安全，並明文規定除非倡議、抗議或表達異見（不論是為達到某政治或社會目的或並非為該等目的）相當可能是藉暴力手段進行的，否則該等作為本身不得視為對公共安全的威脅。政府當局亦會動議委員會審議階段修正案，規定執法機關在尋求就截取或秘密監察發出訂明授權的申請中，加入對該威脅於香港、香港居民或在香港的其他人的安全方面的直接及間接影響所作的評估。

40. 部分委員對上一段所述委員會審議階段修正案中有關“相當可能”的準則表示關注。政府當局認為這是一項恰當的驗證準則。政府當局解釋在該等倡議、抗議等進行之前，未必可能確定有關行動會否藉暴力手段進行，因此只能就其可能性作出評估。

41. 吳靄儀議員會提出委員會審議階段修正案，把公共安全界定為“香港免於對生命構成明確及逼切威脅的恐怖主義行為，或即時危及公眾安全的行為的公共安全”。此外，就條例草案而言，任何人如行使其根據《基本法》，或根據適用於香港特區的國際條約、公約或文書或根據普通法而享有的任何權利，不應視為對公共安全的威脅。

42. 涂謹申議員會提出委員會審議階段修正案，規定公共安全指香港的公共安全，但並不包括經濟上的安全。涂議員亦會提出委員會審議階段修正案，訂明除非結社、集結、罷工、對抗、倡議、抗議或表達異見是意圖藉暴力手段進行，否則該等作為本身並不視為對公共安全的威脅。此外，就《基本法》第二十三條所訂明的任何行為而言，

除非是意圖藉暴力手段進行，否則該等行為本身並不視為對公共安全的威脅。

嚴重罪行的定義

43. 根據條例草案，“嚴重罪行”——

- (a) 就發出對截取的訂明授權、將對截取的訂明授權續期或對截取的訂明授權持續有效而言，指可判處的最高刑罰是或包括監禁不少於7年的任何罪行；或
- (b) 就發出對秘密監察的訂明授權、將對秘密監察的訂明授權續期或對秘密監察的訂明授權持續有效而言，指可判處的最高刑罰是或包括監禁不少於3年；或罰款不少於\$1,000,000的任何罪行。

44. 部分委員指出，條例草案所訂有關嚴重罪行的範圍過於廣泛。就截取通訊而言，可判處監禁超過7年的罪行實際上包括了所有可公訴罪行。就秘密監察而言，可判處監禁3年的罪行將會包括所有可公訴罪行及不少循簡易程序定罪的罪行。舉例而言，搶劫罪可被判處的最高刑罰為終身監禁。盜竊、以欺騙手段取得財產及偽造帳目罪行，則可被判處監禁10年。《公安條例》(第245章)所訂與組織未經批准集結及非法集結有關的罪行，一經循公訴程序或簡易程序定罪，可被判處的最高刑罰為監禁3年。此等委員認為條例草案應只涵蓋最嚴重的罪行。他們並認為對於若干高度侵擾的秘密監察，例如使用竊聽儀器收聽對話，應一如截取通訊般訂定較高的準則。

45. 政府當局回應時表示，以罪行的最高刑罰作為決定該罪行嚴重程度的準則，實與法改會1996年報告書、1997年發表的白紙條例草案及《截取通訊條例》採取的做法相若。由於截取被視為高度侵擾的調查手法，因此有必要訂立較高的準則。另一方面，秘密監察行動所涉範圍廣泛，侵擾程度各有不同。由於監察行動在所涉地點、時間及活動方面一般可較為具體，因此其侵擾程度較低。就可使用此種調查手法的罪行訂定較低準則，是合理的做法。

46. 政府當局進一步解釋，有關嚴重罪行的準則只屬初步的篩選。在此方面還需要符合條例草案第3條所列明的其他驗證準則，包括最重要的有關相稱性的準則，而此項準則進而與所須防止或偵測的嚴重罪行的嚴重及逼切程度有關。政府當局認為，就進行初步篩選的目的而言，參考罪行的最高刑罰水平是恰當的做法。

47. 政府當局並告知委員，澳洲就進行電訊截取訂定的準則，是可判處監禁最少7年的罪行。至於監察方面，相關罪行包括可判處監禁3年或以上的罪行、其他數項特定罪行，以及相關規例所訂明的罪行。英國就進行截取及具侵擾性的監察行動所訂定的準則是 ——

- (a) 已達21歲而過往並無犯罪紀錄的人士合理地預期會被判處監禁3年或以上的罪行；或
- (b) 涉及使用暴力、導致重大財務得益或由數目龐大而具有共同目的的人一同進行的罪行。

至於侵擾程度較低的秘密監察形式，則並無訂定準則。

48. 吳靄儀議員會提出委員會審議階段修正案，訂明嚴重罪行指可判處的最高刑罰是監禁不少於7年的任何罪行。

49. 涂謹申議員會提出委員會審議階段修正案，規定就發出對秘密監察的訂明授權、將對秘密監察的訂明授權續期或對秘密監察的訂明授權持續有效而言，嚴重罪行指可判處的最高刑罰是監禁不少於7年的任何罪行。

有關合理懷疑的驗證準則

50. 部分委員認為，發出訂明授權或將訂明授權續期或訂明授權持續有效的先決條件之一，是有合理理由懷疑有任何人曾涉及、正涉及或相當可能涉及特定嚴重罪行，或構成或會構成對公共安全的威脅的任何活動。政府當局同意提出有關的委員會審議階段修正案。

有關必要性的驗證準則

51. 應委員的建議，政府當局同意在條例草案中明文列出除了有關相稱性的驗證準則外，在發出授權前必須符合有關必要性的驗證準則。政府當局將會動議有關的委員會審議階段修正案。

其他須考慮的事項

52. 部分委員關注到有關相稱性的驗證準則限制過大。他們建議授權當局須充分考慮截取或秘密監察行動對人權的影響，並提議在條例草案加入有關《基本法》(特別是關於居民的基本權利和義務的第三章)的明文提述。

53. 因應委員提出的關注，政府當局將會提出委員會審議階段修正案，訂明授權當局亦須考慮在有關情況下屬相關的其他事宜。政府當局解釋擬議條文是以廣義方式擬訂，讓授權當局可考慮所有與個案有關的事宜。這並不排除在適當情況下就《基本法》有關條文作出考慮。小組法官在考慮申請時將知悉有必要顧及《基本法》有關條文。政府當局會在實務守則中指明執法人員須顧及《基本法》的規定。政府當局認為並無需要在條例草案中作出有關《基本法》的明文提述。

54. 部分委員建議應在條例草案中訂明，就涉及新聞材料的截取或秘密監察行動授權申請作出考慮時，須符合有關公眾利益的驗證準則。

55. 政府當局回應時表示，涉及相稱性的驗證準則已涵蓋所有基本權利及自由，並已規定有關當局研究擬議行動會否造成任何不相稱的效果時，充分顧及受影響人士的此等權利及自由。相應而言，小組法官會考慮新聞自由的重要性。政府當局會在實務守則中加入有關此事的備忘，供執法機關參考。如執法機關謀求進行的截取或秘密監察能符合條例草案第3條所訂的所有先決條件，則有關行動亦必然符合公眾利益。政府當局認為並無需要特別納入有關公眾利益的驗證準則。

56. 吳靄儀議員會提出委員會審議階段修正案，規定《基本法》第三十條所保障的通訊自由和通訊秘密的權利，是授權當局所須考慮的相關因素。《基本法》及《公民權利和政治權利國際公約》所保障的權利及自由，亦是相關的考慮因素。涂謹申議員會提出類似的委員會審議階段修正案。

委員提出的其他修正案

57. 吳靄儀議員會提出委員會審議階段修正案，訂明發出訂明授權、將訂明授權續期或訂明授權持續有效的先決條件，是為了達到防止或偵測申請人合理地相信將會或已經發生(視屬何情況而定)的嚴重罪行的目的，或為了保障公共安全以免受申請人合理地相信屬於逼切的威脅。此外，當中必須具有可信的證據，證明有合理理由懷疑截取或秘密監察行動目標人物曾涉及、正涉及或相當可能涉及干犯有關的嚴重罪行，或從事構成或會構成對公共安全的威脅的有關活動。

禁止截取及秘密監察

58. 條例草案第4及5條禁止公職人員直接或透過任何其他人進行任何截取通訊或秘密監察，除非他們是依據訂明授權進行上述行動。部分委員指出，政府當局的立場是行政長官並非公職人員。此等委員關注到行政長官可能會在不受規管之下進行截取行動。他們建議加入明訂條文，禁止行政長官進行該等行動。

59. 政府當局回應時表示，條例草案的主要目的是訂定“法律程序”，使執法機關的公職人員可據以進行截取通訊及秘密監察而不致觸犯《基本法》第三十條。就行政長官而言，當局無意讓行政長官根據條例草案取得授權以進行截取行動，因此條例草案所訂的法律程序並不延展至適用於行政長官。由於第三十條已禁止進行沒有根據法律程序進行的截取及秘密監察活動，因此並無需要明文禁止行政長官進行此類行動。

60. 政府當局指出，《基本法》第四十八條所訂行政長官的憲制職能之一，是負責執行《基本法》。沒有根據條例草案或其他法律程序行事而侵犯他人的通訊私隱，是違反第三十條的行為。因此，如行政長官沒有根據條例草案或其他法律程序行事而檢查通訊，即屬違反《基本法》。如情況嚴重的話，此種行為或會構成《基本法》第七十三(九)條所訂的嚴重違法或瀆職行為，更可能導致立法會通過對他的彈劾議案。單以條例草案第4及5條所訂禁制規定並未延展至適用於

行政長官而言，並不會免除行政長官遵守和執行《基本法》第三十條所訂的職責。

61. 吳靄儀議員會提出委員會審議階段修正案，規定並不屬於公務員的行政長官、行政會議成員及政策局首長，亦為條例草案所涵蓋。

62. 涂謹申議員會提出委員會審議階段修正案，訂明行政長官及政策局首長亦為條例草案所涵蓋。

小組法官及所作出的授權

條例草案所提出的建議

63. 根據條例草案，授權進行所有截取通訊及第1類監察行動的權力，將由行政長官委任為小組法官的3至6名原訟法庭法官的其中一名行使。據政府當局所述，在此等原訟法庭法官獲委任為小組法官前將對其進行深入審查。當局建議把小組法官根據執法人員作出的申請而發出的授權，或對授權作出的續期稱為“司法授權”。條例草案亦建議小組法官以司法身份行事，但不得視為法院或法院的成員。

小組法官的委任

64. 部分委員反對小組法官由行政長官委任的建議。此等委員認為應將此項委任權力賦予終審法院首席法官。他們關注到若由行政長官委任法官加入該小組，可能會對他們履行原訟法庭法官的司法職責的獨立性或他們擔任原訟法庭法官的資格構成影響。他們對於有關建議對司法機構造成的資源影響亦表示關注，並要求政府當局提供執法機關過往進行的截取通訊和秘密監察行動的統計資料。

65. 政府當局解釋，行政長官在作出委任前，會向終審法院首席法官徵詢其推薦人選。委任期將定為3年，而政府當局建議行政長官只有在按照終審法院首席法官的建議之下，並基於充分理由才可撤銷某項委任。獲委任加入小組的法官不會因而有任何得益，他們將繼續擔任法官，而他們在小組內執行的工作絕不會影響他們繼續擔任法官的資格。由行政長官委任法官加入小組的安排，並不會對他們履行小組法官職責時的獨立性產生任何正面或負面的影響。政府當局告知法案委員會，當局事先已就由行政長官作為委任當局，根據終審法院首席法官所作推薦任命小組法官的建議諮詢司法機構，而司法機構亦認為此項建議可以接受。

66. 政府當局指出，行政長官根據《基本法》第四十八條享有多項權力，包括有權任免各級法院的法官。《基本法》第八十八條進一步規定，香港特區法院的法官，由行政長官根據司法人員推薦委員會的推薦任命。該項職能反映了《基本法》所訂由行政長官作為香港特區首長的角色，而由行政長官委任小組法官的建議實與上述角色一致。現時，法官可能會獲委出任不少其他法定職位，而此等職位幾乎一律以行政長官作為委任當局。

67. 政府當局告知委員，指定由選定法官處理不同類別的案件，在本港或海外均非罕見的安排。建議的委任安排已顧及此項考慮因素，並與其他地方由政府高層人員作出委任的安排相若。舉例而言，在澳洲會由部長宣布合資格的法官人選及提名行政上訴委員會的成員，由其負責批准進行截取通訊。至於英國方面，監察事務專員是由首相委任，負責就進行具侵擾性的監察行動作出批准。

68. 在資源影響方面，政府當局向委員保證，當局會與司法機構討論落實條例草案所載建議所需的資源。政府當局亦告知委員，在2006年2月20日至5月19日的3個月期間內共有151宗截取通訊個案，所有此等個案均須根據條例草案建議的新架構取得小組法官的授權。至於秘密監察方面，在上述期間共有238宗個案，當中有44宗個案須根據新的架構取得小組法官的授權。

69. 鑒於部分委員建議應由終審法院首席法官委任小組法官，政府當局告知法案委員會當局已向司法機構轉達有關建議。司法機構確實表明其立場維持不變，亦即認為政府當局的建議可以接受。

70. 關於吳靄儀議員所提出有關小組法官須以個人名義獲得委任的建議，政府當局解釋，條例草案附表2第4段訂明，小組法官在執行其在條例草案下的任何職能時，不得視為法院。然而，由於只有合資格法官才可獲委任為小組法官，如規定他們完全基於個人身份獲得委任，可能會令人誤解。因此，政府當局認為不宜採納此項建議。

71. 吳靄儀議員會提出委員會審議階段修正案，訂明小組法官將由終審法院首席法官委任。吳靄儀議員亦會提出另一項委員會審議階段修正案，規定小組法官在獲委擔任小組法官期間，不得兼任普通法官的職務。

對小組法官進行深入審查

72. 部分委員反對在小組法官獲得委任前對其進行深入審查，亦即最高層次的品格審查，因為此等法官在獲委任為法官前應已曾接受品格審查。此舉亦可能令公眾產生當局不信任此等法官的印象。此等委員質疑為何有必要進行此類審查。

73. 政府當局解釋審查工作分為3個層次，亦即入職審查、一般審查及深入審查，而最後一種審查屬最全面的審查。深入審查適用於所有將獲委出任政府最高層職位的人士，例如主要官員及高級公務員，以及可接觸非常敏感的資料的人士。政府當局亦解釋，當局一直有對可接觸大量從秘密行動所得的較敏感資料的執法人員進行深入審查，並會對小組法官、截取通訊及監察事務專員及其轄下職員進行類似審查。

74. 政府當局指出，深入審查包括與委任人選、其諮詢人及其上司會面，以及核對檔案。因此，深入審查較其他審查徹底，藉以協助委任當局評估委任有關人選出任涉及大量敏感資料的職位，會否出現

任何可能風險。此做法並不涉及任何形式的政治審查，當局亦不會對委任人選的政治理念或聯繫進行任何調查。

75. 司法機構政務處已告知法案委員會，司法機構並不反對政府當局對小組法官進行深入審查的建議。

76. 應部分委員的要求，保安局局長承諾在條例草案恢復二讀辯論時，在其發言中述明若小組法官的委任前審查顯示存在任何風險因素，會向終審法院首席法官作出知會。

政黨聯繫

77. 部分委員質疑小組法官有政黨聯繫是否恰當。如容許小組法官有政黨聯繫，此等委員對他們行事能否大公無私和保持獨立感到關注。

78. 政府當局回應時表示，司法及法律事務委員會現正就有關法官政治聯繫的政策進行研究。

小組法官的權力及職能

79. 部分委員認為，小組法官應以法院的職能行事，並根據司法程序作出授權。法案委員會質疑是否有必要在條例草案附表2第4段作出“以司法身分行事”的提述，因為小組法官不被視為法院。法案委員會並詢問小組法官的權力、保障及豁免權的涵義為何。

80. 政府當局解釋，原訟法庭法官擁有法定權力及普通法下的權力，其法定權力是《高等法院條例》(第4章)及《高等法院規則》列明的權力。法官的保障及特權和原訟法庭的法律程序，均屬普通法所訂的保障、特權和法律程序。原訟法庭法官在履行其職能的過程中作出的事宜或所說的話均可獲得保障，而無須因為任何民事訴訟而承擔法律責任。該項保障更延展至適用於法庭以外的類似審裁處。

81. 因應委員的建議，政府當局同意刪除“以司法身分行事”的提述。政府當局並會提出委員會審議階段修正案，把附表2就小組法官權力及職能作出規定的第4段移往條例草案的主體條文。

82. 部分委員不同意把小組法官作出的授權稱為“司法授權”，因為小組法官並非行使法院的職能。採用上述詞語可能會令公眾覺得有關授權是由法院發出。此等委員建議採用“法官授權”一詞。政府當局贊同此項建議，並會提出有關的委員會審議階段修正案。

83. 部分委員(包括何俊仁議員、吳靄儀議員及湯家驊議員)始終認為小組法官應以法院的職能行事，並根據司法程序作出授權。

84. 涂謹申議員會提出委員會審議階段修正案，規定授權進行所有截取通訊及第1類監察的有關當局為任何原訟法庭法官，而非獲委任為小組法官的原訟法庭法官。

作出授權的運作安排

85. 委員曾問及小組法官執行授權職能的運作安排。

86. 政府當局解釋在處理授權申請時，小組法官會採用條例草案第3條所列明的驗證準則，並根據有關程序處理申請個案。在一般情況下，執法機關須提交書面申請，並以列明申請理據的誓章作為支持。小組法官會在非公開的情況下考慮有關申請，並會小心考慮有關的材料是否足以符合相稱性及必要性的驗證準則。如有需要，小組法官會要求有關的執法機關提供進一步資料及作出澄清。因應委員的建議，政府當局同意動議委員會審議階段修正案，述明小組法官可以其認為適當的方式考慮上述申請。

87. 附表2第1(2)段訂明，在不損害小組法官須於非公開的情況下考慮向他提出的任何申請的規定之下，如小組法官如此指示，則可在法院範圍以外的任何地方考慮申請。部分委員建議應明文規定小組法官不得在執法機關的處所考慮申請。

88. 政府當局回應時表示，在何處就申請進行聆訊，將由小組法官作出決定。然而，政府當局並不預期小組法官會在執法機關的處所考慮申請。政府當局已就此諮詢司法機構，而司法機構表明小組法官不會在執法機關的處所處理任何申請。鑒於委員對此感到關注，政府當局同意提出委員會審議階段修正案，明文規定小組法官不得在執法機關的處所考慮申請。

89. 部分委員認為小組法官應就所發出的授權提出理由。吳靄儀議員會提出委員會審議階段修正案，就小組法官在考慮申請時下令在非公開的情況下進行聆訊及查訊任何線人，或在不進行聆訊的情況下就有關申請作出決定訂定條文，並規定小組法官須以書面述明其決定及提出其作出有關決定的理由。吳議員亦會提出委員會審議階段修正案，把分別涉及小組法官監誓及監理誓章的進一步權力和小組法官職能的附表2第2及4段，移往條例草案的主體條文。

90. 涂謹申議員會提出委員會審議階段修正案，訂明原訟法庭法官在考慮發出授權或將授權續期的申請時，可邀請私隱專員作為特別代訟人以非公開形式作出陳詞。

法官授權的申請

91. 根據條例草案，執法人員為尋求發出截取或第1類監察的授權而向小組法官提出的申請，須以書面提出並以誓章作為支持。

92. 委員建議批准作出法官授權申請的人員，與根據條例草案第54條進行檢討的人員不得屬同一人。

93. 政府當局解釋，批准人員的角色是考慮小組法官的授權申請是否恰當。根據條例草案第54條進行檢討的人員，則是就執法機關人

員遵守條例草案所訂有關規定的情況進行定期檢討。兩者的角色並無衝突，故政府當局認為並無需要在條例草案明文規定履行該兩個角色的人員不得屬同一人，儘管執行該兩項工作的人員實際上將不會是同一人。政府當局會在實務守則中訂明此項規定。

94. 部分委員建議加入一項明訂條文，禁止執法機關在向小組法官提出的申請已遭到拒絕的情況下，根據相同資料再次提出申請。

95. 政府當局回應時表示，當局預期執法機關不會在申請遭到拒絕後，再次提交相同的申請以要求作出授權。然而，在先前提出的申請遭到拒絕後，他們可基於合法的理由重新提出申請，例如情況可能已有改變或出現新的資料。由於執法機關在作出申請時須提供有關其先前所提出申請的資料，小組法官會就此作出考慮。政府當局會在實務守則明確規定，不得再次提出已遭拒絕的申請。

96. 因應委員的建議，政府當局同意提出委員會審議階段修正案，規定在提出申請時須提供下述附加資料 ——

- (a) 先前所提出申請的資料；
- (b) 提出申請的人員的職位；
- (c) 就取得新聞材料的內容的可能性作出的評估；及
- (d) 批准提出截取或第1類監察授權申請的首長級人員的身份。

行政授權

97. 條例草案第14條規定，部門人員可向該部門的授權人員提出申請，尋求發出進行任何第2類監察的行政授權。申請須以書面提出，並以符合條例草案附表3第3部指明規定的申請人書面陳述支持。根據條例草案第7條，部門的首長可指定職級不低於等同高級警司的職級的任何人員擔任授權人員。第2類監察行動的授權申請只會由條例草案附表1第2部指明的部門的人員提出，該等部門分別為香港海關、香港警務處、入境事務處及廉政公署(“廉署”)。

98. 委員建議把授權人員的職級提升至總警司的職級。部分委員認為應訂定嚴格程序，以防可能出現的濫用情況。舉例而言，只有屬於處理有關案件的單位的人員才可向授權人員提出申請。授權人員不得直接參與有關案件的工作，而申請人不得是授權人員。此外，同一刑事調查單位的人員不得是有關的授權當局。委員並詢問執法機關內職級屬首長級薪級第1點的人員數目為何。

99. 政府當局告知委員，香港警務處、香港海關及入境事務處內職級相等於首長級薪級第1點的人員數目，分別為48人、3人及2人。

至於廉署，其架構中最低級的首長級職級相等於公務員首長級薪級第2點，亦即助理處長職級，而署內有4名人員屬於該個職級。

100. 政府當局解釋，經考慮個別部門的情況，香港警務處、香港海關及入境事務處的授權人員的職級，將會提升至等同總警司或以上的職級。然而，在廉署方面，有關職級應維持於首席調查主任或以上的水平，因為該署架構中最低級的首長級職級為助理處長職級。在實務守則中將訂明有關安排。

101. 政府當局並解釋，刑事調查單位首長通常屬總警司職級。從宏觀層面而論，部門內可能會有很多人員參與調查工作，如有關案件涉及特別嚴重性質的罪行，參與程度更可能會有所增加。政府當局的政策目的是，授權人員不得直接參與有關案件的調查工作，而在實務守則中將會訂明此項政策目的。

102. 涂謹申議員會提出委員會審議階段修正案，訂明進行第2類監察的授權當局將為區域法院法官，以及區域法院法官在考慮發出授權或將授權續期的申請時，可邀請私隱專員作為特別代訟人以非公開形式作出陳詞。

訂明授權的時限

103. 條例草案建議所批給的訂明授權(即所批給的法官授權或行政授權)的時限，不得超過自該授權生效的時間起計的3個月，而其每次可獲續期的時限亦不得超過3個月。

104. 委員質疑訂定3個月時限的理據何在。部分委員對於續期次數並無限制表示關注。他們建議在申請續期時，應規定就已進行長時間截取或監察行動的個案，提供秘密行動已共計進行了多少時間的資料。

105. 政府當局回應時表示，3個月時限只是最長時限，授權當局可授權進行較短時間的行動。該時限與其他司法管轄區就此方面所訂定的制度相若。在續期申請方面，條例草案附表3第4部已規定申請人須提供附加資料，說明所尋求作出的續期是否首次續期，以及若不屬首次續期的話，有關授權過往每次獲得續期的情況如何、截至提出申請為止已取得的資料的價值為何，以及有必要申請續期的理由何在。此外，條例草案第3條所訂給予授權的先決條件，已要求授權當局在批准續期時考慮有關行動的侵擾程度。

106. 關於部分委員所提出有關訂定最高續期次數的建議，政府當局認為該項建議並不切實可行。政府當局解釋，嚴重和有組織罪案可能需要經過長時間的策劃，因而也需要進行長時間的監察。在每次續期時，授權當局須考慮從進行監察而相當可能取得的資料的價值及相關程度。除非會繼續取得寶貴的資料，否則要證明有理由需要繼續進行有關行動，將會越來越困難。專員可就涉及長時間監察的個案進行檢討，藉以確保不會出現濫用權力的情況。政府當局亦同意，同一授權若已獲續期多於5次，便應向專員報告，而該等個案的數目會納入專

員的周年報告內(請參閱下文第179(f)段)。政府當局相信條例草案所訂機制的既有制衡措施，將可確保不會進行較合理所需時間為長的行動。

107. 吳靄儀議員會提出委員會審議階段修正案，規定授權當局在考慮續期申請時，須考慮進行截取或秘密監察(視屬何情況而定)的合計時間。吳靄儀議員亦會提出委員會審議階段修正案，把訂明授權的時限訂為兩年。

108. 涂謹申議員會提出委員會審議階段修正案，規定原訟法庭法官或區域法院法官在考慮續期申請時，須考慮進行截取或秘密監察(視屬何情況而定)的合計時間。

緊急授權

109. 條例草案第20(1)條規定，如符合以下條件，任何人員可向其部門的首長提出申請，尋求發出進行截取通訊或第1類監察的緊急授權 ——

“(a) 該人員認為由於存在 ——

(i) 任何人死亡或蒙受嚴重身體傷害；

(ii) 財產蒙受重大損害；

(iii) 對公共安全的嚴重威脅；或

(iv) 損失關鍵證據，

的逼切風險，因而有即時需要進行該截取或第1類監察；
及

(b) 該人員在顧及有關個案的整體情況後，認為申請發出對截取或第1類監察的法官授權，並非合理地切實可行。”

110. 條例草案第23條規定，有關部門的首長須安排該部門的人員在緊急授權生效後，於合理地切實可行範圍內，盡快(而無論如何須在自該授權生效時間起計的48小時內)向小組法官申請確認該授權。

111. 鑒於可向小組法官提出口頭申請，而且小組法官屬24小時候命，委員詢問在何種情況下需要發出緊急授權。部分委員關注到，條例草案第20(1)(b)條的規定可能會引起有關執法人員是否在所有情況下(即使在緊急情況下)均須先行嘗試聯絡小組法官以申請作出授權的爭議。然而，部分其他委員認為有必要保留該條文，使執法人員在提出緊急授權申請前會竭盡所能聯絡小組法官。

112. 政府當局解釋，緊急申請只適用於本來需要獲得法官授權的個案。只有在申請法官授權(包括向小組法官提出口頭申請)並不切實可行時，才可提出此類申請。舉例而言，當遇有緊急情況而須盡快取得

授權以進行有關行動時，以及存在任何人死亡或蒙受嚴重身體傷害、財產蒙受重大損害、對公共安全的嚴重威脅或損失關鍵證據的逼切風險時，才可申請緊急授權。執法人員須先行考慮與小組法官取得聯絡以申請法官授權是否切實可行，並只有在與小組法官取得聯絡並不切實可行時，才提出緊急授權申請。在發出緊急授權後的48小時內，須以誓章形式向小組法官提出申請。如小組法官信納有關情況符合條例草案第3條所訂的先決條件，他可以確認該項緊急授權。他亦可拒絕確認該項緊急授權，或在作出他指明的更改下確認該項授權。政府當局預期應不會經常需要作出緊急授權。

113. 政府當局告知委員，如未能在48小時內提出確認緊急授權的申請(例如因發生涉及有關申請人的交通意外等的突發事件)，依據該緊急授權取得的資料會即時銷毀。載有該個案詳情的報告將提交截取通訊及監察事務專員。

114. 部分委員認為，即使未能在48小時內提出確認授權申請，有關的執法人員仍須向小組法官呈交所發出的緊急授權，並解釋為何不能在48小時內提出有關申請。所取得的資料應予保留，只供專員進行調查之用。

115. 政府當局回應時表示，小組法官在確認程序中所擔當的角色，是考慮尋求確認授權的有關申請。如有部門未能在48小時內提出確認申請，確認該項緊急授權的問題將不再存在。隨之而產生的問題是，該部門為何未能遵守提出確認申請的規定，而此問題較宜交由專員考慮。此外，條例草案訂有其他條文，為專員提供各種渠道，以供採取他認為適當的跟進行動。因此，政府當局認為在此等情況下，規定部門首長向專員而非小組法官作出報告是較為恰當的安排。

116. 政府當局進一步解釋，銷毀透過緊急授權取得的資料的安排，旨在確保依據訂明授權取得的資料，在有關授權未有獲得確認的情況下會被銷毀。考慮到此等行動的目標人物的私隱，政府當局認為保留有關資料作專員的調查用途並不恰當。無論如何，部門首長須在提交專員的報告內載述所涉個案的詳情，以便專員作出檢討。

117. 因應部分委員的建議，政府當局同意在實務守則列明 ——

- (a) 申請發出緊急授權的程序；
- (b) 緊急授權在有關部門首長發出該項授權時所指明的日期及時間開始生效；及
- (c) 應盡可能避免使用申請緊急授權的安排。

118. 吳靄儀議員會提出委員會審議階段修正案，訂明以口頭方式提出緊急申請，以及部門首長須以書面提供發出緊急授權的理由。如有關部門未能在48小時內向小組法官提出確認授權申請，有關的部門首長須向專員提交載有所涉個案詳情的報告。依據緊急授權取得的任

何資料均須予以保留，以供專員作出檢討或審查。小組法官獲賦權在拒絕確認緊急授權時可作出命令。

119. 涂謹申議員會提出委員會審議階段修正案，規定部門首長須就發出緊急授權提供理由。當考慮確認緊急授權的申請時，原訟法庭法官可邀請私隱專員作為特別代訟人以非公開形式作出陳詞。原訟法庭法官亦可邀請私隱專員協助他得出不確認緊急授權的結論。此外，原訟法庭法官拒絕確認緊急授權時將可作出命令，下令銷毀取自依據該緊急授權取得的資料的任何進一步資料或情報或紀錄。

口頭申請

120. 根據條例草案，發出訂明授權或將訂明授權續期的申請可以口頭方式提出，前提是按照有關的書面申請程序考慮該項申請，並非合理地切實可行。在提出此項申請後，須在訂明授權或訂明授權的續期生效時間起計的48小時內，以書面向有關的授權當局申請確認。如未有在48小時限期內提出尋求確認訂明授權或訂明授權的續期的申請，有關的執法機關會即時銷毀任何依據該項授權取得的資料，並向截取通訊及監察事務專員提交載有該個案詳情的報告。

121. 委員質疑在何種情況下，將有需要就訂明授權或訂明授權的續期提出口頭申請。

122. 政府當局解釋，訂定有關口頭申請的規定，旨在處理不可能遵照書面申請程序(例如以書面提供所有資料)行事的緊急個案。在其他司法管轄區(例如澳洲、加拿大和英國)，口頭申請條文相當常見。政府當局預期應不會經常需要就訂明授權續期提出口頭申請。

123. 委員建議作出安排，以便小組法官或就法官授權或行政授權提出口頭申請的申請人進行錄音。

124. 政府當局告知委員，在切實可行的範圍內會盡量把向小組法官提出的口頭申請錄音。在進行錄音並不切實可行的情況下，小組法官會作出書面記錄。至於行政授權個案方面，批准當局會就有關申請進行書面記錄。無論如何，申請人將須在48小時內提交書面申請，並一併提交支持該項申請的誓章／非宗教式誓詞，以及載列在作出口頭申請時向授權當局陳述的事實的文件，以申請確認。

125. 政府當局回應委員的查詢時證實，當局會在實務守則列明，就行政授權申請向授權人員提供的任何附加資料，均會作出書面記錄。

126. 部分委員並不信納有需要訂定有關口頭申請的規定。吳靄儀議員及涂謹申議員會分別提出委員會審議階段修正案，刪除有關口頭申請的條文。

訂明授權所授權、規定或訂定的事宜

127. 根據條例草案第29(4)條，訂明授權(行政授權除外)可載有條款，授權干擾任何財產，而不論所涉財產是否屬有關截取或秘密監察的目標人物的任何人的財產。委員質疑就秘密行動而言，現時就執法行動進行期間對財產引致的損害作出補償的機制是否足夠，以及當局會否訂定特別的補償機制。

128. 政府當局解釋，條例草案所涵蓋行動的秘密性質，已必然就財產受到干擾的程度造成限制。任何干擾只會在小組法官根據有關條文作出的明示授權之下，才會獲得批准。政府當局預期在絕大部分個案中，所作出的干擾將完全不會導致任何損害。如出現任何損害，損害程度亦會非常輕微。政府當局的政策是會就所引致的任何損害作出補償，並會在實務守則訂明上述政策。

129. 政府當局並解釋，在條例草案中訂定補償機制未必切實可行。向遭到干擾的財產的擁有人作出補償，會令有關行動曝光，因而可能破壞有關方面所作部署。經考慮委員提出的關注，政府當局會在實務守則列明，執法機關在執行根據條例草案授權進行的行動期間，如有需要干擾任何財產並對有關財產造成任何損害，均須就所有此類干擾財產個案向專員作出報告。執法機關須向專員報告他們採取了何種補救行動，就所造成的損害作出補償，以及如有關損害無從補償，原因何在。專員繼而可檢討執法機關在此方面所採取的措施是否足夠，以及在他認為適當的情況下，根據條例草案第48條向行政長官作出報告，或根據條例草案第50條向有關的執法機關提出建議。

130. 條例草案第29(5)條規定，訂明授權所指明的任何人須向有關的執法機關的人員提供執行該訂明授權的協助。委員詢問如不按照該條文的規定提供協助會有何後果，以及此舉會否構成妨礙警務人員執行職責的罪行。

131. 政府當局證實，任何人如未有根據條例草案第29條向執法機關提供協助，將不會因此而須要承擔任何刑事責任。此外，拒絕提供此等協助並不會構成違反有關妨礙公職人員執行職責，或未有協助公職人員執行職責的各項法例條文。

132. 根據條例草案第29(7)(a)(ii)條，訂明授權可授權進入(在有需要時可使用武力進入)任何處所及毗連該處所或可通往該處所的任何其他處所，以進行根據該訂明授權而授權進行或規定進行的任何行為。

133. 經考慮委員對使用武力的關注，政府當局會就條例草案第29(7)(a)(ii)條提出委員會審議階段修正案，以明確訂明在有需要時會使用合理武力。當局會就條例草案第29(7)(b)(ii)及(c)(ii)條作出類似修正。

134. 吳靄儀議員會提出委員會審議階段修正案，規定在所發出的訂明授權中作出若干說明，例如提供進行屬截取目標的通訊的人的身份。

135. 涂謹申議員會就條例草案第29及30條提出各項委員會審議階段修正案。其中一項修正案旨在規定就有關授權作出決定前，須向授權當局提交對使用武力進入任何處所而引致的風險及損害作出評估的資料。

器材取出手令

136. 條例草案第32條訂明，凡訂明授權失效，有關部門的人員可向小組法官申請發出器材取出手令，授權取出任何根據該訂明授權而授權使用的器材。條例草案第34條規定，器材取出手令於小組法官在發出該手令時指明的期間(該段期間在任何情況下，均不得超過自該手令生效的時間起計的3個月)屆滿時失效。

137. 委員關注到有關部門的人員可能不會申請器材取出手令。委員認為應盡快取出所裝設的監察器材。委員指出當訂明授權失效時，便再無任何法律依據讓該等器材繼續裝設於任何處所之內或之上。委員建議訂立條文，規定有關部門如認為取出所使用的器材並不切實可行，便須由該部門的人員向小組法官提出申請。

138. 政府當局回應時表示，當局的政策是在使用監察器材後，於合理的切實可行範圍內盡快嘗試取出有關器材。當局會在實務守則訂明此點。政府當局並解釋，在某些情況下，於行動結束後取出監察器材未必切實可行。取出有關器材可能會令秘密行動曝光，或危及有關執法人員的安全。另一可能是目標人物已發現有關器材，以致並無必要取出該器材。當局擬規定執法機關向專員報告沒有就授權屆滿後尚未取出的器材申請器材取出手令的所有個案，以及不作出申請的原因。專員繼而可就執法人員提供的資料及作出的解釋作出檢討，並在他認為適當的情況下，根據條例草案第48條向行政長官作出報告，或根據條例草案第50條向執法機關提出建議。

139. 吳靄儀議員會提出委員會審議階段修正案，規定小組法官須提供其發出器材取出手令的理由。

140. 涂謹申議員會提出委員會審議階段修正案，規定原訟法庭法官在考慮器材取出手令的申請時，須顧及就取出監察器材對有關處所或物體造成的風險及損害所作出的評估。原訟法庭法官須就發出器材取出手令提出其理由。如原訟法庭法官拒絕發出器材取出手令，他須作出命令，指示有關的部門首長須令該器材失去其功能。

法律專業保密權

141. 條例草案第2(3)條訂明，凡任何秘密監察屬第2類監察，而可能享有法律專業保密權的任何資料相當可能藉進行該監察而取得，則該監察即視為第1類監察。換言之，此類監察行動需要取得小組法官作出的授權。

142. 部分委員對法律專業保密權的保障表示關注。該等委員質疑在何種情況下會就律師進行截取通訊和秘密監察行動，以及對法律專業保密權將有何保障。他們指出，根據《基本法》第三十五條，香港居民有權得到秘密法律諮詢。若沒有訂定充分保障措施以防止濫用的情況，執法人員可能會傾向聆聽享有法律專業保密權的通訊，即使他們知道不能保留或在法庭上使用有關通訊的內容。若當事人知道甚或懷疑他們與代表律師之間的通訊可被執法機關截取，他們可能會不敢徵詢法律意見或不願與代表律師坦誠交談。委員認為應訂定充分的法定保障措施，防止執法機關蓄意或在無意間取得及使用享有法律專業保密權的材料。他們建議在進行已獲適當授權的截取通訊或監察行動的過程中，如發現有若干通訊享有法律專業保密權，應立即停止進行截取或監察。此外，在未經有權免除有關特權的人士同意之下，享有法律專業保密權的材料仍然不可在法庭上獲接納為證據。

143. 政府當局指出，根據普通法，若當事人與其法律顧問之間為取得法律意見的目的而進行通訊，不論該等通訊是以口頭還是書面形式進行，均可享有法律專業保密權，但若該等通訊是為了達到犯罪目的而進行，則屬例外。此項保密權並無例外情況，除非當事人放棄此項保密權，或有任何法例凌駕此項保密權(不論是以明示或必然含示的方式凌駕)。在草擬條例草案時，政府當局已在關於秘密行動各個階段的條文中，全面顧及此項普通法原則。在就行動作出批核或搜集資料的階段，條例草案並無凌駕法律專業保密權的原則，因而保存了該項保密權。為此，執法機關及小組法官須分別在擬訂及考慮有關申請時，依循法律專業保密權的原則行事。條例草案並規定執法機關及小組法官在申請及考慮作出授權時，須特別顧及取得可能享有法律專業保密權的資料的可能性。此等條文將確保根據條例草案進行的所有秘密行動，均不會明知而仍然謀求取得享有法律專業保密權的資料。

144. 政府當局告知法案委員會，當局預期小組法官不會批准進行以在律師的辦公室或住所進行的通訊作為目標的行動，除非法官同意有合理理由相信有關通訊會被用以協助進行某項罪行，或該名律師本身在刑事上涉及某項指稱所犯的罪行。

145. 儘管如此，為回應委員的關注，政府當局同意就條例草案提出委員會審議階段修正案，以明確反映其政策目的如下：禁止對於在律師的辦公室，或在通常由該律師為向當事人提供法律意見而使用的任何其他處所，或在該律師的住所進行的通訊，進行任何以該等通訊為目標的行動，除非 ——

- (a) 該律師，或在該律師的辦公室工作或在該律師的住所居住的任何其他人，是構成或會構成某項嚴重罪行或對公共安全的威脅的活動的參與者；或
- (b) 有關通訊是為達到某犯罪目的而作出。

146. 關於終止行動方面，政府當局指出，根據條例草案第55(2)(a)及(b)條，有關人員 ——

- (a) 須在他察覺有終止該訂明授權的理由存在後，於合理地切實可行範圍內，盡快安排終止該截取或秘密監察；及
- (b) 可隨時安排終止該截取或秘密監察。

就享有法律專業保密權的材料而言，上述(a)項條文規定有關人員在特定個案的情況下終止行動，而所涉情況是基於例如較大可能會取得享有法律專業保密權的資料，以致有關行動的侵擾程度變得較高等理由，而不再符合條例草案第3條所訂讓訂明授權持續有效的先決條件。上述(b)項條文可讓有關人員能夠在其他情況下終止行動。

147. 政府當局並解釋，在進行已獲授權的秘密行動期間，有關方面會訂定運作安排，盡量減少披露任何在無意中取得而享有法律專業保密權的資料。該等適用於所有截取和第1類秘密監察行動的運作安排包括 ——

- (a) 實際監察工作由有關執法機關的專責小組進行，而該等專責小組的工作完全與調查人員分開；
- (b) 該等專責小組須根據指示剔除受法律專業保密權保障的資料，使調查人員不能接觸該等資料。調查人員只會獲得提供經剔除享有法律專業保密權的資料後的資料；
- (c) 上述安排的例外情況如下：當有關行動涉及對某人(包括所調查罪行的受害人、線人或由參與一方進行的監察行動中的臥底人員)的安全或福祉構成即時威脅，或出現可能需要即時採取拘捕行動的情況時。在此等情況下，調查人員或有需要實時監聽談話內容。若有此需要，在提交小組法官的申請中會作出指明，而小組法官在決定是否作出授權時會考慮此點；以及如作出授權，會在決定應否施加任何條件時考慮此點。此類行動結束後，負責監督有關行動的調查人員須把記錄所得的資料移交專責小組，由專責小組剔除任何享有法律專業保密權的資料，然後才把資料送交調查人員備存；及
- (d) 對於相當可能涉及享有法律專業保密權的資料的行動，執法機關須向專員作出通知。在其他情況下，執法機關如在無意間取得享有法律專業保密權的資料，亦須通知專員。

148. 政府當局告知法案委員會，截取通訊及監察事務專員可根據執法機關作出的通知採取多項行動，包括覆檢專責小組送交調查人員的資料，藉以查核當中是否包含任何享有法律專業保密權而應予剔除的資料。當局會在實務守則列明上文第147段所載安排，而專員會監察實務守則獲得遵守的情況。

149. 關於使用及銷毀享有法律專業保密權的成果，政府當局指出，由於享有法律專業保密權的資料可能會在無意之間取得，條例草案第56(1)條在規管成果或資料的使用及銷毀方面訂立若干保障措施。經考慮委員提出的關注，政府當局同意就條例草案提出委員會審議階段修正案，明確訂明在進行已獲得適當授權的截取通訊或秘密監察行動的過程中取得，並受到法律專業保密權保障的成果，將繼續受到保密權的保障，而不得在任何情況下加以使用，但為了供檢控人員履行其職責，以便在日後就郵件截取及秘密監察成果進行的法律程序中確保進行公平審訊而屬必須者，則屬例外。政府當局亦會提出委員會審議階段修正案，明確訂明 ——

(a) 就截取電訊行動的成果而言，該等成果須盡快銷毀，且不得保留任何文本；及

(b) 就郵件截取及秘密監察行動的成果而言，除非為法律程序的目的而須保留該等成果，否則須盡快將之銷毀。

150. 至於使用享有法律專業保密權的材料作為證據，政府當局同意提出委員會審議階段修正案，明確訂明在進行秘密行動期間取得而享有法律專業保密權的任何資料，將繼續受到保密權的保障。換言之，有關資料將受到若干保障，包括在未經有關當事人同意下，不可提供作為證據。

151. 吳靄儀議員會提出委員會審議階段修正案，就須在某律師的辦公室或住所進行截取或秘密監察的特殊情況作出進一步限制。

實務守則

152. 根據條例草案第59條，保安局局長須為就條例草案訂定的事宜向執法人員提供指引的目的，發出實務守則。

153. 涂謹申議員建議由律政司司長發出廉署的實務守則，以免令公眾覺得廉署屬保安局局長的管轄範圍。

154. 政府當局回應時表示，實務守則旨在向執法人員提供實務指引。保安局局長將根據條例草案賦予他的權力發出守則，而守則所載的程序步驟會劃一適用於所有執法機關。由條例草案指定的保安局局長發出一套適用於所有執法機關的守則，是恰當的安排。

155. 應委員的要求，政府當局同意以在憲報刊登一般公告的形式公布實務守則。政府當局亦會不時向保安事務委員會提供實務守則的最新版本。

156. 劉慧卿議員建議，專員向保安局局長提出其對實務守則的意見或建議時，應考慮議員的意見。政府當局答允向專員轉達該項建議。法案委員會建議由保安事務委員會跟進有關事宜。

截取通訊及監察事務專員

條例草案所提出的建議

157. 條例草案建議，由行政長官按終審法院首席法官的建議委任專員，任期為3年。上訴法庭的上訴法庭法官、原訟法庭法官、前任終審法院常任法官、前任上訴法庭的上訴法庭法官或前任原訟法庭法官，均合資格獲得委任。專員的職能是監督執法機關及其人員遵守有關規定(即條例草案任何條文、實務守則或任何有關的訂明授權或器材取出手令)的情況。具體而言，專員的職能包括對部門及其人員遵守有關規定的情況進行檢討；就任何相信本身是截取或秘密監察的目標人物的人士所提出的申請進行審查；向行政長官提交報告；以及向保安局局長和部門的首長提出建議。

專員的委任

158. 部分委員認為專員一職應由退休法官出任，並質疑由現任法官以兼職身份擔任專員的職務是否恰當。吳靄儀議員建議專員應以個人身份獲得委任。

159. 政府當局回應時表示，為擴大專員人選的範圍，把現任法官和退休法官一併列為可委任為專員的合資格法官，是恰當的做法。現任法官獲委出任法定職位的例子為數甚多。政府當局亦從司法機構得知，在香港居住的退休法官的數目十分有限，而且他們未必願意接受此項工作。政府當局已就獲委任為專員的現任法官在其獲委出任專員期間，不應獲編派就任何案件進行聆訊的建議諮詢司法機構。司法機構對此項建議並無異議。

160. 政府當局認為，在條例草案中訂明法官是以個人身份獲委任為專員，可能會令人產生誤解。

161. 至於部分委員建議設立一個委員會作為獨立的監督機構，政府當局指出，委任一名人士作為法定監督的建議，是本港及海外的慣常做法。舉例而言，香港的申訴專員和私隱專員均為法定監督。英國的《2000年調查權力規管法令》規定，截取通訊專員是監察截取通訊活動的監督當局。在澳洲，申訴專員負責履行監察為調查罪行而進行的截取通訊的職責。委任專員的建議，亦與法改會於1996年發表的報告書所載的建議一致。

162. 因應委員的建議，政府當局同意提出委員會審議階段修正案，清楚訂明在行政長官按終審法院首席法官的建議之下，專員可再獲委任。

163. 吳靄儀議員會提出委員會審議階段修正案，把專員的委任資格限制為終審法院、上訴法庭和原訟法庭的退休法官。行政長官必須就其將專員免任的決定提供理由，而法庭可就此類免任作出覆檢。

164. 涂謹申議員會提出委員會審議階段修正案，訂明專員的委任或免任均須經立法會批准。

專員的職能和權力

165. 吳靄儀議員會提出委員會審議階段修正案，清楚訂明專員有權調查由任何人針對在獲得授權或未獲授權下進行的任何截取或監察所提出的申訴。

166. 涂謹申議員會提出委員會審議階段修正案，訂明專員須監督條例草案的整體實施情況，但與條例草案有關的原訟法庭法官和區域法院法官職能的條文，則屬例外。涂議員亦會提出委員會審議階段修正案，規定專員對於就任何指稱的截取或秘密監察個案提出的申訴，具有進行調查的一般權力。

167. 此外，涂謹申議員會提出委員會審議階段修正案，訂明專員可要求部門的首長採取他認為合理和必要的補救措施，以及作出他認為合理和必要的補償。

覆檢專員的工作

168. 部分委員建議設立一個委員會，負責覆檢專員的工作。

169. 政府當局回應時表示，專員將獲提供足夠的支援，俾能履行其按條例草案所訂的職能。條例草案亦賦予專員廣泛的權力，使他可要求他人提供資料。他向行政長官提交的周年報告將提交立法會省覽。當局並無必要設立另一委員會以監督專員的工作。對於其他法定監督如申訴專員和私隱專員，當局亦沒有此類安排。

由專員進行檢討

170. 因應委員的建議，政府當局同意提出委員會審議階段修正案，明文規定專員須就向其提交，有關執法機關未有在48小時內向小組法官尋求確認緊急授權或口頭申請，或不遵守條例草案第23(3)(b)、26(3)(b)(ii)及52條的任何有關規定的報告進行檢討。

171. 吳靄儀議員會提出委員會審議階段修正案，清楚述明專員有權就根據條例草案第23(3)(b)、24(3)(v)及52條向其提交的報告進行檢討。吳靄儀議員亦會提出委員會審議階段修正案，賦予專員權力，使他可要求部門調查任何違反條例草案的情況，以及用以取得訂明授權的虛假資料。

由專員進行審查

172. 部分委員認為，專員應向申請由專員進行審查而已獲其判定得直的人士提供更多資料。

173. 吳靄儀議員會提出委員會審議階段修正案，訂明如專員認為或懷疑在任何個案中曾違反條例草案的規定而進行截取或秘密監察，即須就有關個案進行審查。吳議員亦建議若在有關截取或秘密監察被指稱發生的日期後的5年(而不是條例草案所建議的1年)以後才接獲申請，專員可無須就此進行審查。此外，吳靄儀議員亦會提出委員會審議階段修正案，規定專員須就其對某項審查作出的斷定提供理由。

174. 涂謹申議員會提出委員會審議階段修正案，訂明如專員認為或懷疑在任何個案中曾違反條例草案的規定而進行截取或秘密監察，即須就有關個案進行審查。此外，如專員在進行審查後，斷定所指稱的截取或秘密監察已在沒有訂明授權的授權下進行，則他須通知申請人 ——

- (a) 述明他已就有關個案判定申請人得直，並表示該個案屬於截取還是秘密監察的個案；
- (b) 述明有關的截取或秘密監察的性質概要；及
- (c) 述明有關的截取或秘密監察在何時開始，以及在何時結束。

175. 涂謹申議員會提出委員會審議階段修正案，訂明若在有關截取或秘密監察被指稱發生的日期後的5年(而不是條例草案所建議的1年)以後才接獲申請，專員可無須就此進行審查。涂議員亦會提出委員會審議階段修正案，訂明如專員說明其斷定的理由、提供有關截取或秘密監察的細節，或表示所指稱的截取或秘密監察是否有發生，會對防止或偵測罪行或保障公共安全造成損害，他不得提供此等資料。

專員的定論和建議

176. 委員認為條例草案應明確規定專員可向小組法官匯報其定論。

177. 政府當局同意，在某些情況下，專員在履行其職責的過程中所作出的定論、斷定和建議，對小組法官可具有若干參考價值。政府當局會提出委員會審議階段修正案，訂明除行政長官和律政司司長外，專員亦可將其檢討定論、斷定和建議提交予小組法官。

178. 應委員的要求，政府當局同意在條例草案中明文規定，如部門的首長接獲專員的檢討定論、斷定和建議的通知，他須向專員提交一份報告，其內須載有該部門採取的任何措施的細節，包括就任何人員採取的紀律行動。有關的委員會審議階段修正案將由政府當局提出。

周年報告

179. 經考慮委員所提出有關在專員提交行政長官的周年報告內載述更多詳細資料的建議，政府當局同意，除條例草案規定的資料外，亦會在周年報告納入下述資料——

- (a) 按授權類別(即法官授權、行政授權及緊急授權)分項列出已發出和拒絕發出的授權的數字，以及獲得續期和不獲續期的授權的數字；
- (b) 專員分別根據條例草案第43(2)條(即判定申請人得直)及條例草案第43(3)條(即判定申請人並不得直)發出的通知的數目；
- (c) 根據下文第229段所述擬議通知機制發出通知的個案數目；
- (d) 已作出的口頭申請、所發出的授權及拒絕發出的授權的數目；
- (e) 涉及享有法律專業保密權的資料的個案數目；
- (f) 已獲續期多於5次的個案的數目；
- (g) 按照提交予專員的任何報告而就任何部門人員採取的紀律行動的數目及性質概要；
- (h) 專員在進行檢討期間發現的任何有錯誤個案的數目及性質概要；及
- (i) 專員根據條例草案第48條作出的建議的性質概要。

有關的委員會審議階段修正案將由政府當局提出。

180. 關於部分委員要求在報告內加入按罪行和公共安全個案分項列出的數字，政府當局認為不宜提供該類分項數字及公共安全個案的主要分類資料。政府當局解釋，當局不能排除一個可能性，就是進一步提供任何分項數字，可能會在無意中披露執法機關的運作細節及能力，因而令罪犯得益。澳洲和英國亦沒有披露此類分項數字。至於美國，雖然在法例上規定須公布外國情報監察法庭的法官所批給授權的統計數字，但此方面的法定要求並不如建議納入專員報告的資料般全面。此外，法改會於2006年發表的有關規管秘密監察的報告書，亦沒有建議在監察機關提交立法會的周年報告內，就發出手令的理據提供分項數字。

181. 吳靄儀議員會提出委員會審議階段修正案，擴大周年報告內容的涵蓋範圍。

182. 涂謹申議員會提出委員會審議階段修正案，訂明周年報告提供的資料亦須包括下述各項 ——

- (a) 為防止和偵測嚴重罪行，以及為保障公共安全而分別發出的授權或就授權作出的續期的數目；
- (b) 對公共安全構成的威脅(已就此發出訂明授權或將訂明授權續期)的主要類別；
- (c) 被截取通訊的電話線、圖文傳真線、電郵帳戶的各別總數，以及受到監察的互聯網規約地址的總數；
- (d) 已取得新聞材料內容的個案數目；及
- (e) 各個部門按照提交予專員的任何報告而就任何人員採取紀律行動的個案的數目。

把專員的報告提交立法會省覽

183. 根據條例草案第47(4)條，行政長官須安排將專員的周年報告的文本提交立法會會議席上省覽。然而，條例草案第47(5)條規定，如行政長官認為發表報告內的任何事宜，會對防止或偵測罪行或保障公共安全造成損害，他可從提交予立法會會議席上省覽的文本中剔除該等事宜。根據條例草案第48條，專員可不時就他認為合適的關乎執行他的職能的任何事宜，向行政長官提交任何進一步的報告。

184. 委員認為，專員及行政長官對於從提交予立法會會議席上省覽的專員周年報告的文本中剔除的事宜，如有任何意見分歧之處，立法會亦須獲得知會。政府當局對此表示贊同，並會為此提出委員會審議階段修正案。

185. 部分委員認為應向立法會作出匯報，告知從提交予立法會會議席上省覽的專員報告中剔除了何種事宜。專員根據條例草案第48條向行政長官提交的任何報告，亦應提交予立法會會議席上省覽。此外，當局應設立機制，以供立法會監察執法機關遵守有關規定的整體情況。此等委員建議政府當局應把下述建議轉達專員：專員應考慮以閉門方式向保安事務委員會作出簡報，匯報從專員報告中所剔除的事宜，以及執法機關遵守有關規定的整體情況。

186. 政府當局解釋，機密資料的取用受“只查閱須知資料”的原則所規限。讓專員享有向行政長官提交機密報告的行事彈性，是恰當的安排。

187. 劉慧卿議員建議就海外司法管轄區的立法機關監察執法機關執行秘密行動的工作進行資料研究，包括在此方面向立法機關提供機密資料的事宜。法案委員會同意由保安事務委員會跟進擬議的資料研究工作。

188. 涂謹申議員會提出委員會審議階段修正案，規定須以機密文件的方式，向立法會匯報當局根據條例草案第47(5)條從專員報告中所剔除的事宜。涂謹申議員亦會提出委員會審議階段修正案，規定行政長官須將專員根據條例草案第48條提交的報告的文本，連同述明以下事宜的陳述提交立法會會議席上省覽：是否有任何事宜在沒有專員的同意下從該報告中剔除。如行政長官認為發表報告內的任何事宜，會對防止或偵測罪行或保障公共安全造成損害，他可在諮詢專員後從報告中剔除該等事宜。任何已從報告中剔除的事宜，均須以機密文件的方式向立法會作出匯報。

189. 此外，涂謹申議員會提出委員會審議階段修正案，規定專員須把他向各部門提出建議的報告的文本提交予立法會會議席上省覽。如專員認為發表報告內的任何事宜，會對防止或偵測罪行或保障公共安全造成損害，他可從報告的文本中剔除該等事宜。被剔除的事宜須以機密文件的方式向立法會作出匯報。

支援人員

190. 委員曾問及專員辦事處的人手編制，並詢問專員是否須負責其轄下員工的管理事宜。

191. 政府當局告知委員，專員轄下將設有一個屬首長級薪級第1點的秘書長職位，以及另外16名支援人員。條例草案就專員職能作出的規定，已隱含他可管理任何員工，以協助他履行其職能的意思。政府當局會在委任專員時向他申明此點。

192. 關於涂謹申議員建議訂立條文，讓專員聘請一名法律顧問協助其執行工作一事，政府當局表示，應否聘請此名職員將由專員作出決定。當局會向專員批撥資源，以供在他認為適當的情況下聘請其他專業人士(包括法律顧問)協助其工作。

取用由小組法官保存的密封封套

193. 部分委員認為，條例草案應明文規定專員可要求小組法官准許其開啟由後者保存，用以存放文件或紀錄的密封封套，以供專員作出審查。

194. 政府當局指出，條例草案第57條對執法機關施加責任，規定其必須備存指明事宜的妥善紀錄，包括發出訂明授權或器材取出手令，或將訂明授權或器材取出手令續期的申請的有關事宜，以及條例草案所訂其他事宜。此項安排的目的之一，是讓專員獲得所需資料，以便妥善檢討執法機關遵守條例草案、實務守則所訂規定及任何訂明授權的情況。執法機關須備存其他文件和紀錄，以協助專員履行其職責。專員取用由小組法官保存的密封封套的需要應微乎其微。在出現專員認為有需要取用由小組法官保存的文件的罕見情況下，專員可與小組法官聯絡。經考慮委員的意見後，政府當局會加入一項明訂條文，訂明專員可要求取用由某小組法官保存的文件，而有關的小組法官可遵從該項要求。

定期檢討

195. 條例草案第54(1)條規定，每一部門的首長均須安排定期檢討該部門的人員遵守有關規定的情況。根據條例草案第54(2)條，有關方面須安排職級高於有關部門的授權人員的人員，檢討授權人員行使及執行條例草案下任何職能的情況。

196. 委員指出部門首長可發出緊急授權，並質疑條例草案第54(2)條所訂的檢討，是否包括就部門首長發出緊急授權進行的檢討。委員亦詢問就發出緊急授權所作的內部檢討會如何進行。

197. 政府當局回應時表示，在發出緊急授權的時間起計的48小時內，須向小組法官提出確認該項授權的申請。部門首長會確保與發出緊急授權有關的條文獲得遵守。實務守則將列明部門如何進行檢討。政府當局亦表示，緊急授權由部門首長發出。因此，條例草案第54(2)條所訂檢討機制對他們並不適用，因為該機制旨在檢討條例草案第7條指定的授權人員履行其職能的情況。然而，發出緊急授權的工作涉及多個步驟，而大部分步驟須由執法人員進行。此方面的循規情況須按照條例草案第54(1)所訂進行定期檢討。

198. 關於定期檢討的頻密程度，政府當局告知委員，當局希望每3個月最少進行一次一般檢討。

截取或秘密監察的終止

199. 根據條例草案第55條，在所作出的授權停止有效前，正在進行定期檢討的人員或負責有關行動的人員如信納條例草案第3條所指，該訂明授權持續有效的先決條件未獲符合，或批准授權進行的行動所謀求達到的目的已經達到，則須於切實可行範圍內盡快終止有關行動，並須通知有關的授權當局該行動已經終止。授權當局繼而會撤銷有關授權。

200. 政府當局解釋，有關條文是為了應付當情況有所轉變，以致條例草案第3條所訂的先決條件不再獲得符合時，即須終止有關的行動。

201. 委員認為應修改條例草案第55(1)條，清楚訂明檢討人員可隨時終止行動，而不只是在進行檢討的過程中或在進行檢討後才可終止行動。政府當局對此表示贊同。當局亦同意刪除條例草案第55(6)(b)條，因為該項條文並非絕對需要。當局會提出有關的委員會審議階段修正案。

202. 委員建議在條例草案中加入本來便不應提出訂明授權的申請及錯誤進行有關行動，作為終止訂明授權的理由。委員亦建議加入一項條文，訂明如出現任何重大改變，包括在享有法律專業保密權的可能性方面出現改變或目標人物保持緘默的權利受到侵犯時，有關的授權須停止有效。

203. 政府當局同意提出委員會審議階段修正案，規定必須評估某項逮捕對於將會藉繼續進行截取或秘密監察而取得任何可能享有法律專業保密權的資料的可能性有何影響。有關的評估應在逮捕某人後於合理地切實可行範圍內，盡快向有關的授權當局提交。有關當局如信納持續進行有關行動的先決條件已不再獲得符合，便須撤銷該項授權。

204. 政府當局亦同意在實務守則列明下述規定：必須為條例草案第55(2)條的目的指定一名人員為負責秘密行動的人員；以及確保他對可能構成終止授權的理由的有關資料和事態發展必須知情。此外，實務守則將會列明並未符合持續進行行動的先決條件的例子。

205. 吳靄儀議員會提出委員會審議階段修正案，訂明下述情況將構成終止行動的理由 ——

- (a) 訂明授權的申請、發出或續期違反條例草案的規定；及
- (b) 已進行的截取或秘密監察行為超出訂明授權的範圍。

吳靄儀議員亦會提出委員會審議階段修正案，規定在截取或秘密監察行動目標人物被捕後，有關行動將自動終止。

206. 涂謹申議員會提出委員會審議階段修正案，訂明下述情況將構成終止行動的理由 ——

- (a) 訂明授權的申請、發出或續期違反條例草案的規定；
- (b) 已進行的截取或秘密監察行為超出訂明授權的範圍；及
- (c) 條例草案第31條的指明先決條件未獲符合。

對受保護成果的保障及備存紀錄

207. 部分委員建議訂定條文，規定秘密監察的成果或紀錄在所有法律程序完結後須保存1年。政府當局對此表示贊同，並會就條例草案第56及57條提出有關的委員會審議階段修正案。

208. 涂謹申議員建議備存被執法機關截取通訊的電話線、圖文傳真線和電郵帳戶的各別總數，以及受到監察的互聯網規約地址的總數，並向專員提供該等資料。政府當局告知法案委員會，實務守則將規定執法機關須備存該等紀錄。政府當局亦答允向專員轉達有關他可參閱該等資料的建議。

209. 委員認為應訂定充分的保障措施，防止在保存及使用從截取通訊及秘密監察活動所得的情報方面，可能出現濫用的情況。部分委員建議就備存及銷毀從該等活動所得的情報訂立機制，並規定須就備存此等情報向小組法官提出申請。此外，專員應獲賦權監督備存從秘密行動所得情報的情況。委員亦詢問當局根據甚麼準則，決定應否備存從秘密行動取得的情報。

210. 政府當局回應時表示，從秘密行動所得的資料只要是有關成果的正本、文本、複本、副本、拷貝、摘錄或撮錄，便符合成果的定義。條例草案第56條就披露、保護及銷毀從秘密行動取得的成果作出規定。若有任何分析不能追溯至源自有關成果，執法機關將只會保留對防止及偵測罪行或保障公共安全有用的資料。任何資料如屬於個人資料，均須受《個人資料(私隱)條例》(第486章)所規管。

211. 政府當局亦解釋，就警方的情況而言，警方的情報管理系統受到嚴格監控。該系統設有中央數據庫，並由獨立於調查隊伍的專責小組負責執行輸入資料的工作。該小組的成員曾接受專門為執行此項職務而設的特別訓練及紀律培訓，並在一名警司統領之下履行其職務。該系統只載有與防止或偵測罪行及保障香港的安全有關的資料。在取用數據庫所載資料方面亦受到嚴格管制。所有數據輸入及檢索均會記錄在案，為進行檢查設立稽查紀錄。

212. 政府當局認為，就備存及銷毀從秘密行動所得情報訂立機制，並規定須就備存此等情報向小組法官提出申請的建議並不切實可行。據政府當局所知，並無任何普通法司法管轄區規定作出類似安排。

213. 政府當局告知委員，當局會另行就執法機關的情報管理系統進行全面檢討，以期進一步加強該等系統，特別是提高使用系統資料的政策透明度。按照委員的建議，政府當局答允向保安事務委員會匯報上述檢討的結果。

214. 吳靄儀議員會提出委員會審議階段修正案，訂明任何從受保護成果產生的資料或情報報告或紀錄，均須受到與受保護成果相同的限制及保障。吳靄儀議員亦會提出委員會審議階段修正案，規定部門就尋求發出訂明授權或器材取出手令，或將訂明授權或器材取出手令續期的申請的有關事宜，保存相關的紀錄，以及保存與條例草案所訂其他事宜有關的紀錄，為期最少10年，而非條例草案所建議的1年。

電訊截取成果不獲接納為證據

215. 根據條例草案第58條，任何電訊截取成果不得於在任何法院進行的任何法律程序中獲接納為證據，並不得提供予任何一方。任何證據或問題如傾向顯示關於尋求發出任何有關訂明授權或將有關訂明授權續期的申請的事宜，以及其他相關事宜，均不可舉出該等證據或發問該等問題。然而，為達致公義，在指明情況下可向法官作出披露。

216. 部分委員認為，刑事法律程序中的辯方應獲准取用電訊截取成果，並以此作為抗辯證據。該等委員指出，接受公平審訊的權利，是《基本法》所保證的基本權利。拒絕讓辯方取用電訊截取資料，可能會違反《香港人權法案條例》(第383章)。作出披露的決定應由主審法官而非控方作出。委員並質疑，控方知悉但辯方並不知情的證據或資料，是否符合“雙方不比對方佔優”的原則。他們指出，條例草案第58(3)條禁止發問任何與截取行動的訂明授權有關的問題，實改變了現時容許就所有相關事宜作出查訊，作為刑事法律程序一部分的做法。

此外，條例草案第58(4)條以現有草擬方式而言，可能嚴重限制控方在普通法下作出披露的責任。他們並指出，根據條例草案第58(6)條，法官在信納作出披露對達致公義屬不可或缺時，將只會命令向他作出披露。該等委員認為此項準則是相當嚴格的標準。

217. 政府當局回應時表示，當局的既定政策是電訊截取資料不會在法律程序中獲接納為證據。條例草案所載的建議，與法改會在1996年及2006年發表的報告書中所作的分析和建議一致，並已依循英國在此方面的做法。政府當局解釋，若透過截取通訊取得材料獲接納為證據，便須保留有關材料作此用途，此舉與須在切實可行範圍內盡快銷毀截取成果的建議背道而馳。以截取所得材料作為證據，會構成揭露執法機關截取能力的風險。由於此做法會導致公開散播個人資料，因而對私隱亦會構成不利影響。

218. 政府當局認為，由於控辯雙方均不可舉出從電訊截取取得的任何證據，故此雙方在此方面均沒有比對方佔優。若在調查過程中發現可證明某人無罪的材料，將會尋求主審法官的指示，而主審法官可命令披露有關資料。若主審法官認為無法出示截取成果會導致不公平審訊，他可擱置有關的法律程序。因此，應不會出現對辯方不公平的問題。

219. 經考慮委員所提出的關注，政府當局同意動議委員會審議階段修正案，規定必須向主審法官披露可證明某人無罪的資料。根據擬議的修正案，凡為任何刑事法律程序(包括上訴法律程序)的目的，依據有關訂明授權取得的並可繼續被有關部門取用的任何資料，而該等資料可能會合理地被認為是能夠削弱控方針對辯方的論據，或會有助於辯方的論據，則該部門須向控方披露該等資料。然後控方須於以非公開形式進行的單方面聆訊中，向主審法官披露該等資料。主審法官繼而可作出他認為就確保有關法律程序得以公平進行而屬合適的命令。凡有任何該等命令作出，控方須於以非公開形式進行的單方面聆訊中，向審理任何有關法律程序的法官披露該命令的條款及有關資料。

220. 吳靄儀議員會提出委員會審議階段修正案，以准許辯方使用由截取得來的材料。

221. 涂謹申議員並不信納有需要訂定條例草案第58條。他會提出委員會審議階段修正案以刪除該條文，使在法律程序中接納證據的現況維持不變。

不遵守條例草案所訂條文或實務守則

222. 部分委員認為應加入罰則條文，處理不遵守條例草案所訂條文或實務守則的情況。

223. 政府當局回應時表示，由於條例草案旨在對政府機構作出規管，故非政府機構將不受條例草案所訂條文規限。若就同一行為而言，執法人員須受新訂的刑事罪行條文規限，而其他人則不受規限，便會

出現不合常理的情況。政府當局會在下一階段工作中考慮是否有需要就未獲授權下進行截取或秘密監察訂定一般刑事罪行。

224. 政府當局進一步告知法案委員會，違反條例草案的規定會遭受紀律處分，而此點會在實務守則中加以訂明。執法人員在沒有適當授權下蓄意進行有關行動，亦可能觸犯普通法中有關擔任公職時行為不當的罪行。執法人員會繼續受到適用的法律所規管，例如《刑事罪行條例》(第200章)就作出虛假陳述施加的刑事制裁。專員可將個案轉交律政司司長，以便後者考慮是否有充分證據，可控告違規人員觸犯刑事罪行。此外，任何違規情況均須受到專員的審查，而專員可向部門首長及行政長官匯報該等涉及行為不當的個案。在專員提交行政長官的周年報告內將會提供該等個案的統計數字，而該報告亦會提交予立法會省覽。政府當局認為此等措施已相當有效，足以確保執法機關及其人員遵守有關法律及各項適用的程序。

225. 吳靄儀議員會提出委員會審議階段修正案，訂明任何違反條例草案所作規定的情況，均屬可透過衡平法濟助及損害賠償提出訴訟的民事過失。

226. 涂謹申議員會提出委員會審議階段修正案，訂明任何人如違反條例草案第4條所訂禁止截取或條例草案第5條所訂禁止秘密監察的規定，即屬犯罪，可被判處的最高刑罰為監禁2年。任何公職人員或任何其他人士如未有遵照專員根據條例草案第51條作出的指示，回答任何問題或提供任何資料、文件或其他事宜，即屬犯罪，可被判處的最高刑罰為監禁2年。

通知截取通訊或監察行動的目標人物

227. 委員質疑為何曾被執法機關截取向他或由他發送的通訊，或本身是秘密監察行動目標人物的人士，在有關活動終止後不會獲得當局通知曾對其進行該類行動。委員並質疑如該人不獲告知當局曾進行有關行動，他如何能作出申訴。部分委員建議作出規定，訂明須在有關行動終止後通知行動的目標人物。然而，部分其他委員認為只有在當局錯誤進行截取或秘密監察的情況下，有關的人士才應獲得通知。

228. 政府當局告知法案委員會，不通知行動目標人物的建議，與法改會在1996年及2006年發表的報告書所載的建議一致，亦符合英國和澳洲的做法。加拿大及美國訂有作出通知的規定，但該項規定只適用於刑事案件。有關規定只涵蓋獲授權的截取或申請進行的截取，並訂明若干例外情況，例如為配合行動需要則屬例外。政府當局解釋，訂定一般通知規定會有困難，理由如下——

- (a) 並非所有秘密行動均會導致有人被捕。該等行動沒有導致任何人被捕，並不一定表示目標人物沒有涉及任何對治安或公共安全構成威脅的行為。儘管某項行動沒有導致目標人物被捕，但他仍有可能在實際上當有關行動結束後的一段時間內，繼續對社會構成威脅。在此等情況

下通知目標人物，將極有可能向該人及他的同黨通風報信，令其後以類似方式進行的調查工作更加困難；

- (b) 在目標人物被捕及調查工作公開的情況下，披露該等秘密行動的任何詳細資料，依然會令罪犯及同一犯罪集團的黨羽(如有的話)獲得與執法機關查案能力和辦案方式有關的資料。這樣不但會減低再次就同一罪犯進行類似秘密行動時取得成功的機會，而且會令罪犯(特別是越見有組織及先進的犯罪集團)得以逃避法律制裁；
- (c) 即使最後發現目標人物沒有涉及任何威脅，向他作出通知亦可能會引起真正目標人物的懷疑，又或在其他方面對秘密行動造成妨害。若就錯誤進行的行動通知誤被當為目標人物的人士，他可能會在明知或無意之間令真正的疑犯提高警覺；
- (d) 為了令秘密行動保持機密，可予披露的詳細資料數量有限。作出通知所帶來的好處不多，與因此而引起的不安相比之下，可說得不償失；及
- (e) 訂定一般通知規定後或須備存所有相關的詳細資料，以備作出通知時所需。此做法將有違必須盡快銷毀該等詳細資料以保障私隱的原則。

因此，政府當局認為不宜訂定一般通知規定。

229. 儘管如此，經考慮委員所提出有關設立機制，以便在錯誤進行有關行動時通知目標人物的建議後，政府當局建議設立機制，以便在有限情況下通知目標人物。根據政府當局提出的委員會審議階段修正案，如專員在執行他在條例草案下的任何職能的過程中，認為存在有部門在沒有發出或續期的訂明授權的授權下進行任何截取或秘密監察的情況，則專員須向有關人士發出通知。有關人士可在接獲上述通知後的6個月內，或在專員所容許的進一步期間內，提出尋求就該截取或秘密監察進行審查的申請。適用於審查個案的其他規定亦會適用。該等規定分別為運用司法覆核原則進行審查、可能繳付賠償金的安排，以及在專員認為發出通知或判給賠償會對防止或偵測罪行或保障公共安全造成損害期間，不得發出該通知或判給賠償。如遇有下述情況，專員亦無須向有關人士發出通知 ——

- (a) 在作出合理的努力後，有關人士不能被識別或尋獲；
- (b) 專員認為秘密行動對有關人士的侵擾程度屬微不足道；或
- (c) 就截取而言，有關截取屬條例草案第4(2)(b)條(截取藉無線電通訊傳送的電訊)，以及條例草案第4(2)(c)條(由或根據條例草案以外的任何成文法則授權、准許或規定進行的任何截取)所描述的截取。

230. 政府當局解釋，在考慮某項行動是否在沒有訂明授權的授權下進行時，專員不會僅限於確立有關授權是否已發出的事實。若授權已經發出，他亦會檢討作出有關決定的過程，藉以確保有關申請是按照訂明程序提出，以及在實施訂明授權方面，確保是按照該項授權的條款予以實施。因此，若出現下述情況，專員可決定有理由通知目標人物 ——

- (a) 部門應就某項行動申請作出授權，但該部門事實上並沒有這樣做；及
- (b) 授權已經作出，但專員認為存在某些情況，例如理應申請較高級別的授權、授權當局未獲提供可供使用及相當可能會影響就是否發出授權作出的斷定的資料，或有關行動不符合有關授權所載的條款。

231. 關於賠償金方面，政府當局表示，根據條例草案第43(2)(b)條，專員在通知目標人物時可同時命令繳付賠償金，而無須待目標人物自行提出申索。政府當局建議修訂就審查及通知個案作出的安排，以便向目標人物查詢其是否希望專員考慮繳付賠償金的問題；以及他若有此意的話，可向專員提交申述書。專員根據條例草案第43(2)(b)及(4)條就是否有理據繳付賠償金作出考慮時，須把該申述書納入考慮範圍。政府當局將會提出有關的委員會審議階段修正案。

232. 部分委員認為，政府當局提出的委員會審議階段修正案中有關“沒有根據……訂明授權的授權下進行”的用語，未必可以涵蓋若干錯誤地或不當地進行截取或秘密監察的個案。他們亦認為專員向有關人士作出通知時，應就其定論提供理由。

233. 政府當局解釋，“沒有根據……訂明授權的授權下進行”一語是恰當的驗證準則。政府當局亦指出，訂明時限和有關個案是否關乎截取或秘密監察，已能取得適當平衡，既可為目標人物提供若干細節，而又不會危害有關行動的秘密性質。

234. 吳靄儀議員會提出委員會審議階段修正案，訂明 ——

- (a) 須就錯誤進行或沒有根據訂明授權的授權下進行的截取或秘密監察的個案，通知有關人士；
- (b) 須就專員的定論提供理由；及
- (c) 由專員命令繳付賠償金。

235. 涂謹申議員會提出委員會審議階段修正案，訂明 ——

- (a) 須就錯誤地或不當地進行的截取或秘密監察個案，或在違反條例草案的情況下進行的截取或秘密監察個案，通知有關人士；及

- (b) 專員須就截取或秘密監察的性質概要，以及有關的截取或秘密監察在何時開始和在何時結束，提供有關的資料。

規例及修訂附表

236. 應委員的要求，政府當局同意提出委員會審議階段修正案，訂明行政長官根據條例草案第62條訂立的規例，以及行政長官會同行政會議根據條例草案第63條，藉於憲報刊登公告而對附表1、2、3及4作出的修訂，均須經立法會批准(即按照先審議後訂立的程序審批)。

過渡性安排

237. 根據條例草案第65條，在經制定的本條例草案生效前，按照根據《電訊條例》第33條發出或續期的命令進行截取所得的任何材料，亦須受到條例草案第56及58條所規限，猶如該等材料是依據訂明授權取得的成果一樣。

238. 政府當局解釋，訂定該條文的政策目的，是使新制度建議訂定的有關保障材料和成果獲接納為證據的保障措施，適用於條例草案生效前已取得的成果，以便該等成果與根據新制度新近取得的成果一樣，須受到相同的規定所規限(例如須予以保留及銷毀)。由於相同的私隱和政策考慮因素適用，政府當局認為規定該等保障措施適用於先前已然存在的材料，藉以為有關各方的私隱作出更佳保障，實屬恰當。

239. 因應上文第4段所述的終審法院的判決，政府當局會就條例草案第65條提出委員會審議階段修正案，清楚訂明該條文所載規定，不應被解釋為認可或授權進行依據在擬議條例生效前根據《電訊條例》第33條作出的命令進行的任何電訊截取。此外，政府當局會提出委員會審議階段修正案，刪除條例草案第65條中有關第58條的提述，使條例草案第58條不適用於依據上述命令進行的任何電訊截取，或透過進行此種截取而取得的材料。

240. 吳靄儀議員會提出委員會審議階段修正案，以免條例草案經制定成為法例後，會被解釋為授權進行在條例草案生效前已被任何法庭裁定為非法的截取或監察行動。

241. 涂謹申議員會提出委員會審議階段修正案，刪除有關條例草案第58條的提述。

建議訂定“日落條文”

242. 部分委員認為，鑒於通訊自由和通訊秘密是憲法所賦予的權利，亦是個人自由及政治自由的基礎元素，當局有必要在條例草案中訂立機制，以便在諮詢公眾後檢討或廢除經制定的條例草案。此外，當局並沒有就條例草案進行公眾諮詢。此等委員建議在條例草案中加入一項“日落條文”，訂明政府當局會檢討此項法例，否則此項法例將會失效。

243. 然而，部分其他委員認為並無需要訂定“日落條文”。劉江華議員建議政府當局定期(例如每6個月一次)就經制定的條例草案的實施情況，向保安事務委員會作出匯報。政府當局亦應承諾在有關法例開始實施2至3年後，就該法例進行全面檢討。

244. 政府當局認為並無需要在條例草案中訂定“日落條文”，因為公眾在過去10年已就相關事宜進行多番討論，當局在擬訂條例草案的立法建議前亦已作出諮詢，而且法案委員會已就條例草案進行詳細及全面的商議。經過商議後，政府當局更已因應委員的意見和建議提出多項委員會審議階段修正案。

245. 就有關法例並無時限而言，政府當局認為訂定“日落條文”並不恰當。與此亦屬相關的一點是，在法案委員會所察悉的部分海外例子當中，當地有關法例在不足一個月的時間內制定，情況有別於此項條例草案。政府當局會繼續就新法例的實施情況進行檢討。

246. 吳靄儀議員會提出委員會審議階段修正案，就訂定“日落條文”作出規定。

委員會審議階段修正案

247. 除了於上文各段討論的委員會審議階段修正案外，政府當局亦同意就條例草案動議其他修正案，以便條文更加清晰或更臻完善。政府當局動議的整套委員會審議階段修正案的擬稿載於**附錄III**。

248. 除了於上文各段討論的委員會審議階段修正案外，吳靄儀議員亦會就條例草案提出其他修正案。顯示吳靄儀議員所提出委員會審議階段修正案的擬稿的條例草案標明修正事項文本載於**附錄IV**。

249. 除了於上文各段討論的委員會審議階段修正案外，涂謹申議員亦會就條例草案提出其他修正案。顯示涂謹申議員所提出委員會審議階段修正案的擬稿的條例草案標明修正事項文本載於**附錄V**。

條例草案恢復二讀辯論

250. 法案委員會對條例草案在2006年8月2日立法會會議席上恢復二讀辯論並無異議。

政府當局須作出的跟進行動

251. 政府當局答允 ——

- (a) 不時向保安事務委員會提供實務守則的最新版本(請參閱上文第155段)；

- (b) 向專員轉達下述建議：專員向保安局局長提出其對實務守則的意見或建議時，應考慮立法會議員的意見(請參閱上文第156段)；
- (c) 向專員轉達下述建議：專員可參閱關於被執法機關截取通訊的電話線、圖文傳真線和電郵帳戶的各別總數，以及受到監察的互聯網規約地址總數的資料(請參閱上文第208段)；及
- (d) 向保安事務委員會匯報就執法機關情報管理系統進行檢討的結果(請參閱上文第213段)。

保安事務委員會須作出的跟進行動

252. 法案委員會建議由保安事務委員會跟進下列事宜 ——

- (a) 建議就海外司法管轄區的立法機關監察執法機關執行秘密行動的工作進行資料研究，包括在此方面向立法機關提供機密資料的事宜(請參閱上文第187段)；及
- (b) 建議專員向保安局局長提出其對實務守則的意見或建議時，應考慮議員的意見(請參閱上文第156段)。

徵詢意見

253. 謹請議員察悉法案委員會的商議工作及條例草案恢復二讀辯論的日期。

立法會秘書處
議會事務部2
2006年7月20日

《截取通訊及監察條例草案》委員會

委員名單

主席	劉健儀議員, GBS, JP
副主席	劉江華議員, JP
委員	何俊仁議員 李卓人議員 李柱銘議員, SC, JP 李國寶議員, GBS, JP 呂明華議員, SBS, JP 吳靄儀議員 周梁淑怡議員, GBS, JP 涂謹申議員 陳智思議員, GBS, JP 陳鑑林議員, SBS, JP 梁劉柔芬議員, SBS, JP 單仲偕議員, JP 黃宜弘議員, GBS 曾鈺成議員, GBS, JP 楊孝華議員, SBS, JP 劉慧卿議員, JP 霍震霆議員, GBS, JP 張宇人議員, JP 余若薇議員, SC, JP 方剛議員, JP 李國英議員, MH, JP 李國麟議員, JP 林偉強議員, SBS, JP 林健鋒議員, SBS, JP 梁君彥議員, SBS, JP 梁家傑議員, SC 梁國雄議員 張學明議員, SBS, JP 黃定光議員, BBS 湯家驊議員, SC 詹培忠議員(至2006年6月19日) 劉秀成議員, SBS, JP (總數：34位議員)
秘書	湯李燕屏女士
法律顧問	李裕生先生
日期	2006年6月20日

《 截取通訊及監察條例草案 》委員會

曾向法案委員會口頭申述意見的團體及個別人士

1. 民主建港協進聯盟
2. 青年行動21
3. 香港大律師公會
4. 香港律師會
5. 香港社區組織協會
6. 香港人權監察
7. 曾健成先生
8. 林志偉先生
9. 陳志興先生
10. 廖譚婉琮女士

《 截取通訊及監察條例草案 》

委員會審議階段

由保安局局長動議的修正案

條次

建議修正案

- 2(1) (a) 在“文本”的定義中 —
- (i) 在(a)(i)段中，刪去“標明本身是該等內容的文本、複本、副本、拷貝、摘錄或撮錄的”；
 - (ii) 在(a)(ii)段中，刪去“並且是”而代以“，並且是直接或間接顯示”；
 - (iii) 在(b)(i)段中，刪去“標明本身是該等材料的文本、複本、副本、拷貝、摘錄或撮錄的”；
 - (iv) 在(b)(ii)段中，刪去“標明本身是以該等材料製備的謄本或紀錄的”。
- (b) 在“法院”的定義中，刪去“53 條及附表 2 第 4”而代以“6(3A)及 53”。
- (c) 在“秘密監察”的定義中 —
- (i) 在(a)段中，刪去“有系統”；
 - (ii) 刪去(b)段而代以 —
“(b) 不包括 —

- (i) 對沒有預見的事件或情況作出的當場反應；及
 - (ii) 構成本條例所指的截取的該等監察；”。
- (d) 在“數據監察器材”的定義中，在(a)段中，刪去在“指”之後的所有字句而代以“用作以下用途的任何器材或程式：監測或記錄藉電子方法向任何資訊系統輸入資料或自任何資訊系統輸出資料；但”。
- (e) 在“head”的定義中，在英文文本中，刪去“deputy of the”而代以“deputy”。
- (f) 在“截取”的定義中 —
 - (i) 在(a)段中，刪去“任何通訊而言，指就該”而代以“某項通訊而言，指就該項”；
 - (ii) 在(b)段中，刪去“處於沒有特定提述任何通訊的文意中，指就”而代以“在沒有特定提述某項通訊的文意中出現，指就任何”。
- (g) 刪去“司法授權”的定義而代以 —
 - ““法官授權”(judge’s authorization)指根據第3部第2分部發出或續期的法官授權，而凡文意所需，亦包括將會根據該分部發出或續期的法官授權；”。

- (h) 在“維修”的定義中，在(a)段中，刪去“、遷移、修理或保養該器材”而代以“、修理或保養該器材，或轉移其位置”。
- (i) 在“郵政服務”的定義中，刪去“所指”而代以“適用”。
- (j) 在“公眾地方”的定義中，在(b)段中，刪去“在上述處所屬擬供公眾人士用作洗手間、沐浴地方或更衣地方的範圍內，不包括該”而代以“不包括屬擬供公眾人士用作洗手間、沐浴地方或更衣地方的任何該等”。
- (k) 刪去“傳送”的定義。
- (1) 在“第2類監察”的定義中 —
 - (i) 刪去“在第(3)款的規限下，在任何秘密監察符合以下條文的範圍內，指該秘密監察”而代以“在第(3)及(3A)款的規限下，指”；
 - (ii) 刪去(a)段而代以 —
 - “(a) 由某人使用監聽器材或視光監察器材，為監聽、監測或記錄任何其他人所說的說話或所進行的活動的目的而進行的任何秘密監察，而使用該器材的人 —
 - (i) 屬在該其他人的意向或應有的合理預期中是會聽見該說話或看見該活動的人；或

(ii) 是在第(i)節所描述的人
明示或默示同意下監聽、
監測或記錄該說話或活動
的人；或”；

(iii) 在(b)段中，刪去“該監察是”；

(iv) 在(b)段中，在“進行的”之後加入“任
何秘密監察”；

(v) 在(b)(ii)段中，在“內部”之後加入
“，或未經准許而對該器材進行電子干
擾”。

(m) 在“行政授權”、“緊急授權”、“審查”及“器
材取出手令”的定義中，在中文文本中，刪去“有
此要求”而代以“所需”。

(n) 在“監聽器材”的定義中，在中文文本中，刪去
(a)段而代以 —

“(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”。

(o) 在“藉郵政服務傳送的通訊”的定義中，在中文文
本中，刪去“郵件”而代以“郵遞品”。

(p) 加入 —

““公共安全”(public security)指香港的公共安
全；

“郵遞品”(postal article)具有《郵政署條例》
(第98章)第2(1)條給予該詞的涵義；

“新聞材料”(journalistic material)具有《釋
義及通則條例》(第1章)第82條給予該詞

的涵義；”。

2(2) 刪去句號而代以“；但本款並不影響該人就他在公眾地方所說的說話或所寫或所讀的字句而享有的任何該等權利。”。

2 加入 —

“(3A) 部門的人員可在猶如任何第2類監察是第1類監察的情況下，申請就該第2類監察發出訂明授權或將訂明授權續期；而本條例中關乎該申請及該訂明授權的條文適用於該第2類監察，猶如該第2類監察是第1類監察一樣。”。

2 加入 —

“(5A) 就本條例而言，除非倡議、抗議或表達異見(不論是為達到某政治或社會目的或並非為該等目的)相當可能是藉暴力手段進行的，否則該等作為本身不得視為對公共安全的威脅。”。

2(6) (a) 在(a)段中，在“電話”之前加入“親身口述方式或藉”。

(b) 在(a)段中，在中文文本中，刪去“亦”。

(c) 在(b)段中，在“電話”之前加入“親身口述方式或藉”。

(d) 在(b)段中，在中文文本中，刪去“亦”。

(e) 在(c)段中，在“電話”之前加入“親身口述方式或藉”。

(f) 在(c)段中，在中文文本中，刪去“亦”。

2 刪去第(7)款。

- 3(1)
- (a) 在(a)(ii)段中，刪去“及”。
 - (b) 加入 —
“(aa) 有合理懷疑，懷疑有任何人曾涉及、正涉及或相當可能涉及 —
 - (i) (如謀求藉進行有關截取或秘密監察達到的目的是(a)(i)段所指明者)須予防止或偵測的有關特定嚴重罪行；或
 - (ii) (如謀求藉進行有關截取或秘密監察達到的目的是(a)(ii)段所指明者)構成或會構成對公共安全的有關特定威脅的任何活動；及”。
 - (c) 在(b)段中 —
 - (i) 在“驟之下”之後加入“，該截取或秘密監察對謀求藉進行該截取或秘密監察達到的目的是必要的，並且是與該目的相稱的”。
 - (ii) 刪去“該截取或秘密監察與謀求藉進行該截取或秘密監察達到的目的是相稱的。”。
 - (d) 在(b)(i)段中，刪去“從運作的角度，探求”而代以“在”。
 - (e) 在(b)(i)段中，刪去“的平衡；及”而代以“，求取平衡；”。
 - (f) 在(b)(ii)段中，刪去末處的逗號而代以“；及”。
 - (g) 在(b)段中，加入 —
“(iii) 考慮在有關情況下屬有關的其他事

宜。”。

3(2) 在(a)(i)段中，在“嚴重罪行”之前加入“有關特定”。

4(1) 刪去“透過任何其他人士”而代以“間接(不論是透過任何其他人士或是以其他方式)”。

5(1) 刪去“透過任何其他人士”而代以“間接(不論是透過任何其他人士或是以其他方式)”。

6(2) 刪去“，並可不時再獲委任”。

6 加入 —

“(3A) 小組法官在執行他在本條例下的任何職能時 —

(a) 不得視為法院或法院的成員；
但

(b) 具有與原訟法庭的法官就該法庭的法律程序而具有者相同的權力、保障及豁免權。”。

6 加入 —

“(4A) 以往曾獲委任為小組法官的人，可按照本條例中適用於委任小組法官的條文，不時再獲委任為小組法官。”。

11(2) 在(b)(ii)段中，刪去“任何”而代以“所有”。

12(2) 刪去“的批予”而代以“的”。

17(2) 在(b)(ii)段中，刪去“任何”而代以“所有”。

18(2) 刪去“的批予”而代以“的”。

- 20(1) (a) 在中文文本中，刪去“權一”而代以“權：該人員認為一”。
- (b) 在(a)段中，在中文文本中，刪去“該人員認為”。
- (c) 在(b)段中，在中文文本中，刪去“該人員”；
- (d) 在(b)段中，在中文文本中，刪去“後，認為”而代以“下，”。
- 23(3) (a) 在英文文本中，刪去“If no application for confirmation of the emergency authorization is made”而代以“In default of any application being made for confirmation of the emergency authorization”。
- (b) 在(a)段中，刪去在“安排”之後的所有字句而代以“將藉進行有關截取或第1類監察取得的資料即時銷毀；及”。
- 24(3) (a) 在(b)段中，刪去在“安排”之後而在破折號之前的所有字句而代以“將以下資料即時銷毀”。
- (b) 在(b)(i)段中，刪去在“規限下)”之後的所有字句而代以“藉進行有關截取或第1類監察取得的資料；或”。
- (c) 在(b)(ii)段中，刪去在“適用)”之後的所有字句而代以“藉進行有關截取或第1類監察取得的屬該命令所指明的資料。”。

- 26(3) (a) 在英文文本中，刪去 “If no application for confirmation of the prescribed authorization or renewal is made” 而代以 “In default of any application being made for confirmation of the prescribed authorization or renewal” 。
- (b) 在 (b)(i) 段中，刪去在 “安排” 之後的所有字句而代以 “將藉進行有關截取或秘密監察取得的資料即時銷毀；及” 。

26 加入 —

“(4A) 如有關當局在按第(1)款的規定申請確認訂明授權或其續期時不再擔任其職位，或不再執行其職位的有關職能，則 —

- (a) 在不損害《釋義及通則條例》(第 1 章)第 54 條的原則下，在該款中對有關當局的提述，包括提述在當其時獲委任為小組法官或授權人員(視屬何情況而定)並合法地執行該當局的職位的有關職能的人；及
- (b) 本條的條文及第 27 條據此適用。”。

- 27(3) (a) 在 (b) 段中，刪去在 “安排” 之後而在破折號之前的所有字句而代以 “將以下資料即時銷毀” 。
- (b) 在 (b)(i) 段中，刪去在 “規限下)” 之後的所有字句而代以 “藉進行有關截取或秘密監察取得的資料；或” 。

- (c) 在(b)(ii)段中，刪去在“適用)”之後的所有字句而代以“藉進行有關截取或秘密監察取得的屬該命令所指明的資料。”。
- 29(6) (a) 在(b)段中，在“武力”之前加入“合理”。
- (b) 刪去(c)段而代以 —
- “(c) 授權截取因截取根據該訂明授權而授權截取的通訊，而必然產生的連帶截取的任何通訊；及”。
- 29(7) (a) 在(a)(ii)及(b)(ii)段中，刪去“授權進入(在有需要時可使用)”而代以“(就第1類監察而言)授權進入(在有需要時可使用合理)”。
- (b) 在(c)(i)段中，在英文文本中，刪去“authorization,”而代以“authorization”。
- (c) 在(c)(ii)段中，刪去“授權進入(在有需要時可使用)”而代以“(就第1類監察而言)授權進入(在有需要時可使用合理)”。
- 30 (a) 在標題中，刪去“進一步”而代以“亦同時”。
- (b) 刪去在破折號之前的所有字句而代以 —
- “訂明授權亦同時授權從事為進行根據該授權而授權進行或規定進行的事情的目的而需要的及所連帶的行為，包括以下行為”。
- 新條文 加入 —

“30A. 訂明授權不可作出的授權

- (1) 儘管本條例有任何規定，除非存在特殊情況，否則 —

(a) 訂明授權不可載有藉提述以下事項而授權截取通訊的條款 —

(i) (就郵件截取而言)某律師的辦公室或其他有關處所或住所；或

(ii) (就電訊截取而言)於某律師的辦公室或其他有關處所或住所使用的任何電訊服務，或申請人知悉或申請人按理可被預期知悉是通常由律師為向當事人提供法律意見而使用的任何電訊服務；及

(b) 訂明授權不可載有條款授權就於某律師的辦公室或其他有關處所或住所作出的口頭或書面通訊，進行任何秘密監察。

(2) 就第(1)款而言，如有關當局信納 —

(a) 有合理理由相信 —

(i) 有關律師；

(ii) (就該律師的辦公室或其他有關處所而言)與該律師一同執業的任何其他律師，或在該辦公室工作的任何其他人；或

(iii) (就該律師的住所而言)在該住所居住的任何其他人，

是構成或會構成某項嚴重罪行或對公共安全的威脅的活動的參與者；或

(b) 有合理理由相信有關通訊之中的任何一項是為達到某犯罪目的而作出的，

即屬存在特殊情況。

(3) 為免生疑問，訂明授權並不授權在沒有某人的同意下，將任何器材植入或置入該人體內。

(4) 在本條中 —

“其他有關處所”(other relevant premises)就某律師而言，指申請人知悉或申請人按理可被預期知悉是通常由該律師及其他律師為向當事人提供法律意見而使用的任何處所(該律師的辦公室除外)；

“律師”(lawyer)指在《法律執業者條例》(第159章)第2(1)條界定為以大律師、律師或外地律師身分執業的人，或根據《法律援助條例》(第91章)第3(1)條獲委任的任何人。”。

36 在標題中，刪去“**進一步**”而代以“**亦同時**”。

36(1) (a) 刪去在破折號之前的所有字句而代以 —

“ (1) 器材取出手令亦同時授權從事為進行根據該手令而授權進行的事情的目的而需要的及所連帶的行為，包括以下行為” 。

(b) 在 (b) 段中，在“武力”之前加入“合理” 。

38(3) 刪去“，並可不時再獲委任” 。

38 加入 —

“ (5A) 以往曾獲委任為專員的人，可按照本條例中適用於委任專員的條文，不時再獲委任為專員。” 。

39 在 (b) 段中，加入 —

“(iia) 根據第 3A 分部向有關人士發出通知；” 。

40 加入 —

“ (1A) 在不局限第 (1) 款的一般性的原則下，凡有報告根據第 23(3)(b)、26(3)(b)(ii) 或 52 條就任何個案向專員提交，專員須就該等個案進行檢討。” 。

40(2) 在“(1)”之後加入“或(1A)” 。

41(2) 在“的細節”之前加入“(包括就任何人員採取的紀律行動)” 。

41(3) 刪去在“行政長官”之後的所有字句而代以“、律政司司長或任何小組法官，或提交予他們之中的任何人或所有人。” 。

42(1) (a) 刪去“相信”而代以“懷疑” 。

(b) 在(a)及(b)段中，在“部門”之後加入“的人員”。

43(1) 在(b)段中，刪去在“發生)”之後的所有字句而代以“所指稱的截取或秘密監察是否在沒有根據本條例發出或續期的訂明授權的授權下由某部門的人員進行。”。

43(2) 刪去在“斷定”之後的所有字句而代以 —

“所指稱的截取或秘密監察已在沒有根據本條例發出或續期的訂明授權的授權下由某部門的人員進行，則他須於合理地切實可行範圍內，盡快向申請人發出通知 —

(a) 述明他已就有關個案判定申請人得直，及表示該個案是屬截取或是屬秘密監察，以及述明該截取或秘密監察的時限；及

(b) 邀請申請人確認申請人是否有意願根據該申請，尋求繳付賠償金的命令，及(如申請人有此意願)邀請申請人為該目的作出書面陳詞。”。

43 加入 —

“(2A) 在接獲申請人尋求繳付賠償金的命令的確認後，專員在考慮為該目的而向他作出的任何書面陳詞後，可命令政府向申請人繳付賠償金。

(2B) 根據第(2A)款命令須予繳付的賠償金，可包括對精神傷害的補償。”。

43(3) 在“他須”之後加入“於合理地切實可行範圍內，盡快”。

43 刪去第(4)款。

43 刪去第(5)款而代以 —

“ (5) 儘管有第(2)、(2A)及(3)款的規定，專員須僅在他認為根據該等條文發出任何通知或作出任何命令不會對防止或偵測罪行或保障公共安全造成損害時，才發出該通知或作出該命令(視屬何情況而定)。”。

43 加入 —

“ (6) 如截取屬第 4(2)(b)或(c)條所描述的截取，則專員不得就該截取作出第(2)款所提述的斷定。”。

44(1) 在(c)段中，在“認為”之後加入“在作出合理的努力後，”。

45 刪去第(1)款而代以 —

“ (1) 為進行審查的目的 —

(a) 專員在斷定任何截取或秘密監察是否在沒有根據本條例發出或續期的訂明授權的授權下進行時，須應用可由法院在有人申請司法覆核時應用的原則；及

(b) (除第 51(1)條另有規定外)專員須基於向他作出的書面陳詞而進行審查。”。

45(3) (a) 刪去“43(2)(a)或(3)條向申請人發出通知”而代以“43(2)、(2A)或(3)條向申請人發出通知或作出任何命令”。

- (b) 在(b)段中，刪去在“提供”之後的所有字句而代以“第43(2)(a)條所述的有關截取或秘密監察的細節以外的該截取或秘密監察的細節；或”。
- 46(1) (a) 刪去“所指”而代以“所述”。
- (b) 在“該斷定”之後加入“(包括他在進行審查時作出的任何命令或定論)”。
- 46(2) (a) 刪去“根據第(1)款接獲關於斷定”而代以“接獲第(1)款所指”。
- (b) 在“的細節”之前加入“(包括就任何人員採取的紀律行動)”。
- 46(3) 刪去在“行政長官”之後的所有字句而代以“、律政司司長或任何小組法官，或提交予他們之中的任何人或所有人。”。
- 新條文 加入 —

“第 3A 分部 — 由專員發出通知

46A. 通知有關人士

(1) 如專員在執行他在本條例下的任何職能的過程中，認為存在有部門的人員在沒有根據本條例發出或續期的訂明授權的授權下進行任何截取或秘密監察的情況，則除第(6)款另有規定外，專員須於合理地切實可行範圍內，盡快向有關人士發出通知 —

- (a) 述明存在該情況，及表示該情況是屬截取或是屬秘密監察，以及述明該截取或秘密監察的時限；及

(b) 告知有關人士他就該截取或秘密監察向專員申請進行審查的權利。

(2) 凡有關人士在接獲上述通知後的 6 個月內，或在專員所容許的進一步期間內，提出尋求就該截取或秘密監察進行審查的申請，則儘管有第 44(1)(a)條的任何規定(但在第 44 條的其他條文規限下)，專員須作出第 43(2)條所提述的斷定，而本條例的條文據此適用。

(3) 儘管有第(1)款的規定，專員須僅在他認為根據該款發出任何通知不會對防止或偵測罪行或保障公共安全造成損害時，才發出該通知。

(4) 在不損害第(3)款的原則下，在根據第(1)款向有關人士發出通知時，專員不得 —

(a) 說明其定論的理由；或

(b) 提供第(1)(a)款所述的有關截取或秘密監察的細節以外的該截取或秘密監察的細節。

(5) 就本條而言，專員在考慮任何截取或秘密監察是否在沒有根據本條例發出或續期的訂明授權的授權下進行時，須應用可由法院在有人申請司法覆核時應用的原則。

(6) 在以下情況下，本條並不規定專員向有關人士發出通知 —

(a) 在作出合理的努力後，有關人士不能被識別或尋獲；

(b) 專員認為有關截取或秘密監察對有關人士的侵擾程度屬微不足道；或

(c) (就截取而言)有關截取屬第4(2)(b)或(c)條所描述的截取。

(7) 在本條中，“有關人士”(relevant person)指屬有關截取或秘密監察的目標人物的任何人。”。

47(2) (a) 刪去(a)段而代以 —

“(a) 一份清單，顯示 —

(i) 在該報告期間，根據本條例發出的法官授權、行政授權及緊急授權的各別數目，及該等授權各別的平均時限；

(ii) 在該報告期間，根據本條例續期的法官授權及行政授權的各別數目，及該等授權各別的平均續期時限；

(iii) 在該報告期間，因應根據本條例提出的口頭申請而發出的法官授權、行政授權及緊急授權的各別數目，及該等授權各別的平均時限；

(iv) 在該報告期間，因應根據本條例提出的口頭申請而續期的法官授權及行政授權的各別數目，及該等授權各別的平均續期時限；

- (v) 在該報告期間，根據本條例續期而在續期之前已獲 5 次或多於 5 次續期的法官授權及行政授權的各別數目；
 - (vi) 在該報告期間，為尋求發出法官授權、行政授權及緊急授權而根據本條例提出的並遭拒絕的申請的各別數目；
 - (vii) 在該報告期間，為尋求將法官授權及行政授權續期而根據本條例提出的並遭拒絕的申請的各別數目；
 - (viii) 在該報告期間，為尋求發出法官授權、行政授權及緊急授權而根據本條例提出的並遭拒絕的口頭申請的各別數目；及
 - (ix) 在該報告期間，為尋求將法官授權及行政授權續期而根據本條例提出的並遭拒絕的口頭申請的各別數目；”。
- (b) 在(d)(ii)段中，在“規定”之後加入“或有錯誤的”。
- (c) 刪去(d)(iv)段而代以 —
- “(iv) 專員繼進行審查後在該報告期間根據第 43(2)條發出的通知及根據第 43(3)條發出的通知的各別數目；”。
- (d) 在(d)段中，加入 —
- “(iva) 專員在該報告期間根據第 46A 條發出通知的個案的數目；”。

(e) 在(d)(v)段中，在“49”之前加入“48、”。

(f) 在(d)(v)段中，刪去末處的“及”。

(g) 在(d)段中，加入 —

“(vi) 在該報告期間，由於依據訂明授權進行任何截取或秘密監察而取得享有法律專業保密權的資料的個案的數目；及

(vii) 在該報告期間，按照根據第 41、46、50 或 52 條提交予專員的任何報告而就部門的任何人員採取紀律行動的個案的數目，及該等行動的性質概要；及”。

47 刪去第(4)款而代以 —

“(4) 行政長官須安排將報告的文本連同述明以下事宜的陳述，提交立法會會議席上省覽：是否有任何事宜在沒有專員的同意下根據第(5)款從該文本中剔除。”。

50(2) 在“的細節”之前加入“(包括就任何人員採取的紀律行動)”。

50(3) 刪去在“行政長官”之後的所有字句而代以“、律政司司長或任何小組法官，或提交予他們之中的任何人或所有人。”。

51 加入 —

“(1A) 專員可為執行他在本條例下的任何職能，向小組法官要求讓他可取用根據附表 2 第 3 條保存的任何文件或紀錄。”。

52 在句號之前加入“(包括就任何人員採取的紀律行動)”。

55(1) 刪去在“人員認為”之前的所有字句而代以 —

“(1) 如根據第 54(1)或(2)條進行任何定期檢討的”。

55(2) (a) 在(a)段，在英文文本中，刪去“any ground”而代以“the ground”。

(b) 在中文文本中，在“在當其時”之前加入“有關部門”。

(c) 在中文文本中，刪去“有關部門的人員”而代以“人員”。

55 加入 —

“(5A) 如在根據第(3)款向有關當局提供報告時，該當局不再擔任其職位，或不再執行其職位的有關職能，則 —

(a) 在不損害《釋義及通則條例》(第 1 章)第 54 條的原則下，在該款中對有關當局的提述，包括提述在當其時獲委任為小組法官或授權人員(視屬何情況而定)並合法地執行該當局的職位的有關職能的人；及

(b) 本條的條文據此適用。”。

55 刪去第(6)款而代以 —

“(6) 如第 3 條所指的訂明授權持續有效的先決條件未獲符合，則就本條而言，即屬有終止該訂明授權的理由存在。”。

新條文 加入 —

“55A. 繼逮捕某人後向有關當局提供報告

(1) 凡在根據本條例發出訂明授權或將訂明授權續期之後，有關部門在當其時負責有關截取或秘密監察的人員知悉該截取或秘密監察的目標人物已被逮捕，該人員須在他得悉該項逮捕後，於合理地切實可行範圍內，盡快安排向發出該訂明授權或將該訂明授權續期的有關當局，提供一份報告，評估該項逮捕對會藉繼續進行該截取或秘密監察而取得任何可能享有法律專業保密權的資料的可能性的影響。

(2) 凡有關當局接獲第(1)款所指的報告，如該當局認為第3條所指的訂明授權持續有效的先決條件未獲符合，則該當局須撤銷該訂明授權。

(3) 凡訂明授權根據第(2)款被撤銷，則儘管有有關時限條文的規定，該授權自被撤銷之時起失效。

(4) 如在根據第(1)款向有關當局提供報告時，該當局不再擔任其職位，或不再執行其職位的有關職能，則 —

(a) 在不損害《釋義及通則條例》(第1章)第54條的原則下，在該款中對有關當局的提述，包括提述在當其時獲委任為小組法官或授權人員(視屬何情況而定)並合法地執行該當局的職位的有關職能的人；及

(b) 本條的條文據此適用。

(5) 在本條中，“有關時限條文”(relevant duration provision)指第 10(b)、13(b)、16(b)、19(b)或 22(1)(b)條(視何者適用而定)。”。

56

加入 —

“(1A) 凡第(1)款所描述的任何受保護成果包含享有法律專業保密權的任何資料，則第(1)(c)款須解釋為亦規定有關部門的首長作出安排，以確保受保護成果中包含該等資料的部分 —

- (a) (就對郵件截取或秘密監察的訂明授權而言)在自保留該部分對在任何法院進行的待決民事或刑事法律程序，或對相當可能會在任何法院提起的民事或刑事法律程序不再屬必要時起計的 1 年期間屆滿之前被銷毀；或
- (b) (就對電訊截取的訂明授權而言)於合理地切實可行範圍內盡快被銷毀。”。

56

刪去第(2)款而代以 —

“(2) 就本條而言，在以下情況下，某事宜即屬對訂明授權的有關目的屬必要 —

- (a) 在第(1)(a)款所指的情況下 —
 - (i) 該事宜繼續是或相當可能變為是對該有關目的屬必要的；或

(ii) (除對電訊截取的訂明授權外)就於任何法院進行的待決民事或刑事法律程序而言，或就相當可能會在任何法院提起的民事或刑事法律程序而言，該事宜屬必要；或

(b) 在第(1)(c)款所指的情況下 —

(i) 該事宜繼續是或相當可能變為是對該有關目的屬必要的；或

(ii) (除對電訊截取的訂明授權外)就於任何法院進行的待決民事或刑事法律程序而言，或就相當可能會在任何法院提起的民事或刑事法律程序而言，在自該事宜對該等程序不再屬必要時起計的 1 年期間屆滿之前。”。

- 57(2)
- (a) 在(a)(ii)(A)段中，刪去在“言)”之後而在“，予”之前的所有字句而代以“在該待決的法律程序、檢討或申請獲最終裁斷或獲最終的處理之後最少 1 年期間內”。
- (b) 在(a)(ii)(B)段中，刪去在“言)”之後而在“或(”之前的所有字句而代以“在該法律程序獲最終裁斷或獲最終的處理之後最少 1 年期間內”。

- (c) 在(a)(ii)(B)段中，刪去“起之前”而代以“起之後最少1年期間內”。

58 刪去第(4)款而代以 —

“(4) 儘管有第(2)款的規定，凡為任何刑事法律程序(不論是就某罪行提起的刑事法律程序或是任何有關法律程序)的目的，依據有關訂明授權取得的並可繼續被有關部門取用的任何資料，可能會合理地被認為是能夠削弱控方針對辯方的論據，或會有助於辯方的論據，則 —

(a) 該部門須向控方披露該等資料；及

(b) 然後控方須於以非公開形式進行的單方面聆訊中，向法官披露該等資料。”。

58 刪去第(5)款。

58 刪去第(6)款而代以 —

“(6) 法官可在有資料根據第(4)(b)款向他披露後，作出他認為就確保有關法律程序得以公平進行而屬合適的命令。”。

58 加入 —

“(6A) 凡在任何刑事法律程序中，有任何命令根據第(6)款作出，控方須於以非公開形式進行的單方面聆訊中，向審理任何有關法律程序的法官披露該命令的條款及有關資料。”。

58(7) 刪去“指示”而代以“命令”。

58(8) 加入 —

““有關法律程序”(related proceedings)就任何刑事法律程序而言，指該等刑事法律程序所引致的進一步法律程序(包括上訴程序)，或該等刑事法律程序的初步或附帶法律程序；

“法官”(judge)就任何法律程序而言，指聆聽或將會聆聽該等法律程序的法官或裁判官，或任何具有處理有關事宜的司法管轄權的其他法官或裁判官；”。

新條文 加入 —

**“58A. 享有法律專業保密權的資料
繼續享有保密權**

儘管享有法律專業保密權的資料是依據訂明授權被取得，該等資料繼續享有保密權。”。

59(4) 刪去“顧及”而代以“遵守”。

60(1) 刪去“其內”而代以“與其有關”。

60(2) (a) 刪去“損害”而代以“局限”。

(b) 刪去“該授權內”而代以“與該授權有關”。

62 在“會議可”之後加入“在立法會批准下，”。

63 在“會議可”之後加入“在立法會批准下，”。

65(1) (a) 刪去“在當時作為《電訊條例》(第106章)第33條而有效的條文”而代以“《電訊條例》(第106章)第33條”。

(b) 刪去“及58”。

(c) 刪去“亦適用於有關事宜，”。

(d) 刪去(a)(i)段而代以 —

“(i) 該等材料屬受保護成果；及”。

65 加入 —

“(2A) 本條的施行，並不使依據第(1)款所提述的命令進行的任何電訊截取有效，亦不授權進行任何該等截取。”。

65 刪去第(3)款而代以 —

“(3) 在本條中，“文本”(copy)就第(1)款所提述的通訊的任何內容而言，指任何以下項目(不論是否屬文件形式) —

(a) 該等內容的任何文本、複本、副本、拷貝、摘錄或撮錄；

(b) 提述第(1)款所提述的電訊截取，並且是直接或間接顯示屬該通訊的傳送人或傳送對象的人的身分的紀錄的任何紀錄。”。

附表 2 在方括號中，刪去“2、6”而代以“6、51”。

附表 2 刪去在“，則”之後的所有字句而代以“上述申請可在法院範圍以外的任何地方(部門的處所除外)予以考慮。”。

附表 2 刪去第(3)款而代以 —
第 1 條

“(3) 小組法官可按他認為適當的方式考慮上述申請。”。

附表 2 第 3(3)條	在(b)段中，在“職能”之後加入“(包括順應專員根據本條例第 51(1A)條提出的要求而執行的該等職能)”。
附表 2 第 3(5)條	(a) 在英文文本中，在“department concerned”之後加入“， whether”。
	(b) 刪去“其他情況下”。
附表 2 第 4 條	刪去該條。
附表 3 第 1 部	(a) 在(b)(v)段中，刪去“罪行或威脅的性質，以及對以下罪行或威脅的逼切性及嚴重程度的評估”而代以“資料”。
	(b) 在(b)(v)(A)段中，刪去“嚴重罪行”而代以“有關特定嚴重罪行的性質，以及對該罪行的逼切性及嚴重程度的評估”。
	(c) 刪去(b)(v)(B)段而代以 — “(B) (如謀求藉進行該截取達到的目的是本條例第 3(1)(a)(ii)條所指明者)對公共安全的有關特定威脅的性質，以及對該威脅的逼切性及嚴重程度的評估，和對該威脅於香港、香港居民或在香港的其他人的安全方面的直接及間接影響的評估；”。
	(d) 在(b)(viii)段中，刪去“取得任何”而代以“取得以下資料的可能性；”。
	(e) 在(b)(viii)段中，刪去“的可能性；及”而代以“，或可能屬新聞材料的內容的資料；”。
	(f) 在(b)段中，加入 —

“(x) (如知道的話)是否有在過去 2 年期間提出符合以下說明的、尋求發出訂明授權或將訂明授權續期的申請 —

(A) 該申請亦有將根據第(ii)節在有關誓章中列出的任何人，識別為有關截取或秘密監察的目標人物；或

(B) (凡根據第(iii)節在有關誓章中列出任何電訊服務的詳情)該申請亦有尋求對下述通訊進行截取的授權：向該電訊服務發出或從該電訊服務發出的任何通訊，

而如有上述申請的話，該申請的詳情；及”。

(g) 在(c)段中，刪去在“姓名”之後的所有字句而代以“、職級及職位識別申請人及批准提出該申請的該有關部門的任何人員。”。

附表 3
第 2 部

(a) 在(b)(vi)段中，刪去“罪行或威脅的性質，以及對以下罪行或威脅的逼切性及嚴重程度的評估”而代以“資料”。

(b) 在(b)(vi)(A)段中，刪去“嚴重罪行”而代以“有關特定嚴重罪行的性質，以及對該罪行的逼切性及嚴重程度的評估”。

(c) 刪去(b)(vi)(B)段而代以 —

“(B) (如謀求藉進行該第 1 類監察達到的目的是本條例第 3(1)(a)(ii)條所指明者)對公共安全的有關特定威脅的性質，以及對該威脅的逼切性及嚴重程度的評估，和對該威脅於香港、香港居民或在香港的其他人的安全方面的直接及間接影響的評估；”。

- (d) 在(b)(ix)段中，刪去“取得任何”而代以“取得以下資料的可能性：”。
 - (e) 在(b)(ix)段中，刪去“的可能性；及”而代以“，或可能屬新聞材料的內容的資料；”。
 - (f) 在(b)段中，加入 —
 - “(xi) (如知道的話)是否有在過去 2 年期間提出符合以下說明的、尋求發出訂明授權或將訂明授權續期的申請：該申請亦有將根據第(ii)節在有關誓章中列出的任何人，識別為有關截取或秘密監察的目標人物；而如有上述申請的話，該申請的詳情；及”。
 - (g) 在(c)段中，刪去在“姓名”之後的所有字句而代以“、職級及職位識別申請人及批准提出該申請的該有關部門的任何人員。”。
- 附表 3
第 3 部
- (a) 在(b)(vi)段中，刪去“罪行或威脅的性質，以及對以下罪行或威脅的逼切性及嚴重程度的評估”而代以“資料”。
 - (b) 在(b)(vi)(A)段中，刪去“嚴重罪行”而代以“有關特定嚴重罪行的性質，以及對該罪行的逼切性及嚴重程度的評估”。
 - (c) 刪去(b)(vi)(B)段而代以 —
 - “(B) (如謀求藉進行該第 2 類監察達到的目的是本條例第 3(1)(a)(ii)條所指明者)對公共安全的有關特定威脅的性質，以及對該威脅的逼切性及嚴重程度的評估，和對該威脅於香港、香港居民或在香港的其他人的安全方面的直接及間接影響的評估；”。

- (d) 在(b)(ix)段中，刪去“取得任何”而代以“取得以下資料的可能性：”。
 - (e) 在(b)(ix)段中，刪去“的可能性；及”而代以“，或可能屬新聞材料的內容的資料；”。
 - (f) 在(b)段中，加入 —
 “(xi) (如知道的話)是否有在過去 2 年期間提出符合以下說明的、尋求發出訂明授權或將訂明授權續期的申請：該申請亦有將根據第(ii)節在有關陳述中列出的任何人，識別為有關截取或秘密監察的目標人物；而如有上述申請的話，該申請的詳情；及”。
 - (g) 在(c)段中，刪去“及職級”而代以“、職級及職位”。
- 附表 3
第 4 部
- (a) 刪去(a)(iii)段而代以 —
 “(iii) 對至提出該申請為止已依據該法官授權或行政授權取得的資料的價值的評估；”。
 - (b) 在(b)段中，刪去在“姓名”之後的所有字句而代以“、職級及職位識別申請人及批准提出該申請的該有關部門的任何人員。”。

附表 4 在(b)段中，刪去“及職級”而代以“、職級及職位”。

第 2(1) (“訂明授權”的定義及“有關當局”的定義的(a)段)、8(1)及(2)(b)、9(1)、(2)及(3)(a)、10、11(1)及(2)

刪去所有“司法授權”而代以“法官授權”。

(b)(i)及(ii)
、12(1)、(3)
(a)及(4)、13
、20(1)(b)及
22(2)條及附
表3(第1、2
及4部)

第3部 在第2分部的標題中，刪去“**司法授權**”而代以“**法官授權**”。

8及11 在緊接第8及11條之前的小標題中，刪去“**司法授權**”而代以“**法官授權**”。

8、9、10、
11、12
及13 在標題中，刪去“**司法授權**”而代以“**法官授權**”。

附表3
(第1、2
及4部) 在標題中，刪去“**司法授權**”而代以“**法官授權**”。

INTERCEPTION OF COMMUNICATIONS AND SURVEILLANCE BILL

Committee Stage Amendments proposed by Hon. Margaret Ng

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A BILL To

Regulate the conduct of interception of communications and the
use of surveillance devices by or on behalf of public officers and to
provide for related matters.

Enacted by the Legislative Council.

PART 1

PRELIMINARY

1. Short title

This Ordinance may be cited as the Interception of
Communications and Surveillance Ordinance.

2. Interpretation

(1) In this Ordinance, unless the context otherwise requires—
“address” (地址), in relation to a communication transmitted by a
postal service, includes a postal box address;

“authorizing officer” (授權人員), in relation to any department,
means any officer designated under section 7 by the head of the
department to be an
authorizing officer;

“code of practice” (實務守則) means the code of practice issued
under section 59;

“Commissioner” (專員) means the Commissioner on Interception
of Communications and Surveillance appointed under section 38;

“communication” (通訊) means—

~~(a) any communication transmitted by a postal service; or~~
~~(b) any communication transmitted by a telecommunications system;~~

communication transmitted by any means whatsoever including by a postal or courier service or telecommunications system

“communication transmitted by a postal service” (藉郵政服務傳送的通訊) includes a postal article;

“conduct” (行爲) includes any act or omission, and any series of acts or omissions or of acts and omissions;

“conveyance” (運輸工具) means any vehicle, vessel, aircraft, hovercraft or other conveyance;

“copy” (文本)—

(a) in relation to any contents of a communication that have been obtained pursuant to a prescribed authorization for interception, means any of the following (whether or not in documentary form)—

(i) any copy, extract or summary of such contents which identifies itself as such copy, extract or summary of such contents;

(ii) any record referring to the interception which is a record of the identity of any person who is the sender or intended recipient of the communication; or

(b) in relation to any material that has been obtained pursuant to a prescribed authorization for covert surveillance, means any of the following (whether or not in documentary form)—

(i) any copy, extract or summary of the material which identifies itself as such copy, extract or summary of the material;

(ii) any transcript or record made of the material which identifies itself as such transcript or record made of the material;

“court” (法院), without prejudice to section 53 and section 4 of Schedule 2—

(a) means a court as defined in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1); and

(b) includes a magistrate and a tribunal;

“covert surveillance” (秘密監察)—

(a) means any ~~systematic~~ surveillance carried out with the use of any surveillance device or by an undercover agent of a department specified in Schedule 1 for the purposes of a specific investigation or operation, if the surveillance—

~~(i) is carried out in circumstances where any person who is the subject of the surveillance is entitled to a reasonable expectation of privacy;~~

(ii) ~~(i)~~ is carried out in a manner calculated to ensure that the person is unaware that the surveillance is or may be taking place; and

(iii) ~~(ii)~~ is likely to result in the obtaining of any private information about the person; but

(b) does not include any such ~~systematic~~ surveillance ~~to the extent~~ that it constitutes interception under this Ordinance;

“data surveillance device” (數據監察器材)—

(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;

“department” (部門)—

(a) in relation to interception (including any application for the issue or renewal of a prescribed authorization for interception, any prescribed authorization for interception and any other matter relating to interception), means a department specified in Part 1 of Schedule 1;

(b) in relation to covert surveillance (including any application for the issue or renewal of a prescribed authorization for covert

surveillance, any prescribed authorization for covert surveillance and any other matter relating to covert surveillance), means a department specified in Part 2 of Schedule 1; or

(c) in relation to any other matter provided for in this Ordinance, means a department specified in Part 1 or 2 of Schedule 1;

“device” (器材) includes any instrument, apparatus and equipment;

“device retrieval warrant” (器材取出手令) means a device retrieval warrant issued under section 33 (and, where the context requires, includes a device retrieval warrant to be issued under that section);

“directorate officer” (首長級人員) means an officer not below a rank equivalent to that of chief superintendent of police;

“emergency authorization” (緊急授權) means an emergency authorization issued under Division 4 of Part 3 (and, where the context requires, includes an emergency authorization to be issued under that Division);

“enhancement equipment” (增強設備), in relation to a device, means any equipment used to enhance a signal, image or other information obtained by the use of the device;

“examination” (審查) means an examination (including consideration of the application for the examination) carried out under Division 3 of Part 4 (and, where the context requires, includes such an examination to be carried out under that Division);

“executive authorization” (行政授權) means an executive authorization issued or renewed under Division 3 of Part 3 (and, where the context requires, includes an executive authorization to be issued or renewed under that Division);

“function” (職能) includes power and duty;

“head” (首長), in relation to a department, includes any deputy of the head of the department;

“information system” (資訊系統) has the meaning assigned to it by section 2(1) of the Electronic Transactions Ordinance (Cap. 553);

“inspect” (查察) includes listen to, monitor and record;

“install” (裝設) includes attach;

“intercepting act” (截取作為), in relation to any communication, means the inspection of some or all of the contents of the communication, ~~in the course of its transmission by a postal service or by a telecommunications system,~~

(i) by a person other than its sender or intended recipient or
(ii) by a recipient who is an undercover agent of a department specified in Schedule 1;

“interception” (截取)—

(a) in relation to any communication, means the carrying out of any intercepting act in respect of the communication; or

(b) when appearing in a context with no specific reference to any communication, means the carrying out of any intercepting act in respect of communications;

“interception product” (截取成果) means any contents of a communication that have been obtained pursuant to ~~a prescribed authorization for an~~ interception, and includes a copy of such contents;

“judicial authorization” (司法授權) means a judicial authorization issued or renewed under Division 2 of Part 3 (and, where the context requires, includes a judicial authorization to be issued or renewed under that Division);

“listening device” (監聽器材)—

(a) means any device used to overhear, listen to, monitor or record any conversation or words spoken to or by any person in conversation; but

(b) does not include a hearing aid or similar device used by a person with impaired hearing to overcome the impairment;

“maintain” (維修), in relation to a device, includes—

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

(b) replace the device when it is faulty;

“optical surveillance device” (視光監察器材)—

(a) means any device used to record visually or observe any activity; but

(b) does not include spectacles, contact lenses or a similar device used by a person with impaired sight to overcome the impairment;

~~“oral application” (口頭申請) means an oral application made under section 25(1);~~

“panel judge” (小組法官) means a judge appointed under section 6(1) to be a panel judge;

“postal interception” (郵件截取) means interception of any communication transmitted by a postal service;

“postal service” (郵政服務) means any communication service including a postal service within the meaning of the Post Office Ordinance (Cap. 98);

“premises” (處所) includes any place and, in particular, includes—

(a) any land or building;

(b) any conveyance;

(c) any structure (whether or not movable or offshore); and

(d) any part of any of the premises described in paragraph (a), (b) or (c);

“prescribed authorization” (訂明授權) means a judicial authorization, an executive authorization or an emergency authorization;

“protected product” (受保護成果) means any interception product or surveillance product and includes any information derived from such product and any document or record containing such information

“public place” (公眾地方)—

(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;

“public security” (公共安全) means the public security of Hong Kong from terrorist acts which present a clear and imminent threat to life or by acts immediately endangering public safety

“relevant authority” (有關當局)—

(a) in relation to an application for the issue or renewal of a judicial judge’ s authorization, means the panel judge to whom the application is or has been made;

(b) in relation to an application for the issue or renewal of an executive authorization, means the authorizing officer to whom the application is or has been made; or

(c) in relation to an application for the issue of an emergency authorization, means the head of a department to whom the application is or has been made;

“relevant purpose” (有關目的), in relation to a prescribed authorization, means the purpose sought to be furthered by carrying out the interception or covert surveillance concerned as described in section 3 for the purpose of the issue or renewal, or the continuance, of the prescribed authorization;

“relevant requirement” (有關規定) means any applicable requirement under—

(a) any provision of this Ordinance;

(b) the code of practice; or

(c) any prescribed authorization or device retrieval warrant concerned;

“serious crime” (嚴重罪行) means any offence punishable—

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

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

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

~~(ii) a fine of not less than \$1,000,000;~~

“subject of interception or surveillance” means any person whose activity is being monitored by interception of his communication or surveillance;

“surveillance device” (監察器材) means—

- (a) a data surveillance device, a listening device, an optical surveillance device or a tracking device;
- (b) a device that is a combination of any 2 or more of the devices referred to in paragraph (a); or
- (c) a device of a class prescribed by regulation made under section 62 for the purposes of this definition;

“surveillance product” (監察成果) means any material obtained pursuant to ~~a prescribed authorization for~~ covert surveillance, and includes a copy of the material, any information derived from the material, and any odcumetn or record containing such information;

“telecommunications interception” (電訊截取) means interception of any communication transmitted by a telecommunications system;

“telecommunications service” (電訊服務) has the meaning assigned to it by section 2(1) of the Telecommunications Ordinance (Cap. 106);

“telecommunications system” (電訊系統) has the meaning assigned to it by section 2(1) of the Telecommunications Ordinance (Cap. 106);

“tracking device” (追蹤系統) means any electronic device used to determine or monitor the location of any person or any object or the status of any object;

“transmitted” (傳送) includes being transmitted;

“Type 1 surveillance” (第 1 類監察) means any covert surveillance ~~other than Type 2 surveillance~~ which is

- (a) carried out with the use of any surveillance or tracking device; or
- (b) involves entry onto any premises without permission; or
- (c) interferes with the interior of any conveyance or object without permission

“Type 2 surveillance” (第 2 類監察), subject to subsection (3), means any covert surveillance other than Type 1 surveillance to the extent that—

(a) it is carried out with the use of a surveillance device for any purpose involving listening to, monitoring or recording words spoken or activity carried out by any person, and the person using the device is one—

(i) who—

(A) is the person speaking or carrying out the words or activity; or

(B) is a person, or is included in a class of persons, by whom the person described in sub-paragraph (A) intends, or should reasonably expect, the words or activity to be heard or seen; or

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

(b) it is carried out with the use of an optical surveillance device or a tracking device and the use of the device does not involve—

(i) entry onto any premises without permission; or

(ii) interference with the interior of any conveyance or object without permission.

(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

(3) For the purposes of this Ordinance, any covert surveillance which is Type 2 surveillance under the definition of “Type 2 surveillance” in subsection (1) is regarded as Type 1 surveillance if it is likely that any information which may be subject to legal professional privilege will be obtained by carrying it out.

(4) For the purposes of this Ordinance—

~~(a) a communication transmitted by a postal service is regarded as being in the course of the transmission if it is regarded as being in course of transmission by post under section 2(2) of the Post Office Ordinance (Cap. 98); and~~

~~(b) a communication transmitted by a telecommunications system is not regarded as being in the course of the transmission if it has been received by the intended recipient of the communication or by an information system or facility under his control or to which he may have access, whether or not he has actually read or listened to the contents of the communication.~~

(5) For the purposes of this Ordinance, the contents of any communication transmitted by a telecommunications system include any data produced in association with the communication.

(5A) For the purposes of this Ordinance, the exercise of any right enjoyed by any person under the Basic Law or under international treaties, conventions or instruments applying to the HKSAR or under common law shall not be regarded as a threat to public security

~~(6) For the purposes of this Ordinance—~~

~~(a) an application is also regarded as being made orally if it is 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);~~

~~(b) information is also regarded as being provided orally if it is provided by telephone, video conferencing or other electronic means by which words spoken can be heard (whether or not any part of the information is provided in writing); and~~

~~(c) a determination (including the issue of a prescribed authorization or a renewed prescribed authorization and the giving of any reason) is also regarded as being delivered orally if it is delivered by telephone, video conferencing or other electronic means by which words spoken can be heard (whether or not any part of the determination is delivered in writing).~~

~~(7) Without prejudice to section 54 of the Interpretation and General Clauses Ordinance (Cap. 1), any reference in this~~

~~Ordinance to a panel judge or any officer of a department (however expressed) includes—~~

~~(a) where the person who has been such panel judge or officer is no longer holding office as such panel judge or officer, the person for the time being holding such office or appointed to act in or perform the functions of such office or lawfully performing the functions of such office; or~~

~~(b) where the person who is such panel judge or officer is unable to perform the functions of the office of such panel judge or officer, the person for the time being appointed to act in or perform the functions of such office or lawfully performing the functions of such office.~~

3. Conditions for issue, renewal or continuance of prescribed authorization

(1) In this Ordinance, the conditions for the issue or renewal, or the continuance, of a prescribed authorization, are that, in the circumstances of the particular case—

(a) the purpose of sought to be furthered by carrying out the interception or covert surveillance concerned is that of—

(i) preventing or detecting a serious crime which the applicant reasonably believes is about to take place or has taken place as the case may be; or

(ii) protecting public security against a threat which the applicant reasonably believes to be imminent;

(aa) there is credible evidence to show a reasonable suspicion that the subject of the interception or covert surveillance has been, is, or is likely to be, involved in—

(i) Committing the serious crime; or

(ii) undertaking the activity which constitutes or would constitute a threat to public security; and

(b) the serious crime to be prevented or detected or the particular threat to public security referred to in (a)(i) and (ii) as the case may be is identified

(c) ~~(b)~~ the interception or covert surveillance is ~~proportionate to the purpose sought to be furthered by carrying it out~~, in all

circumstances, necessary and proportionate to the purpose, upon—

- (i) balancing, ~~in operational terms~~, 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; and
- (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.

(2) In this section, “relevant factors” (有關因素) means—

(a) the right to freedom and privacy protected by article 30 of the Basic Law;

(ba) the rights and freedoms protected in the Basic Law and the International Covenant on Civil and Political Rights

(cb) the immediacy and gravity of—

- (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), the particular threat to public security; and

(bd) the likely value and relevance, in relation to the purpose ~~sought to be furthered~~ of by carrying out the interception or covert surveillance, of the information likely to be obtained by carrying it out.

PART 2

PROHIBITION ON INTERCEPTION AND COVERT SURVEILLANCE

4. Prohibition on interception

(1) Subject to subsection (2), neither the Chief Executive, members of the Executive Council, bureau heads insofar as they are not public servants nor any public officer shall, directly or through any other person, carry out any interception.

(2) Subsection (1) does not apply to—

(a) any interception carried out pursuant to a prescribed authorization;

~~(b) any interception of telecommunications transmitted by radiocommunications (other than the radiocommunications part of a telecommunications network for the provision of a public telecommunications service by any carrier licensee under the Telecommunications Ordinance (Cap. 106)); and~~

(c) any interception authorized, permitted or required to be carried out by or under any enactment other than this Ordinance ~~(including any interception carried out in the course of the execution of an order of a court authorizing the search of any premises or the seizure of any evidence).~~

(3) ~~In this section, “carrier licensee” (傳送者牌照持有人), “public telecommunications service” (公共電訊服務), “radiocommunications” (無線電通訊), “telecommunications” (電訊) and “telecommunications network” (電訊網絡) have the meanings respectively assigned to them by section 2(1) of the Telecommunications Ordinance (Cap. 106).~~

5. Prohibition on covert surveillance

(1) Subject to subsection (2), neither the Chief Executive, members of the Executive Council, bureau heads insofar as they are not public servants nor any ~~no~~ public officer shall, directly or through any other person, carry out any covert surveillance.

(2) Subsection (1) does not apply to any covert surveillance carried out pursuant to a prescribed authorization.

PART 3 PRESCRIBED AUTHORIZATIONS, ETC.

Division 1—Relevant Authorities

6. Panel judges

(1) ~~The Chief Executive shall, on the recommendation of the~~ Chief Justice shall; appoint 3 to 6 eligible judges to be panel judges for the purposes of this Ordinance.

(2) A panel judge shall be appointed for a period of 3 years, and may from time to time be reappointed.

(3A) ~~The Chief Executive may, on the recommendation of the Chief Justice, revoke the appointment of a panel judge for good cause. In performing any of his functions under the Ordinance, a panel judge has the same powers, protection and immunities as a judge of the Court of First Instance, but is not regarded as a court or member of a court.~~

(3B) For the purpose of performing any of his functions under this Ordinance, a panel judge may administer oaths and take affidavits.

(3C) Panel judges shall not sit as ordinary judges during their appointment as panel judges.

(4) Schedule 2 applies to and in relation to the procedures of, and other matters relating to, a panel judge.

(5) In this section, “eligible judge” (合資格法官) means a judge of the Court of First Instance.

7. Authorizing officers

The head of a department may designate any officer not below a rank equivalent to that of senior superintendent of police to be an authorizing

officer for the purposes of this Ordinance.

Division 2—Judicial Judge’s Authorizations

Issue of judicial judge’s authorizations

8. Application for judicial judge’s authorization for interception or Type 1 surveillance

(1) An officer of a department may apply to a panel judge for the issue of an judicial authorization for any interception or Type 1

surveillance to be carried out by or on behalf of any of the officers of the department.

(1A) An application under (1) shall be made ex parte in writing and supported by an affidavit of the applicant.

(1B) The panel judge may order a hearing to be held and any informant questioned or determine the application without a hearing. Any hearing of the application shall be held in private.

(1C) Regardless of whether a hearing is held the panel judge shall give his determination and his reasons for determination in writing.

(1D) Documents and records compiled by or made available to the panel judge shall be maintained as provided in Schedule 2.

(2) The application is an affidavit in support of an application under (1) shall—

(a) to be made in writing; and

(b) to be supported by an affidavit of the applicant which is to comply with the requirements specified in Part 1 or Part 2 of Schedule 3 as the case may be.—

(i) in the case of a judicial authorization for interception, Part 1 of Schedule 3; or

(ii) in the case of a judicial authorization for Type 1 surveillance, Part 2 of Schedule 3.

(3) An application may not be made under subsection (1) unless the making of the application has been approved by a directorate officer of the department concerned.

9. Determination of application for judicial authorization

(1) Upon considering an application for the issue of an judicial authorization made under section 8, the panel judge may, subject to subsection (2)—

(a) issue the judicial authorization sought under the application, with or without variations; or

(b) refuse to issue the judicial authorization.

(2) The panel judge shall not issue the ~~judicial~~ authorization unless he is satisfied that the conditions for its issue under section 3 have been met.

(3) The panel judge shall deliver his determination under subsection (1) ~~by—~~

~~(a) in the case of subsection (1)(a), issuing the judicial authorization, in writing; or~~

~~(b) in the case of subsection (1)(b), giving the reason for the refusal in writing.~~

10. Duration of ~~judicial judge' s~~ authorization

An ~~judicial~~ authorization—

(a) takes effect at the time specified by the panel judge when issuing the ~~judicial~~ authorization, which in any case is not to be earlier than the time when it is issued; and

(b) subject to any renewal under this Division, ceases to have effect upon the expiration of the period specified by the panel judge when issuing the ~~judicial~~ authorization, which in any case is not to be longer than the period of 3 months beginning with the time when it takes effect.

Renewal of ~~judicial judge' s~~ authorizations

11. Application for renewal of ~~judicial judge' s~~ authorization

(1) At any time before a ~~judicial judge' s~~ authorization ceases to have effect, an officer of the department concerned may apply ~~to a panel judge~~ for the renewal of the ~~judicial~~ authorization.

(2) ~~The application is—~~ An application under (1) shall be made ex parte in writing and supported by—

~~(a) to be made in writing; and~~

~~(b) to be supported by—~~

- (i) a copy of the ~~judicial-judge'~~ s authorization sought to be renewed;
- (ii) a copy of ~~any~~ every affidavit provided under this Part for the purposes of any application for the issue or renewal of the ~~judicial~~ authorization, or for the purposes of any application made further to an ~~oral~~ application for confirmation of ~~the~~ judicial an emergency authorization or its ~~previous~~ renewal; and
- (iii) an affidavit of the applicant which is to comply with the requirements specified in Part 4 of Schedule 3.

(2A) The panel judge may order a hearing to be held and any informant to be questioned or determine the application without a hearing. Any hearing of the application shall be held in private.

(3) An application may not be made under subsection (1) unless the making of the application has been approved by a directorate officer of the department concerned.

12. Determination of application for renewal of ~~judicial-judge'~~ s authorization

(1) Upon considering an application for the renewal of a ~~judicial~~ judge' s authorization made under section 11, the panel judge may, subject to subsection (2)—

(a) grant the renewal sought under the application, with or without variations; or

(b) refuse to grant the renewal.

(2) The panel judge ~~shall not grant the renewal unless he is satisfied that the conditions for its grant under section 3 have been met.~~

(a) shall not grant the renewal unless he is satisfied that the conditions under section 3 are met; and

(b) shall take into account the total duration of the interception or covert surveillance as the case may be under authorization.

(3) The panel judge shall deliver his determination under subsection (1) by—

- (a) in the case of subsection (1)(a), issuing the renewed judicial authorization and reasons for the renewal in writing; or
- (b) in the case of subsection (1)(b), giving the reason for the refusal in writing.
- (4) A judicial authorization may be renewed more than once but in any event not more than a total of 2 years in duration under this Ordinance.

13. Duration of renewal of judicial authorization

A renewal of a judicial authorization—

- (a) takes effect at the time when the judicial authorization would have ceased to have effect but for the renewal; and
- (b) subject to any further renewal under this Division, ceases to have effect upon the expiration of the period specified by the panel judge when granting the renewal, which in any case is not to be longer than the period of 3 months beginning with the time when it takes effect.

Division 3—Executive Authorizations

Issue of executive authorizations

14. Application for executive authorization for Type 2 surveillance

- (1) An officer of a department in charge of the investigation of the subject of interception or surveillance may apply to an authorizing officer of the department for the issue of an executive authorization for any Type 2 surveillance to be carried out by or on behalf of any of the officers of the department.
- (2) The application is—
 - (a) to be made in writing; and
 - (b) to be supported by a statement in writing made by the applicant which is to comply with the requirements specified in Part 3 of Schedule 3.

15. Determination of application for executive authorization

- (1) Upon considering an application for the issue of an executive authorization made under section 14, the authorizing officer may, subject to subsection (2)—
- (a) issue the executive authorization sought under the application, with or without variations; or
 - (b) refuse to issue the executive authorization.
- (2) The authorizing officer shall not issue the executive authorization unless he is satisfied that the conditions for its issue under section 3 have been met.
- (3) The authorizing officer shall deliver his determination under subsection (1) by—
- (a) in the case of subsection (1)(a), issuing the executive authorization and giving reasons for the authorization in writing; or
 - (b) in the case of subsection (1)(b), giving the reason for the refusal in writing.

16. Duration of executive authorization

An executive authorization—

- (a) takes effect at the time specified by the authorizing officer when issuing the executive authorization, which in any case is not to be earlier than the time when it is issued; and
- (b) subject to any renewal under this Division, ceases to have effect upon the expiration of the period specified by the authorizing officer when issuing the executive authorization, which in any case is not to be longer than the period of 3 months beginning with the time when it takes effect.

Renewal of executive authorizations

17. Application for renewal of executive authorization

- (1) At any time before an executive authorization ceases to have effect, an officer of the department concerned may apply to an authorizing officer of the department for the renewal of the executive authorization.
- (2) The application is—

- (a) to be made in writing; and
- (b) to be supported by—
 - (i) a copy of the executive authorization sought to be renewed;
 - (ii) a copy of any statement provided under this Part for the purposes of any application for the issue or renewal of the executive authorization, or for the purposes of any application made further to an oral application for confirmation of the executive authorization or its previous renewal; and
 - (iii) a statement in writing made by the applicant which is to comply with the requirements specified in Part 4 of Schedule 3.

18. Determination of application for renewal of executive authorization

- (1) Upon considering an application for the renewal of an executive authorization made under section 17, the authorizing officer may, subject to subsection (2)—
 - (a) grant the renewal sought under the application, with or without variations; or
 - (b) refuse to grant the renewal.
- (2) The authorizing officer ~~shall not grant the renewal unless he is satisfied that the conditions for its grant under section 3 have been met.~~
 - (a) shall not grant the renewal unless he is satisfied that the conditions for its grant under section 3 have been met; and
 - (b) shall take into account the total duration of the surveillance under the authorization.
- (3) The authorizing officer shall deliver his determination under subsection (1) by—
 - (a) in the case of subsection (1)(a), issuing the renewed executive authorization and giving his reasons for the renewal in writing; or
 - (b) in the case of subsection (1)(b), giving the reason for the refusal in writing.

(4) An executive authorization may be renewed more than once but in any event not more than a total of 2 years in duration under this Ordinance.

19. Duration of renewal of executive authorization

A renewal of an executive authorization—

- (a) takes effect at the time when the executive authorization would have ceased to have effect but for the renewal; and
- (b) subject to any further renewal under this Division, ceases to have effect upon the expiration of the period specified by the authorizing officer when granting the renewal, which in any case is not to be longer than the period of 3 months beginning with the time when it takes effect.

Division 4—Emergency Authorizations

Issue of emergency authorizations

20. Application for emergency authorization for interception or Type 1 surveillance in case of emergency

- (1) An officer of a department may apply to the head of the department for the issue of an emergency authorization for any interception or Type 1 surveillance to be carried out by or on behalf of any of the officers of the department, ~~if he considers that~~where—
 - (a) there is immediate need for the interception or Type 1 surveillance to be carried out by reason of an imminent risk of—
 - (i) death or serious bodily harm of any person;
 - (ii) substantial damage to property; or
 - (iii) serious threat to public security; ~~or~~
 - ~~(iv) loss of vital evidence;~~ and
 - (b) having regard to all the circumstances of the case, it is not reasonably practicable to apply for the issue of a ~~judicial~~judge's authorization for the interception or Type 1 surveillance.

~~(2) The application is~~ Subject to (3) an application for emergency authorization shall be—

(a) ~~to be~~ made in writing; and

(b) ~~to be~~ supported by a statement in writing made by the applicant which is to—

(i) set out the reason for making the application; and

(ii) comply with—

~~(A) in the case of an emergency authorization for interception,~~
the requirements specified in Part 1 or Part 2 of Schedule 3,
as the case may be which are to apply to the statement as they
apply to an affidavit referred to in section 8(2)(b); ~~or~~

~~(B) in the case of an emergency authorization for Type 1
surveillance, the requirements specified in Part 2 of Schedule
3 which are to apply to the statement as they apply to an
affidavit referred to in section 8(2)(b).~~

(3) An application for emergency authorization under (1) may be made orally in person if, having regard to all circumstances of the case, it is not reasonably practicable to make an application in writing.

(4) Where an oral application is made, the applicant shall make an oral statement providing the required information specified in Part 2 or Part 2 of Schedule 3 as the case may be.

21. Determination of application for emergency authorization

(1) Upon considering an application for the issue of an emergency authorization made under section 20, the head of the department concerned may, subject to subsection (2)—

(a) issue the emergency authorization sought under the application, with or without variations; or

(b) refuse to issue the emergency authorization.

(2) The head of the department shall not issue the emergency authorization unless he is satisfied—

(a) that section 20(1)(a) and (b) applies;

(aa) that, where an oral application is made, section 20(3) applies; and

(b) that the conditions for the issue of the emergency authorization under section 3 have been met.

(3) The head of the department shall deliver his determination under subsection (1) by—

(a) in the case of subsection (1)(a), issuing the emergency authorization and giving his reasons for the authorization in writing; or

(b) in the case of subsection (1)(b), giving the reason for the refusal in writing.

22. Duration of emergency authorization

(1) An emergency authorization—

(a) takes effect at the time specified by the head of the department concerned when issuing the emergency authorization, which in any case is not to be earlier than the time when it is issued; and

(b) ceases to have effect upon the expiration of the period specified by the head of the department when issuing the emergency authorization, which in any case is not to be longer than the period of 48 hours beginning with the time ~~when it takes effect~~ of the issuance of the authorization.

(2) Without prejudice to any application under section 8 for the issue of any ~~judicial judge'~~ s authorization for the interception or Type 1 surveillance concerned, an emergency authorization may not be renewed under this Ordinance.

Application for confirmation of emergency authorizations

23. Application for confirmation of emergency authorization

(1) Where ~~any~~ an authorization for interception or Type 1 surveillance is issued as a result of an emergency application ~~carried out pursuant to an emergency authorization~~, the

head of the department concerned shall cause an officer of the department to apply to a panel judge for confirmation of the emergency authorization, as soon as reasonably practicable ~~after,~~ and in any event within ~~the period of~~ 48 hours ~~beginning with, the time when of~~ the issuance of the emergency authorization ~~takes effect.~~

(2) The application for confirmation shall be—

(a) ~~to be~~ made in writing; and

(b) ~~to be~~ supported by—

(i) a copy of the emergency authorization; and

(ii) an affidavit of the applicant which verifies ~~is to verify~~ the contents of the statement provided under section 20(2)(b) or 20(4) as applicable for the purposes of the application for ~~the issue of the~~ emergency authorization.

(3) ~~If Where~~ no application for confirmation of the emergency authorization is made within the period of 48 hours referred to in subsection (1), ~~the head of the department concerned shall —~~ (a) the emergency authorization shall be void and of no effect from the time issued;

(b) without prejudice to section 52, the head of the department concerned shall submit a report to the Commissioner with the details of the case; and

(c) (a) cause the immediate destruction of any information obtained by carrying out the interception or Type 1 surveillance concerned shall be preserved for sole the propose of the Commissioner' s review or examination under Part4, to the extent that it could not have been obtained without carrying out the interception or Type 1 surveillance; and

~~(b) without prejudice to section 52, submit to the Commissioner a report with details of the case.~~

24. Determination of application for confirmation of emergency authorization

(1) Upon considering an application for confirmation of an emergency authorization as provided for in section 23(1), the panel judge may, subject to subsection (2)—

- (a) confirm the emergency authorization; or
- (b) refuse to confirm the emergency authorization.

(2) The panel judge shall not confirm the emergency authorization unless he is satisfied that section 21(2)(a) and (b) havees been complied with in the issue of the emergency authorization.

(3) Where the panel judge refuses to confirm the emergency authorization under subsection (1)(b), he may make one or more of the following orders—

~~(a) in any case where the emergency authorization still has effect at the time of the determination, an order that the emergency authorization is, notwithstanding any other provision of this Ordinance—~~

- ~~(i) an order revoking the emergency authorization;~~
- ~~(ii) an order that the emergency authorization have effect subject to the variation specified by the panel judge;~~
- ~~(iii) an order that the revocation takes effect upon the making of the determination;~~
- ~~(iv) an order that the emergency authorization is to be given no effect from the time of its issuance;~~
- ~~(v) an order that the head of the department preserves any information obtained under the emergency authorization for the sole purpose of a report to and investigation by the Commissioner, to be revoked upon the making of the determination; or~~

~~(ii) only to have effect subject to the variations specified by him, from the time of the determination;~~

~~(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 any information obtained by~~

- ~~carrying out the interception or Type 1 surveillance concerned, to the extent—~~
~~(i) subject to subparagraph (ii), that it could not have been obtained without carrying out the interception or Type 1 surveillance; or~~
~~(ii) where paragraph (a)(ii) applies, that is specified in the order.~~
~~(4) Where the emergency authorization is revoked under subsection (3)(a)(i), the emergency authorization is, notwithstanding section 22(1)(b), to cease to have effect from the time of the revocation.~~
- (5) The panel judge shall deliver his determination under subsection (1) by—
- (a) in the case of subsection (1)(a), endorsing his confirmation on the emergency authorization and giving his reasons for the confirmation in writing; or
 - (b) in the case of subsection (1)(b), giving the reason for the refusal and making any order under subsection (3) in writing.

Division 5—Special Provisions for Oral Applications

Oral applications

25. Oral application and its effect

- ~~(1) Notwithstanding the relevant written application provision, an application for the issue or renewal of a prescribed authorization under this Ordinance may be made orally, if the applicant considers that, having regard to all the circumstances of the case, it is not reasonably practicable to make the application in accordance with the relevant written application provision.~~
- ~~(2) Notwithstanding the relevant determination provision and without prejudice to the relevant conditions provision, where an oral application is made, the relevant authority shall not issue or grant the prescribed authorization or renewal sought under the application unless he is satisfied that, having regard to all the~~

~~circumstances of the case, it is not reasonably practicable to make the application in accordance with the relevant written application provision.~~

~~(3) Notwithstanding the relevant document provision, where an oral application is made, the information required to be provided for the purposes of the application under the relevant document provision may be provided orally (and accordingly any requirement as to the making of any affidavit or statement does not apply).~~

~~(4) Notwithstanding the relevant written determination provision, where an oral application is made, the relevant authority may deliver the determination required to be delivered in respect of the application under the relevant determination provision by—~~
~~(a) issuing the prescribed authorization or the renewed prescribed authorization orally; or~~
~~(b) where he refuses to issue or grant the prescribed authorization or renewal sought under the application, giving the reason for the refusal orally.~~

~~(5) Except as otherwise provided in this Division, any oral application and any prescribed authorization or renewal issued or granted as a result of that application are for all purposes regarded as having the same effect respectively as an application made in writing and a prescribed authorization or renewal issued or granted as a result of that application, and the provisions of this Ordinance are, subject to necessary modifications, to apply accordingly.~~

~~(6) In this section—~~

~~“relevant conditions provision” (有關條件條文) means section 9(2), 12(2), 15(2),~~

~~18(2) or 21(2) (as may be applicable);~~

~~“relevant determination provision” (有關決定條文) means section 9(1), 12(1),~~

~~15(1), 18(1) or 21(1) (as may be applicable);~~

~~“relevant document provision” (有關文件條文) means section 8(2)(b), 11(2)(b),~~

~~14(2)(b), 17(2)(b) or 20(2)(b) (as may be applicable);~~
~~“relevant written application provision” (有關書面申請條文)~~
~~means section 8(2)(a), 11(2)(a), 14(2)(a), 17(2)(a) or 20(2)(a) (as~~
~~may be applicable);~~
~~“relevant written determination provision” (有關書面決定條文)~~
~~means section 9(3), 12(3), 15(3), 18(3) or 21(3) (as may be~~
~~applicable).~~

~~Application for confirmation of prescribed authorizations or~~
~~renewals issued or granted upon oral applications~~
 26. ~~Application for confirmation of prescribed~~
~~authorization or renewal issued or granted upon oral application~~
 (1) ~~Where, as a result of an oral application, the prescribed~~
~~authorization or renewal sought under the application has been~~
~~issued or granted, the head of the department concerned shall cause~~
~~an officer of the department to apply to the relevant authority for~~
~~confirmation of the prescribed authorization or~~
~~renewal, as soon as reasonably practicable after, and in any event~~
~~within the period of 48 hours beginning with, the time when the~~
~~prescribed authorization~~
~~or renewal takes effect.~~
 (2) ~~The application is—~~
 (a) ~~to be made in writing; and~~
 (b) ~~to be supported by—~~
 (i) ~~a record in writing containing all the information that~~
 ~~would have been provided to the relevant authority in writing~~
 ~~under the relevant written application provision had the oral~~
 ~~application been made in writing;~~
 (ii) ~~where section 25(3) applies in relation to the oral~~
 ~~application—~~
 (A) ~~where the relevant authority is a panel judge, an~~
 ~~affidavit of the applicant which is to verify all the~~
 ~~information provided pursuant to that section for the~~
 ~~purposes of the oral application; or~~

- ~~(B) where the relevant authority is not a panel judge, a statement in writing made by the applicant setting out all the information provided pursuant to that section for the purposes of the oral application; and~~
- ~~(iii) where section 25(4) applies in relation to the oral application, a record in writing setting out the determination delivered pursuant to that section in respect of the oral application.~~
- ~~(3) If no application for confirmation of the prescribed authorization or renewal is made within the period of 48 hours referred to in subsection (1), then—~~
- ~~(a) in any case where the prescribed authorization or renewal still has effect upon the expiration of the period, the prescribed authorization or renewal is, notwithstanding any other provision of this Ordinance, to be regarded as revoked upon the expiration of the period; and~~
- ~~(b) in any case whether or not the prescribed authorization or renewal still has effect upon the expiration of the period, the head of the department concerned shall—~~
- ~~(i) cause the immediate destruction of any information obtained by carrying out the interception or covert surveillance concerned, to the extent that it could not have been obtained without carrying out the interception or covert surveillance; and~~
- ~~(ii) without prejudice to section 52, submit to the Commissioner a report with details of the case.~~
- ~~(4) Where the prescribed authorization or renewal is regarded as revoked under subsection (3)(a), the prescribed authorization or renewal is, notwithstanding the relevant duration provision, to cease to have effect from the time of the revocation.~~
- ~~(5) In this section—~~
- ~~“relevant duration provision” (有關時限條文) means section 10(b), 13(b), 16(b) or 19(b) (as may be applicable);~~

~~“relevant written application provision” (有關書面申請條文)~~
~~means section 8(2)(a), 11(2)(a), 14(2)(a), 17(2)(a) or 20(2)(a) (as~~
~~may be applicable).~~

~~27. Determination of application for confirmation of
prescribed authorization or renewal issued or granted upon oral
application~~

- ~~(1) Upon considering an application for confirmation of a
prescribed authorization or renewal as provided for in section
26(1), the relevant authority may, subject to subsection (2)—~~
~~(a) confirm the prescribed authorization or renewal; or~~
~~(b) refuse to confirm the prescribed authorization or renewal.~~
~~(2) The relevant authority shall not confirm the prescribed
authorization or renewal unless he is satisfied that the relevant
conditions provision has been complied with in the issue or grant
of the prescribed authorization or renewal.~~
~~(3) Where the relevant authority refuses to confirm the prescribed
authorization or renewal under subsection (1)(b), he may make one
or more of the following orders—~~
~~(a) in any case where the prescribed authorization or renewal still
has effect at the time of the determination, an order that the
prescribed authorization or renewal is, notwithstanding any other
provision of this Ordinance—~~
~~(i) to be revoked upon the making of the determination; or~~
~~(ii) only to have effect subject to the variations specified by
him, from the time of the determination;~~
~~(b) in any case whether or not the prescribed authorization or
renewal still has effect at the time of the determination, an order
that the head of the department concerned shall cause the
immediate destruction of any information obtained by carrying
out the interception or covert surveillance concerned, to the
extent—~~
~~(i) subject to subparagraph (ii), that it could not have been
obtained without carrying out the interception or covert
surveillance; or~~

- (ii) ~~where paragraph (a)(ii) applies, that is specified in the order.~~
- (4) ~~Where the prescribed authorization or renewal is revoked under subsection (3)(a)(i), the prescribed authorization or renewal is, notwithstanding the relevant duration provision, to cease to have effect from the time of the revocation.~~
- (5) ~~The relevant authority shall deliver his determination under subsection (1) by—~~
 - (a) ~~in the case of subsection (1)(a), issuing the prescribed authorization or the renewed prescribed authorization (being the prescribed authorization confirmed under that subsection or being in terms of the renewal confirmed under that subsection (as the case may be)) in writing; or~~
 - (b) ~~in the case of subsection (1)(b), giving the reason for the refusal and making any order under subsection (3) in writing.~~
- (6) ~~In this section—~~
 - ~~“relevant conditions provision” (有關條件條文) means section 9(2), 12(2), 15(2), 18(2) or 21(2)(b) (as may be applicable);~~
 - ~~“relevant duration provision” (有關時限條文) means section 10(b), 13(b), 16(b), 19(b) or 22(1)(b) (as may be applicable).~~

28. ~~Special case of emergency authorization issued as a result of oral application~~

- (1) ~~Where an emergency authorization is issued as a result of an oral application, sections 26 and 27 do not apply if—~~
 - (a) ~~an application for confirmation of the emergency authorization as provided for in section 23(1) has been made to a panel judge within the period of 48 hours referred to in that section; and~~
 - (b) ~~the application is supported by—~~
 - (i) ~~a record referred to in section 26(2)(b)(i);~~
 - (ii) ~~an affidavit of the applicant which is to verify the contents of the statement provided under section 20(2)(b) for the purposes of the application for the issue of the emergency~~

~~authorization or, where section 25(3) applies in relation to the oral application, all the information provided pursuant to section 25(3) for the purposes of the oral application; and (iii) a copy of the emergency authorization or, where section 25(4) applies in relation to the oral application, a record in writing setting out the determination delivered pursuant to that section in respect of the oral application.~~

~~(2) Notwithstanding section 23(2)(b), the application described in subsection (1)(a) and (b) is for all purposes regarded as an application duly made for confirmation of the emergency authorization as provided for in section 23(1), and the provisions of this Ordinance are to apply accordingly (subject to section 24(5)(a) being read as requiring the **panel judge** to deliver **his** determination under section 24(1) by issuing the emergency authorization (being the emergency authorization confirmed under section 24(1)(a)) in writing).~~

Division 6—General Provisions for Prescribed Authorizations

Matters authorized, required or provided for
by prescribed authorizations

29. What a prescribed authorization may authorize or
require under or by virtue of its terms, etc.

(1A) A prescribed authorization for interception must specify the person or persons whose communications are to be the subject of interception and no authorization for interception shall be construed as authorizing the interception of any communication to or from any person other than the person or persons so specified.

(1AA) A prescribed authorization for covert surveillance must specify the person or persons who is to be the subject of covert surveillance and no authorization for covert surveillance shall be construed as authorizing the surveillance of any person other than the person or persons so specified.

(1) Subject to subsection (1A), a A prescribed authorization for interception may—

(a) in the case of a postal interception, contain terms that authorize one or both of the following—

- (i) the interception of communications made to or from any premises or address specified in the prescribed authorization;
- (ii) the interception of communications made to or by any person specified in the prescribed authorization (whether by name or by description); or

(b) in the case of a telecommunications interception, contain terms that authorize ~~one or both of the following—~~

- ~~(i) the interception of communications made to or from any telecommunications service specified in the prescribed authorization;~~
- ~~(ii) the interception of communications made to or from any telecommunications service that any person specified in the prescribed authorization (whether by name or by description) is using, or is likely to use.~~

(2) Subject to subsection (1AA), a A prescribed authorization for covert surveillance may contain terms that authorize one or more of the following—

- (a) the use of any surveillance devices in or on any premises specified in the prescribed authorization as the place for installation of the surveillance device;
- (b) the use of any surveillance devices in or on any object or class of objects specified in the prescribed authorization;
- (c) the use of any surveillance devices in respect of the conversations, activities or location of any person specified in the prescribed authorization (whether by name or by description).

(3) A prescribed authorization, other than an executive authorization, may contain terms that authorize the doing of anything lawful and reasonably necessary to conceal any conduct authorized or required to be carried out under the prescribed authorization.

(4) A prescribed authorization, other than an executive authorization, may, if it is necessary for the execution of the prescribed authorization, contain terms that authorize the interference with any property (whether or not of any person who is the subject of the interception or covert surveillance concerned) provided that the nature of the interference so authorized must be specified in the authorization.

(5) A prescribed authorization, other than an executive authorization, may contain terms that require any person specified in the prescribed authorization (whether by name or by description), on being shown a copy of the prescribed authorization, to provide to any of the officers of the department concerned such assistance for the execution of the prescribed authorization as is specified in the prescribed authorization.

(6) A prescribed authorization for interception also authorizes—
 (a) the installation, use and maintenance of any devices required to be used in order to intercept any of the communications authorized to be intercepted under the prescribed authorization provided that if the device is to be installed in or used from any private property, the address and if ascertainable, the owner, tenant and occupier of such property must be specified in the authorization ;

(b) subject to (a) above, the entry, by force if necessary, onto any premises in order to carry out any conduct authorized or required to be carried out under the prescribed authorization;

(c) the interception of any communication which it is necessary to intercept in order to intercept any of the communications authorized to be intercepted under the prescribed authorization;
 and

(d) where subsection (1)(a)(ii) or (b)(ii) is applicable, the provision to any person, for the execution of the prescribed authorization, of particulars of the addresses, numbers, apparatus or other factors, or combination of factors, that are to be used for identifying—

- (i) in the case of subsection (1)(a)(ii), the communications made to or by the person specified in the prescribed authorization; or
 - (ii) in the case of subsection (1)(b)(ii), the communications made to or from any telecommunications service that the person specified in the prescribed authorization is using, or is likely to use.
- (7) A prescribed authorization for covert surveillance also authorizes—
- (a) where subsection (2)(a) is applicable—
 - (i) the installation, use and maintenance of any of the surveillance devices authorized to be used under the prescribed authorization in or on the premises specified in the prescribed authorization provided that if the device is to be installed in or used from any private property, the address and if ascertainable, the owner, tenant and occupier of such property must be specified in the authorization ; and
 - (ii) subject to (i) above the entry, by force if necessary, onto the premises, and onto any other premises adjoining or providing access to the premises, in order to carry out any conduct authorized or required to be carried out under the prescribed authorization;
 - (b) where subsection (2)(b) is applicable—
 - (i) the installation, use and maintenance of any of the surveillance devices authorized to be used under the prescribed authorization in or on the object, or an object of the class, specified in the prescribed authorization; and
 - (ii) the entry, by force if necessary, onto any premises where the object, or an object of the class, is reasonably believed to be or likely to be, and onto any other premises adjoining or providing access to the premises in order to carry out any conduct authorized or required to be carried out under the prescribed authorization provided that if the device is to be installed in or used from any private property, the address

- and if ascertainable, the owner, tenant and occupier of such property must be specified in the authorization; and
- (c) where subsection (2)(c) is applicable—
- (i) the installation, use and maintenance of any of the surveillance devices authorized to be used under the prescribed authorization, in or on any premises where the person specified in the prescribed authorization is reasonably believed to be or likely to be provided that if the device is to be installed in or used from any private property, the address and if ascertainable, the owner, tenant and occupier of such property must be specified in the authorization ; and
 - (ii) subject to (i) above, the entry, by force if necessary, onto the premises, and onto any other premises adjoining or providing access to the premises, in order to carry out any conduct authorized or required to be carried out under the prescribed authorization.

30. What a prescribed authorization further authorizes

~~A~~ Subject to section 29, a prescribed authorization further authorizes the undertaking of any lawful conduct which it is necessary to undertake in order to carry out what is authorized or required to be carried out under the prescribed authorization and, without limiting the generality of the foregoing, such conduct includes—

- (a) the retrieval of any of the devices authorized to be used under the prescribed authorization;
- (b) the installation, use, maintenance and retrieval of any enhancement equipment for the devices;
- (c) the temporary removal of any conveyance or object from any premises for the installation, maintenance or retrieval of the devices or enhancement equipment and the return of the conveyance or object to the premises;
- (d) the breaking open of anything for the installation, maintenance or retrieval of the devices or enhancement equipment;

- (e) the connection of the devices or enhancement equipment to any source of electricity and the use of electricity from that source to operate the devices or enhancement equipment;
- (f) the connection of the devices or enhancement equipment to any object or system that may be used to transmit information in any form and the use of that object or system in connection with the operation of the devices or enhancement equipment; and
- (g) the provision of assistance for the execution of the prescribed authorization.

30A. What a prescribed authorization may not authorize

(1) Notwithstanding anything in this Ordinance, subject to subsection (2)—

- a. no prescribed authorization may contain terms that authorize the interception of communications by reference to—
 - i. in the case of a postal interception, an office or other relevant premises, or a residence of a lawyer; or
 - ii. in the case of a telecommunications interception, any telecommunications service used at an office or other relevant premises, or a residence, of a lawyer, or any telecommunications service known or reasonably expected to be known by the applicant to be ordinarily used by a lawyer for the purpose of providing legal advice to clients; and
- b. no prescribed authorization may contain terms that authorize any covert surveillance to be carried out in respect of oral or written communications taking place at an office or other relevant premises, or a residence, of a lawyer; and
- c. no prescribed authorization may contain terms that authorize any covert surveillance to be carried out in respect of oral or written communications taking place in any place provided for legal visits by lawyers visiting

- prisons or other places of detention or in any place where a lawyer is visiting any other person in detention
- (2) a prescribed authorization may contain terms that authorize
- i. the interception of a communication service used by a lawyer other than a service referred to in (1)(a)(ii); or
 - ii. covert surveillance to be carried out in respect of oral or written communications taking place at the residence of a lawyer
- if the relevant authority is satisfied that there is credible evidence to justify a reasonable belief that the lawyer concerned is a party to any activity which constitutes or would constitute a serious crime or threat to public security and the communications concerned is for the furtherance of that criminal purpose, or that threat to public security.
- (3) For the avoidance of doubt, a prescribed authorization does not authorize any device to be implanted in, or administered to, a person without the consent of the person.
- (4) In this section—
- “lawyer” means a barrister, solicitor or foreign lawyer as defined in section 2(1) of the Legal Practitioners Ordinance (Cap. 159) who practices as such, or any person holding an appointment under section 3(1) of the Legal Aid Ordinance (Cap. 91);
- “other relevant premises” in relation to a lawyer, means any premises, other than an office of the lawyer, that are known or reasonably expected to be known by the applicant to be ordinarily used by the lawyer and by other lawyers for the purpose of providing legal advice to clients.

31. Prescribed authorization may be issued or renewed

subject to conditions

A prescribed authorization may be issued or renewed subject to any conditions specified in it that apply to the prescribed authorization itself or to any further authorization or requirement under it (whether granted or imposed under its terms or any provision of this Ordinance).

Device retrieval warrants after prescribed authorizations having
ceased to have effect

32. Application for device retrieval warrant

(1) Where a prescribed authorization has in any way ceased to have effect under this Ordinance, an officer of the department concerned may apply, *ex parte*, to a panel judge for the issue of a device retrieval warrant authorizing the retrieval of any of the devices authorized to be used under the prescribed authorization if such devices—

(a) have been installed in or on any premises or object, pursuant to the prescribed authorization; and

(b) are still in or on such premises or object, or are in or on any other premises or object.

(2) The application is—

(a) to be made in writing; and

(b) to be supported by—

(i) a copy of the prescribed authorization; and

(ii) an affidavit of the applicant which is to comply with the requirements specified in Schedule 4.

33. Determination of application for device retrieval warrant

(1) Upon considering an application for the issue of a device retrieval warrant made under section 32, the panel judge may, subject to subsection (2)—

(a) issue the device retrieval warrant sought under the application, with or without variations; or

(b) refuse to issue the device retrieval warrant.

(2) The panel judge shall not issue the device retrieval warrant unless he is satisfied that section 32(1)(a) and (b) applies to the devices concerned.

(3) The panel judge shall deliver his determination under subsection (1) by—

(a) in the case of subsection (1)(a), issuing the device retrieval warrant and giving reasons for the issuance of the warrant in writing; or

(b) in the case of subsection (1)(b), giving the reason for the refusal in writing.

34. Duration of device retrieval warrant

A device retrieval warrant—

(a) takes effect at the time specified by the panel judge when issuing the warrant, which in any case is not to be earlier than the time when it is issued; and

(b) ceases to have effect upon the expiration of the period specified by the panel judge when issuing the warrant, which in any case is not to be longer than the period of 3 months beginning with the time when it takes effect.

35. What a device retrieval warrant may authorize under or by virtue of its terms, etc.

(1) A device retrieval warrant may authorize the retrieval of any devices specified in the warrant.

(2) A device retrieval warrant may contain terms that authorize the doing of anything reasonably necessary to conceal any conduct authorized to be carried out under the warrant.

(3) A device retrieval warrant may, if it is necessary for the execution of the warrant, contain terms that authorize the interference with any property (whether or not of any person who is the subject of the interception or covert surveillance concerned).

36. What a device retrieval warrant further authorizes

(1) A device retrieval warrant further authorizes the undertaking of any conduct which it is necessary to undertake in order to carry out what is authorized to be carried out under the warrant and, without limiting the generality of the foregoing, such conduct includes—

- (a) the retrieval of any enhancement equipment for the devices authorized to be retrieved under the warrant;
- (b) the entry, by force if necessary, onto any premises where the devices or enhancement equipment is reasonably believed to be or likely to be, and onto any other premises adjoining or providing access to the premises, in order to retrieve the devices or enhancement equipment;
- (c) the temporary removal of any conveyance or object from any premises for the retrieval of the devices or enhancement equipment and the return of the conveyance or object to the premises;
- (d) the breaking open of anything for the retrieval of the devices or enhancement equipment; and
- (e) the provision of assistance for the execution of the warrant.

(2) A device retrieval warrant which authorizes the retrieval of any tracking devices also authorizes the use of the tracking devices and any enhancement equipment for the tracking devices solely for the purposes of the location and retrieval of the tracking devices or enhancement equipment.

37. Device retrieval warrant may be issued subject to conditions
A device retrieval warrant may be issued subject to any conditions specified in it that apply to the warrant itself or to any further authorization under it (whether granted under its terms or any provision of this Ordinance).

PART 4

THE COMMISSIONER

Division 1—The Commissioner and his Functions

38. The Commissioner

(1) There is hereby established an office by the name of the Commissioner on Interception of Communications and Surveillance.

- (2) The Chief Executive shall, on the recommendation of the Chief Justice, appoint an eligible ~~judge~~ person to be the Commissioner.
- (3) The Commissioner shall be appointed for a period of 3 years, and may from time to time be reappointed.
- (4) The Commissioner shall be entitled to such remuneration and allowances as are determined by the Chief Executive.
- (5) The Chief Executive may, ~~on the recommendation of the Chief Justice,~~ revoke the appointment of the Commissioner for good cause provided that the reason for such revocation must be given in writing and shall be reviewable by a court of law.
- (6) In this section, “eligible ~~judge~~person” (合資格法官) means—
- ~~(a) a Justice of Appeal of the Court of Appeal;~~
 - ~~(b) a judge of the Court of First Instance;~~
 - ~~(c) (a) a former permanent judge of the Court of Final Appeal;~~
 - ~~(d) (b) a former Justice of Appeal of the Court of Appeal; or~~
 - ~~(e) (c) a former judge of the Court of First Instance.~~

39. Functions of Commissioner

The functions of the Commissioner are—

- (a) to oversee the compliance by departments and their officers with the relevant requirements; and
- (b) without limiting the generality of paragraph (a), to—
 - (i) conduct reviews under Division 2;
 - (ii) carry out examinations under Division 3;
 - (iii) submit reports to the Chief Executive and make recommendations to the Secretary for Security and heads of departments under Division 4;
 - (iv) investigate complaints made by any person in relation to any interception or surveillance carried out whether with or without authorization
 - ~~(iv) (v)~~ perform any further functions prescribed by regulation made under section 62 for the purposes of this subparagraph; and

~~(v)~~ (vi) perform such other functions as are imposed or conferred on him under this Ordinance or any other enactment.

Division 2—Reviews by Commissioner

40. Reviews on compliance with relevant requirements

(1) The Commissioner shall conduct such reviews as he considers necessary on compliance by departments and their officers with the relevant requirements.

(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), 24(3)(b)(v) or 52.

(2) Upon the conduct of any review under subsection (1), the Commissioner shall record in writing—

(a) details, as identified in the review, of any case of failure by any department or any of its officers to comply with any relevant requirement; and

(b) any other finding he has made in the review.

(3) The Commissioner shall have a general power to require any department to investigate any person within that department where a panel judge or he determines that there is reasonable grounds to believe that the person concerned has contravened provisions of the Ordinance or has presented false information in obtaining an authorization and to require a report from such department on the outcome of any investigation and any disciplinary action taken.

(4) The Commissioner shall have a general power to conduct any investigation as he considers necessary into the conduct of any person apart from a panel judge and to refer any matter to the Director of Public Prosecutions upon conclusion of such investigation.

41. Notifications to departments concerned, etc.

(1) The Commissioner shall notify the head of any department concerned of his findings in a review under section 40(2).

- (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 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.
- (3) Without prejudice to sections 47 and 48, the Commissioner may, whether before or after the head of the department has submitted a report to him under subsection (2), refer the findings and any other matters he thinks fit to the Chief Executive or the Secretary for Justice or both.

Division 3—Examinations by Commissioner

42. Application for examination

- (1) A person may apply to the Commissioner for an examination under this Division, if he believes—
- (a) that any communication transmitted to or by him has been intercepted by a department; or
 - (b) that he is the subject of any covert surveillance that has been carried out by a department.
- (2) The application is to be made in writing.

43. Examination by Commissioner

- (1) Where the Commissioner in the course of performing any of his functions under this Ordinance considers or suspects that there is any case in which any interception or covert surveillance has been carried out in contravention of this Ordinance, or receives an application under section 42, he shall, subject to section 44, carry out an examination to determine—
- (a) whether or not the interception or covert surveillance alleged has taken place; and

(b) if so, whether or not the alleged interception or covert surveillance was carried out under the authority of a prescribed authority issued or renewed in accordance with this Ordinance ~~a prescribed authorization should have been, but has not been, issued or renewed under this Ordinance in relation to the interception or covert surveillance alleged.~~

(2) If, on an examination, the Commissioner determines that a prescribed authorization ~~should have been, but has not been, issued or renewed under this~~ Ordinance in relation to the interception or covert surveillance alleged, he—

~~(a) shall give notice to the applicant stating that he has found the case in the applicant's favour; and~~

~~(b) may, if he thinks fit, make an order for the payment of compensation by the Government to the applicant.~~ was issued or renewed in contravention of this Ordinance or should not have been issued or renewed or the interception or covert surveillance alleged has been carried out without the authority of a prescribed authorization issued or renewed under this Ordinance, he shall give notice as soon as practicable to the subject of interception or surveillance or the applicant—

(a) stating he has found the case in the subject of interception or surveillance's or the applicant's favour with particulars of his findings; and

(b) inviting the subject of interception or surveillance or the applicant to confirm whether the latter wishes to seek an order for the payment of compensation under the application, and if so, to make written submissions to him for that purpose.

(2A) Upon receiving confirmation from the applicant that an order for the payment of compensation is sought, the Commissioner, upon taking into account any written submissions made to him for the purpose, may make any order for the payment of compensation by the Government to the applicant.

(2B) The compensation ordered to be paid under subsection (2A) may include compensation for injury of feelings.

(3) If, on an examination, the Commissioner makes a determination other than that referred to in subsection (2), he shall give notice as soon as practicable to the applicant stating that he has not found the case in the applicant's favour.

~~(4) The compensation ordered to be paid under subsection (2)(b) may include compensation for injury to feelings.~~

(5) Notwithstanding subsections (2), (2A), and (3), the Commissioner shall not give any notice or make any order under those subsections for so long as he considers that the giving of the notice or the making of the order (as the case may be) would be prejudicial to the prevention or detection of crime or the protection of public security.

44. Grounds for not carrying out examination, etc.

(1) Where, before or in the course of an examination, the Commissioner considers—

(a) that the application for the examination is received by the Commissioner more than 4-5 year after the day on which the interception or covert surveillance is alleged to have taken place or, where the interception or covert surveillance is alleged to have taken place on more than 1 day, the last occasion on which it is alleged to have taken place, and that it is not unfair for him not to carry out the examination;

(b) that the application is made anonymously;

(c) that the applicant cannot be identified or traced; or

(d) that, having regard to all the circumstances of the case, the application is frivolous or vexatious or is not made in good faith, the Commissioner may refuse to carry out the examination or, where the examination has been commenced, to proceed with the carrying out of the examination (including the making of any determination further to the examination).

~~(2) Where, before or in the course of an examination, the Commissioner is satisfied that any relevant criminal proceedings~~

~~are pending or are likely to be instituted, the Commissioner shall not carry out the examination or, where the examination has been commenced, proceed with the carrying out of the examination (including the making of any determination further to the examination)—~~

~~(a) in the case of any pending criminal proceedings, until they have been finally determined or finally disposed of; or~~

~~(b) in the case of any criminal proceedings which are likely to be instituted, until they have been finally determined or finally disposed of or, if applicable, until they are no longer likely to be instituted.~~

~~(3) For the purposes of subsection (2), criminal proceedings are, in relation to an examination, regarded as relevant if, but only if, the interception~~

~~or covert surveillance alleged in the application for the examination is or may be relevant to the determination of any question concerning any evidence which has been or may be adduced in those proceedings.~~

45. Further provisions relating to examinations

(1) For the purposes of an examination, the Commissioner shall—

(a) except as otherwise provided in this Ordinance, apply the principles applicable by a court on an application for judicial review except that the burden of proving the interception or covert surveillance alleged to have been lawfully carried out shall lie with the government; and

(b) subject to section 51(1), carry out the examination on the basis of written submissions made to him.

(2) Without prejudice to section 51(3), for the purposes of an examination, the applicant is not entitled to have access to any information, document or other matter compiled by, or made available to, the Commissioner in connection with the examination.

(3) Without prejudice to section 43(5), in giving notice to an applicant under section 43(2)(a) or (3), the Commissioner ~~shall not~~—

- (a) shall give reasons for his determination;
- (b) shall not give details of any interception or covert surveillance concerned; and
- (c) in the case of section 43(3), shall not indicate whether or not the interception or covert surveillance alleged has taken place.

46. Notifications to departments concerned, etc.

- (1) Where, on an examination, the Commissioner makes a determination under section 43(2), he shall notify the head of the department concerned of the determination.
- (2) On being notified of the determination under subsection (1), the head of the department shall submit to the Commissioner a report with details of
any measures taken by the department to address any issues arising from the determination, 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.
- (3) Without prejudice to sections 47 and 48, the Commissioner may, whether before or after the head of the department has submitted a report to him under subsection (2), refer the determination and any other matters he thinks fit to the Chief Executive or the Secretary for Justice or both.

46A. Notifications to relevant persons

- (1) If, in the course of performing any of his functions under this Ordinance, the Commissioner considers that there is any case in which any interception or covert surveillance has been wrongly carried out or carried out without the authority of a prescribed authorization issued or renewed under, or constituted a material contravention of, this Ordinance, subject to subsection (6), the Commissioner shall give notice to the relevant person –

- (a) stating that there has been such a case and indicating whether the case is one of interception or covert surveillance and the duration of the interception or covert surveillance; and
- (b) informing the relevant person of his right to apply to the Commissioner for an examination in respect of the interception or covert surveillance.

(2) Where the relevant person makes an application for an examination in respect of the interception or covert surveillance within 6 months after receipt of the notice or within such further period as the Commissioner may allow, the Commissioner shall, notwithstanding anything in section 44(1)(a) but subject to the other provisions of section 44, make a determination referred to in section 43(2), and the provisions of this Ordinance are to apply accordingly.

(3) Notwithstanding subsection (1), the Commissioner shall not give any notice under that subsection for so long as he considers that the giving of the notice would be prejudicial to the prevention or detection of crime or the protection of public security.

- (4) Without prejudice to subsection (3), the Commissioner shall give reasons for his findings or so much of his reasons as would not be prejudicial to the prevention or detection of crime or the protection of public security.

(5) For the purposes of this section, in considering whether any interception or covert surveillance has been carried out without the authority of a prescribed authorization issued or renewed under this Ordinance, the Commissioner shall apply the principles applicable by a court on an ex parte application.

(6) This section does not require the Commissioner to give any notice to a relevant person if –

- (a) the relevant person cannot, after the use of reasonable efforts, be identified or traced;

- (b) the Commissioner considers that the intrusiveness of the interception or covert surveillance concerned on the relevant person is negligible; or
- (c) in the case of interception, it is within the description of section 4(2)(b) or (c).

(7) In this section, “relevant person” (有關人士) means any person who is the subject of the interception or covert surveillance concerned or such person as being affected by interception or covert surveillance carried out.

Division 4—Reports and Recommendations by Commissioner

~~47. Annual reports to Chief Executive by Commissioner~~

~~(1) The Commissioner shall, for each report period, submit a report to the Chief Executive.~~

~~(2) A report for a report period is to set out, separately in relation to interception and covert surveillance—~~

~~(a) a list showing—~~

~~(i) the number of prescribed authorizations issued under this Ordinance during the report period, and the average duration of the prescribed authorizations;~~

~~(ii) the number of prescribed authorizations renewed under this Ordinance during the report period, and the average duration of the renewals;~~

~~(iii) the number of applications for the issue of prescribed authorizations made under this Ordinance that have been refused during the report period; and~~

~~(iv) the number of applications for the renewal of prescribed authorizations made under this Ordinance that have been refused during the report period;~~

~~(b) a list showing—~~

~~(i) the major categories of offences for the investigation of which prescribed authorizations have been issued or renewed under this Ordinance during the report period; and~~

- ~~(ii) the number of persons arrested during the report period as a result of or further to any interception or covert surveillance carried out pursuant to a prescribed authorization;~~
- ~~(c) a list showing—~~
 - ~~(i) the number of device retrieval warrants issued under this Ordinance during the report period, and the average duration of the warrants; and~~
 - ~~(ii) the number of applications for the issue of device retrieval warrants made under this Ordinance that have been refused during the report period;~~
- ~~(d) a list showing—~~
 - ~~(i) a summary of reviews conducted by the Commissioner under section 40 during the report period;~~
 - ~~(ii) the number and broad nature of any cases of irregularities identified in the reviews during the report period;~~
 - ~~(iii) the number of applications for examination that have been received by the Commissioner during the report period;~~
 - ~~(iv) a summary of the determinations of the Commissioner on examinations carried out during the report period; and~~
 - ~~(v) the broad nature of recommendations made by the Commissioner under sections 49 and 50 during the report period; and~~
 - ~~(e) an assessment on the overall compliance with the relevant requirements during the report period.~~
- ~~(3) The report is to be submitted within 6 months after the expiry of the report period.~~
- ~~(4) Subject to subsection (5), the Chief Executive shall cause a copy of the report to be laid on the table of the Legislative Council.~~
- ~~(5) If the Chief Executive considers that the publication of any matter in the report referred to in subsection (4) would be prejudicial to the prevention or detection of crime or the protection of public security, he may, after consultation with the Commissioner, exclude such matter from the copy of the report to be laid on the table of the Legislative Council under that subsection.~~

~~(6) In this section, “report period” (報告期間), in relation to a report required to be submitted under subsection (1), means—~~
~~(a) the period beginning on the commencement of this Ordinance and ending on 31 December in the same year; or~~
~~(b) any of the succeeding periods of 12 months ending on 31 December.~~

47. Annual reports to Chief Executive by Commissioner

(1) The Commissioner shall, for each report period, submit a report to the Chief Executive.

(2) A report for a report period is to set out, separately in relation to interception and covert surveillance –

(a) a list showing –

- (i) the respective numbers 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;
- (ii) the respective numbers of judge’s authorizations and executive authorizations renewed under this Ordinance during the report period, and the average duration of the respective renewals;
- (iii) 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;

- (iv) 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;
- (v) 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;
- (vi) the respective numbers of 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;
- (vii) the respective numbers of applications for the renewal of judge's authorizations and executive authorizations made under this Ordinance that have been refused during the report period;
- (viii) 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
- (ix) 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;

- (b) a list showing –
 - (i) the major categories of offences for the investigation of which prescribed authorizations have been issued or renewed under this Ordinance during the report period; and
 - (ii) the number of persons arrested during the report period as a result of or further to any interception or covert surveillance carried out pursuant to a prescribed authorization;
- (c) a list showing –
 - (i) the number of device retrieval warrants issued under this Ordinance during the report period, and the average duration of the warrants; and
 - (ii) the number of applications for the issue of device retrieval warrants made under this Ordinance that have been refused during the report period;
- (d) a list showing –
 - (i) a summary of reviews conducted by the Commissioner under section 40 during the report period;
 - (ii) the number and broad nature of any cases of abuses or suspected abuses, irregularities or errors identified in the reviews during the report period;
 - (iii) the number of applications for examination that have been received by the Commissioner during the report period;
 - (iv) the respective numbers of notices given by the Commissioner under section 43(2) and section 43(3) during the report period further to examinations;

- (iva) the number of cases in which a notice has been given by the Commissioner under section 46A during the report period;
- (v) the broad nature of recommendations made by the Commissioner under sections 49 and 50 during the report period;
- (vi) 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 during the report period; and
- (vii) the number of cases in which disciplinary action 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 during the report period, and the broad nature of such action; and

(e) an assessment on the overall compliance with the relevant requirements during the report period.

(3) The report is to be submitted within 6 months after the expiry of the report period.

(4) 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.

(5) If the Chief Executive considers that the publication of any matter in the report referred to in subsection (4) would be prejudicial to the prevention or detection of crime or the protection of public security, he may, after consultation with the Commissioner, exclude such matter from the copy of the report to be laid on the table of the Legislative Council under that subsection.

(6) In this section, “report period” (報告期間), in relation to a report required to be submitted under subsection (1), means –

- (a) the period beginning on the commencement of this Ordinance and ending on 31 December in the same year; or
- (b) any of the succeeding periods of 12 months ending on 31 December.

48. Other reports to Chief Executive by Commissioner

In addition to any report required to be submitted to the Chief Executive under section 47, the Commissioner may from time to time submit any further report to the Chief Executive on any matter relating to the performance of his functions under this Ordinance as he thinks fit.

49. Recommendations to Secretary for Security on code of practice

(1) If, in the course of performing any of his functions under this Ordinance, the Commissioner considers that any provision of the code of practice should be revised to better carry out the objects of this Ordinance, he may make such recommendations to the Secretary for Security as he thinks fit.

(2) Where the Commissioner makes any recommendations to the Secretary for Security under subsection (1), the Secretary shall notify the Commissioner of any exercise of power by him under section 59(3) to implement the recommendations, as soon as reasonably practicable after the recommendations have been made or, where the Commissioner has specified any period for the issue of the notification when making the recommendations, within that period.

50. Recommendations to departments

(1) If, in the course of performing any of his functions under this Ordinance, the Commissioner considers that any arrangements made by any department should be changed to better carry out the objects of this Ordinance or the provisions of the code of practice,

he may make such recommendations to the head of the department as he thinks fit.

(2) Where the Commissioner makes any recommendations to the head of the department under subsection (1), the head of the department shall submit to the Commissioner a report with details of any measures taken by the department to implement the recommendations, as soon as reasonably practicable after the recommendations have been made or, where the Commissioner has specified any period for submission of the report when making the recommendations, within that period.

(3) Without prejudice to sections 47 and 48, the Commissioner may, whether before or after the head of the department has submitted a report to him under subsection (2), refer the recommendations and any other matters he thinks fit to the Chief Executive or the Secretary for Justice or both.

Division 5—Further Provisions Relating to Performance of Functions by Commissioner

51. Further powers of Commissioner

(1) For the purpose of performing any of his functions under this Ordinance, the Commissioner may—

(a) require any public officer or any other person to answer any question, and to provide any information, document or other matter in his possession or control to the Commissioner, within the time and in the manner specified by the Commissioner when making the requirement; and

(b) require any officer of a department to prepare any report on any case of interception or covert surveillance handled by the department, or on any class of such cases, within the time and in the manner specified by the Commissioner when making the requirement.

(2) Notwithstanding any other provision of this Ordinance or any other

law, any person on whom a requirement is imposed by the Commissioner under subsection (1) shall comply with the requirement.

(3) Subject to section 43 herein, ~~Except except~~ as otherwise provided in this Ordinance, the Commissioner shall not be required to produce in any court or to divulge or communicate to any court, or to provide or disclose to any person, any information, document or other matter compiled by, or made available to, him in the course of performing any of his functions under this Ordinance.

(4) Except as otherwise provided in this Ordinance, the Commissioner may determine the procedure to be adopted in performing any of his functions under this Ordinance.

52. General obligations of departments to report on non-compliance

Without prejudice to other provisions of this Part, where the head of any department considers that there may have been any case of failure by the department or any of its officers to comply with any relevant requirement, he shall submit to the Commissioner a report with details of the case.

53. Commissioner not regarded as court

In performing any of his functions under this Ordinance, the Commissioner is for all purposes not regarded as a court or a member of a court.

PART 5

FURTHER SAFEGUARDS

54A. Contravention of this Ordinance

In addition to any or all of the remedies herein provided, any contravention of this Ordinance shall be a civil wrong actionable in equitable relief as well as damages.

54. Regular reviews

(1) The head of each department shall make arrangements to keep under regular review the compliance by officers of the department with the relevant requirements.

(2) Without prejudice to subsection (1), where the head of any department has made any designation under section 7, he shall make arrangements for officers of a rank higher than those held by the authorizing officers of the department to keep under regular review the performance by the authorizing officers of any function under this Ordinance.

55. Discontinuance of interception or covert surveillance

(1) If, in the course of or further to any regular review conducted under section 54(1) or (2), the officer by whom the regular review is or has been conducted is of the opinion that any ground for discontinuance of a prescribed authorization exists, he shall, as soon as reasonably practicable after forming the opinion, cause the interception or covert surveillance concerned to be discontinued.

(2) Without prejudice to subsection (1), where a prescribed authorization has been issued or renewed under this Ordinance, the officer of the department concerned who is for the time being in charge of the interception or covert surveillance concerned—

(a) shall, as soon as reasonably practicable after he becomes aware that any ground for discontinuance of the prescribed authorization exists, cause the interception or covert surveillance to be discontinued; and

(b) may at any time cause the interception or covert surveillance to be discontinued.

(3) Where any officer has caused any interception or covert surveillance to be discontinued, whether under subsection (1) or (2), he shall, as soon as reasonably practicable after the discontinuance, cause a report on the discontinuance and the ground for the discontinuance to be provided to the relevant

authority to whom an application under this Ordinance for the issue or renewal of the prescribed authorization concerned has last been made.

(4) Where the relevant authority receives a report under subsection (3), he shall, as soon as reasonably practicable after receiving the report, revoke the prescribed authorization concerned.

(5) Where any prescribed authorization is revoked under subsection (4), the prescribed authorization is, notwithstanding the relevant duration provision, to cease to have effect from the time of the revocation.

(6) For the purposes of this section, a ground for discontinuance of a prescribed authorization exists if—

(a) the application for, issuance or renewal of any prescribed authorization was in contravention of this Ordinance;

(b) the interception or acts of covert surveillance carried out was in excess of the prescribed authorization;

(ac) the conditions for the continuance of the prescribed authorization under section 3 are not or are no longer met; or

(bd) the relevant purpose of the prescribed authorization has been achieved.

(7) 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 may be applicable).

55A. Reports to relevant authorities following arrests

(1) A prescribed authorization ceases to have effect automatically upon the arrest of the subject of the interception or covert surveillance. The officer of the department concerned who is for the time being in charge of the interception or covert surveillance concerned shall, immediately after he becomes aware of the matter take all necessary steps to cease any interception or

covert surveillance being or would be carried out in respect of the arrested person.

(3) 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) and lawfully performing the relevant functions of the office of that relevant authority; and
- (b) the provisions of this section are to apply accordingly.

56. Safeguards for protected products

(1) Where any protected product has been obtained pursuant to any prescribed authorization issued or renewed under this Ordinance on an application by any officer of a department, the head of the department shall make arrangements to ensure –

- (a) that the following are limited to the minimum that is necessary for the relevant purpose of the prescribed authorization –
 - (i) the extent to which the protected product is disclosed;
 - (ii) the number of persons to whom any of the protected product is disclosed;
 - (iii) the extent to which the protected product is copied; and
 - (iv) the number of copies made of any of the protected product;

(b) that all practicable steps are taken to ensure that the protected product is protected against unauthorized or accidental access, processing, erasure or other use;

(ba) that any information or intelligence report or record generated from the protected product are subject to the same restriction and protection as the protected product; and

(c) that the protected product ~~that the protected product is destroyed as soon as its retention is not necessary for the relevant purpose of the prescribed authorization~~ and all information or intelligence report or record generated from it are destroyed as soon as its retention is not necessary for the relevant purpose of the prescribed authorization.

(1A) Where any protected product described in subsection (1) contains any communication that is subject to legal professional privilege, subsection (1)(c) is to be construed as also requiring the head of the department concerned to make arrangements to ensure that the person entitled to claim such legal professional privilege be notified of the same and to preserve the protected product pending the person's considering of what, any, action is to be taken as regards the same.

~~(2) For the purposes of this section, something is necessary for the relevant purpose of a prescribed authorization if—~~

~~(a) it continues to be, or is likely to become, necessary for the relevant purpose; or~~

~~(b) except in the case of a prescribed authorization for a telecommunications interception, it is necessary~~

~~for the purposes of any civil or criminal proceedings before any court that are pending or are likely to be instituted.~~

57. Record keeping

(1) Without prejudice to section 56, each department shall keep a record which is to contain—

(a) in respect of each application for the issue or renewal of a prescribed authorization under this Ordinance by any officer of the department, a record of—

(i) the application (including a copy of any affidavit or statement provided under Part 3 for the purposes of the application); and

(ii) the determination in respect of the application by the relevant authority (including a copy of any prescribed authorization issued or renewed under Part 3 as a result of the application);

(b) in respect of each application of confirmation of an emergency authorization by any officer of the department as provided for in section 23(1), a record of—

(i) the application (including a copy of any affidavit provided under section 23(2)(b) or, where section 28 applies, a copy of any record, affidavit or other document provided as described in section 28(1)(b), for the purposes of the application); and

(ii) the determination in respect of the application by a panel judge (including a copy of any endorsement made or, where section 28 applies, a copy of any emergency authorization issued, under section 24(5) as a result of the application);

(c) in respect of each application for confirmation of a prescribed authorization or renewal by any officer of the department as provided for in section 26(1), a record of—

(i) the application (including a copy of any record, affidavit or statement provided under section 26(2)(b) for the purposes of the application); and

(ii) the determination in respect of the application by the relevant authority (including a copy of any prescribed

- authorization issued or renewed under section 27(5) as a result of the application);
- (d) a record of—
- (i) any case in which any interception or covert surveillance has been discontinued by any officer of the department under section 55; and
 - (ii) any case in which any prescribed authorization has been revoked under section 55 further to the discontinuance;
- (e) in respect of each application for the issue of a device retrieval warrant under section 32 by any officer of the department, a record of—
- (i) the application (including a copy of any affidavit provided under section 32(2)(b) for the purposes of the application); and
 - (ii) the determination in respect of the application by a panel judge (including a copy of any device retrieval warrant issued under section 33(3) as a result of the application);
- (f) a record of—
- (i) any case to which section 23(3) applies by reason that no application for confirmation of an emergency authorization is made within the period of 48 hours by any officer of the department;
 - (ii) any case to which section 26(3) applies by reason that no application for confirmation of a prescribed authorization or renewal is made within the period of 48 hours by any officer of the department; and
 - (iii) any findings in respect of any other irregularities and errors identified or detected by any officer of the department, whether in any regular review conducted under section 54(1) and (2) or otherwise; and
- (g) any record reasonably required to be kept by the department to enable the Commissioner to prepare reports for submission to the Chief Executive under section 47, or otherwise to perform any of his functions under this Ordinance.
- (2) The record kept under subsection (1)—

(a) to the extent that it relates to any prescribed authorization or device retrieval warrant—

(i) is to be retained for a period of at least ~~2~~10 years after the day on which the prescribed authorization or device retrieval warrant (as the case may be) has ceased to have effect; and
(ii) without prejudice to subparagraph (i), where it has come to the notice of the department concerned that any relevant civil or criminal proceedings before any court are pending or are likely to be instituted, or any relevant review is being conducted under section 40, or, in the case of a prescribed authorization, any relevant application for an examination has been made under section 42, is to be retained—

(A) in the case of any pending proceedings, review or application, at least until the pending proceedings or application has been finally determined or finally disposed of or until the review has been completed or finally disposed of (as the case may be); or

(B) in the case of any proceedings which are likely to be instituted, at least until they have been finally determined or finally disposed of or, if applicable, until they are no longer likely to be instituted; or

(b) to the extent that it does not relate to any prescribed authorization or device retrieval warrant, is to be retained for a period of at least ~~2~~10 years.

(3) For the purposes of subsection (2), any proceedings, review or application is, in relation to any part of a record that relates to any prescribed authorization or device retrieval warrant, regarded as relevant if, but only if—

(a) the prescribed authorization or device retrieval warrant (as the case may be) is or may be relevant to the determination of any question for the purposes of the proceedings, review or application (as the case may be); or

(b) in the case of a prescribed authorization, any protected product obtained pursuant to the prescribed authorization is or may be

relevant to the determination of any question for the purposes of the proceedings, review or application (as the case may be).

58. Non-admissibility of telecommunications interception product

(1A) Nothing in this Ordinance shall authorize any conduct by any person which affects or may affect the right to a fair trial nor shall any judge or court or prosecutor be constrained or limited in any way in ordering or giving disclosure of any material including any protected product necessary for a fair trial.

(1) Subject to subsection (1A) and the right of any person charged with a criminal offence to apply to the court for disclosure of a telecommunications interception product, Any any telecommunications interception product shall not be admissible in evidence in any proceedings before any court other than to prove that a relevant offence has been committed.

(2) Subject to subsection (1A) and the right of any person charged with a criminal offence to apply to the court for disclosure of a telecommunications interception product, Any any telecommunications interception product, and any particulars as to a telecommunications interception carried out pursuant to a relevant prescribed authorization, shall not be made available to any party to any proceedings before any court (other than any such proceedings instituted for a relevant offence).

~~(3) In any proceedings before any court (other than any such proceedings instituted for a relevant offence), any evidence or question which tends to suggest any of the following matters shall not be adduced or asked—~~

~~(a) that an application has been made for the issue or renewal of a relevant prescribed authorization, or the issue of a relevant device retrieval warrant, under this Ordinance;~~

~~(b) that a relevant prescribed authorization has been issued or renewed, or a relevant device retrieval warrant has been issued, under this Ordinance;~~

~~(c) that any requirement has been imposed on any person to provide assistance for the execution of a relevant prescribed authorization or a relevant device retrieval warrant;~~

~~(d) that any information has been obtained pursuant to a relevant prescribed authorization.~~

(4) This section is not to be construed as prohibiting the disclosure of any information that continues to be available for disclosure, to the extent that—

~~(a) the disclosure is made to ensure that a person conducting the prosecution of any offence has the information he needs to determine what is required of him by his duty to secure the fairness of the trial of that offence; or~~

~~(b) the disclosure is made to a judge alone in a case in which the judge has ordered the disclosure to be so made to him.~~ and which is necessary for the purposes of a fair trial.

~~(5) A judge may only order a disclosure under subsection (4)(b) if he is satisfied that the disclosure is essential in the interests of justice.~~

~~(6) Where a judge orders a disclosure under subsection (4)(b), and in consequence of that disclosure he considers that it is essential in the interests of justice, he may direct the person conducting the prosecution of any offence to make for the purposes of the proceedings concerned any such admission of fact as the judge considers essential to secure the fairness of the trial of that offence.~~

~~(7) Notwithstanding subsection (6), no direction made under that subsection authorizes or requires anything to be done in contravention of subsections (1), (2) and (3).~~

(8) In this section—

“party” (一方), in relation to any criminal proceedings, includes the prosecution;

~~“relevant device retrieval warrant” (有關器材取出手令) means a device retrieval warrant for the retrieval of any of the devices authorized to be used under a relevant prescribed authorization;~~
~~“relevant offence” (有關罪行) means any offence constituted by the disclosure of any telecommunications interception product or of any information relating to the obtaining of any telecommunications interception product (whether or not there are other constituent elements of the offence);~~
 “relevant prescribed authorization” (有關訂明授權) means a prescribed authorization for a telecommunications interception;
 “telecommunications interception product” (電訊截取成果) means any interception product to the extent that it is—
 (a) any contents of a communication that have been obtained pursuant to a relevant prescribed authorization; or
 (b) a copy of such contents.

59. Code of practice

(1) The Secretary for Security shall issue a code of practice for the purpose of providing practical guidance to officers of the departments in respect of matters provided for in this Ordinance.

(2) Without limiting the generality of subsection (1), the Secretary for Security may in the code of practice specify the form of any application to be made to a panel judge under this Ordinance.

(3) The Secretary for Security may from time to time revise the whole or any part of the code of practice, in a manner consistent with his power to issue the code under this section, and, unless the context otherwise requires, any reference to the code of practice, whether in this Ordinance or otherwise, is to be construed as a reference to the code as so revised.

(4) Any officer of a department shall, in performing any function under or for the purposes of any provision of this Ordinance, have regard to the provisions of the code of practice.

(5) A failure on the part of any person to comply with any provision of the code of practice—

(a) is for all purposes not of itself to be regarded as a failure to comply with any provision of this Ordinance; and

(b) without prejudice to paragraph (a), does not affect the validity of any prescribed authorization or device retrieval warrant.

PART 6

MISCELLANEOUS

60. Prescribed authorizations and device retrieval warrants not affected by minor defects

(1) A prescribed authorization or device retrieval warrant is not affected by any minor defect in it.

(2) Without prejudice to the generality of subsection (1), any information (including any protected product) obtained pursuant to a prescribed authorization is not by reason only of any minor defect in the prescribed authorization to be rendered inadmissible in evidence in any proceedings before any court.

(3) For the purposes of this section, any reference to minor defect, in relation to a prescribed authorization or device retrieval warrant, includes any defect or irregularity, other than a substantial defect or irregularity, in or in connection with—

(a) the issue, or the purported issue, of that prescribed authorization or device retrieval warrant or of a document purporting to be that prescribed authorization or device retrieval warrant; or

(b) the execution, or the purported execution, of that prescribed authorization or device retrieval warrant or of a document purporting to be that prescribed authorization or device retrieval warrant.

61. Immunity

(1) Subject to subsection (2), a person shall not incur any civil or criminal liability by reason only of—

(a) any conduct carried out pursuant to a prescribed authorization or device retrieval warrant (including any conduct incidental to such conduct);

(b) his performance or purported performance in good faith of any function under this Ordinance; or

(c) his compliance with a requirement made or purportedly made under this Ordinance.

(2) Nothing in subsection (1) affects any liability that is or may be incurred by any person by reason only of—

(a) any entry onto any premises without permission; or

(b) any interference with any property without permission.

62. Regulation

The Chief Executive in Council may make regulation for—

(a) the better carrying out of the purposes of this Ordinance; and

(b) without limiting the generality of paragraph (a), prescribing any matter which this Ordinance provides is, or may be, prescribed by regulation made under this section.

63. Amendment of Schedules

The Chief Executive in Council may, by notice published in the Gazette, amend Schedules 1, 2, 3 and 4.

64. Repeal and consequential amendments

(1) The Interception of Communications Ordinance (Cap. 532) is repealed.

(2) The enactments specified in Schedule 5 are amended as set out in that Schedule.

65. Transitional arrangements

(1A) Nothing in this Ordinance shall be construed as authorizing or permitting or applying to any interception of communications or

surveillance which has been held unlawful by any court before the commencement of this Ordinance.

(1)Subject to subsection (1A). ~~Where~~ where any materials have been obtained by or on behalf of any department by carrying out any telecommunications interception pursuant to an order issued or renewed before the commencement of this Ordinance under the provision then in force as section 33 of the Telecommunications Ordinance (Cap. 106), sections 56 and 58 apply, with necessary modifications, to the materials, to the extent that they are any of the contents of the communication intercepted or a copy of such contents, and to the relevant matters as if—

(a) the order were a prescribed authorization issued or renewed under this Ordinance, and accordingly—

- (i) the materials were, for the purposes of sections 56 and 58 respectively, protected product and telecommunications interception product; and
 - (ii) the application for the issue or renewal of the order were an application for the issue or renewal of a prescribed authorization under this Ordinance; and
- (b) the purpose sought to be furthered by carrying out the operation required to be carried out under the order were the relevant purpose of the order.
- (2) Subsection (1) is in addition to and not in derogation of section 23 of the Interpretation and General Clauses Ordinance (Cap. 1).
- (3) In this section—
- “copy” (文本), in relation to any contents of a communication referred to in subsection (1), means any of the following (whether or not in documentary form)—
- (a) any copy, extract or summary of such contents which identifies itself as such copy, extract or summary of such contents;
 - (b) any record referring to the telecommunications interception referred to in subsection (1) which is a record of the identity of any person who is the sender or intended recipient of the communication;
- “relevant matters” (有關事宜)—
- (a) in relation to section 58(2), means any particulars as to the telecommunications interception referred to in subsection (1); and
 - (b) in relation to section 58(3), means any evidence or question which tends to suggest any of the following matters—
 - (i) that an application has been made for the issue or renewal of the order referred to in subsection (1);
 - (ii) that the order has been issued or renewed;
 - (iii) that any requirement has been imposed on any person to provide assistance for the execution of the order;
 - (iv) that any information has been obtained pursuant to the order.

SCHEDULE 1 [ss. 2 & 63]

DEPARTMENTS

PART 1

DEPARTMENTS SPECIFIED FOR INTERCEPTION, ETC.

1. Customs and Excise Department
2. Hong Kong Police Force
3. Independent Commission Against Corruption

PART 2

DEPARTMENTS SPECIFIED FOR COVERT SURVEILLANCE, ETC.

1. Customs and Excise Department
 2. Hong Kong Police Force
 3. Immigration Department
 4. Independent Commission Against Corruption
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SCHEDULE 2 [ss. 2, 6 & 63]

PROCEDURES OF, AND OTHER MATTERS RELATING TO, PANEL JUDGE

Judge' s Authorization

~~1. Provisions for consideration of applications
by panel judge to the High Court~~

~~(1) A panel judge court shall consider any application made to him
under this Ordinance in private.~~

~~(2) Without prejudice to subsection (1), the application may, where the panel judgecourt so directs, be considered at any place other than within the court precincts.~~

~~(3) Without prejudice to Division 5 of Part 3 of this Ordinance, nothing in this section prevents consideration of the application by the panel judgecourt on the basis of written submissions made to him.~~

~~2. Further powers of panel judgecourt~~

~~For the purpose of performing any of his functions under this Ordinance, a panel judgecourt may administer oaths and take affidavits.~~

3. Provisions for documents and records compiled by or made available to panel judge

(1) A panel judge shall cause all documents and records compiled by, or made available to, him for any purpose related to the performance of any of his functions under this Ordinance to be kept in a packet sealed by his order, as soon as they are no longer immediately required for the purpose of performing any of his functions under this Ordinance.

(2) Notwithstanding subsection (1), a panel judge to whom any documents or records are made available in the circumstances described in that subsection shall—

(a) cause a copy of each of the documents or records so made available to him to be certified by affixing his seal to it and signing on it; and

(b) cause the copy so certified to be made available to the department concerned.

(3) Where any documents or records are kept in a packet under subsection (1)—

(a) the packet is to be kept in a secure place specified by a panel judge;

(b) the packet may not be opened, and the documents or records may not be removed from the packet, except pursuant to an order

of a panel judge made for the purpose of performing any of his functions under this Ordinance; and

(c) the packet, and the documents or records, may not be destroyed except pursuant to an order of a panel judge.

(4) Where any packet is opened pursuant to any order of a panel judge referred to in subsection (3)(b)—

(a) if any documents or records have been removed from the packet, the panel judge shall cause the documents or records to be returned to be kept in the packet, as soon as they are no longer immediately required for the purpose of performing any of his functions under this Ordinance; and

(b) the panel judge shall cause the packet to be sealed by his order, as soon as access to the documents or records kept in it is no longer immediately required for the purpose of performing any of his functions under this Ordinance, and the provisions of subsection (3) apply, with necessary modifications, to the packet so sealed as they apply to the packet referred to in subsection (1).

(5) Nothing in this section prevents any of the documents and records referred to in subsection (1), or any copies of such documents and records, to be made available to the department concerned for the purposes of any relevant written determination provision or otherwise pursuant to an order of a panel judge.

(6) In this section, “relevant written determination provision” (有關書面決定條文) means section 9(3), 12(3), 24(5) (whether with or without reference to section 28 of this Ordinance), 27(5) or 33(3) of this Ordinance.

~~4. Panel judge to act judicially but not regarded as court~~

~~In performing any of his functions under this Ordinance, a panel judge shall act judicially and have the same powers, protection and immunities as a judge of the Court of First Instance has in relation to proceedings in that Court, although he is for all purposes not regarded as a court or a member of a court.~~

SCHEDULE 3 [ss. 8, 11, 14, 17, 20 & 63]

REQUIREMENTS FOR AFFIDAVIT OR STATEMENT FOR
APPLICATION FOR ISSUE OR RENEWAL OF PRESCRIBED
AUTHORIZATION FOR INTERCEPTION OR COVERT
SURVEILLANCE

PART 1

APPLICATION FOR ISSUE OF JUDICIAL AUTHORIZATION
FOR INTERCEPTION

An affidavit supporting an application for the issue of a judge' s
~~judicial~~ authorization for interception is to—

(a) state which of the purposes specified in section 3(1)(a)(i) and
(ii) of this Ordinance is sought to be furthered by carrying out the
interception and identify the serious crime sought to be prevented
or detected or the threat to public security, whichever is applicable;

(b) set out—

- (i) the form of the interception and the information sought to
be obtained by carrying out the interception;
- (ii) ~~if known~~, the identity of any person who is to be the
subject of the interception;
- (iii) ~~if known~~, particulars of the addresses, numbers,
apparatus or other factors, or combination of factors, that are
to be used for identifying any communication that is to be
intercepted;
- (iv) the proposed duration of the interception;
- (v) the nature of, and an assessment of the immediacy and
gravity of—

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

(B) where the purpose sought to be furthered by
carrying out the interception is that specified in section

- 3(1)(a)(ii) of this Ordinance, the particular threat to public security; (vi) the benefits likely to be obtained by carrying out the interception;
- (vii) an assessment of the impact (if any) of the interception on any person other than that referred to in subparagraph (ii);
- (viii) the likelihood that any information-communication which may be subject to legal professional privilege, or may be confidential journalistic information, or sensitive personal information will be obtained by carrying out the interception; and
- (ix) the reason why the purpose sought to be furthered by carrying out the interception cannot reasonably be furthered by other less intrusive means;
- (x) set out all facts and matters in support of the reasonable suspicion specified in section 3 including the source of information or belief
- (xi) set out whether the subject of the interception has a criminal record, specifying the offences, if applicable
- and
- (c) identify by name and rank the applicant.

PART 2

APPLICATION FOR ISSUE OF JUDICIAL-JUDGE' S AUTHORIZATION FOR TYPE 1 SURVEILLANCE

An affidavit supporting an application for the issue of a judicial authorization for Type 1 surveillance is to—

- (a) state which of the purposes specified in section 3(1)(a)(i) and (ii) of this Ordinance is sought to be furthered by carrying out the Type 1 surveillance and identify the serious crime sought to be prevented or detected or the threat to public security, whichever is applicable;
- ;
- (b) set out—

- (i) the form of the Type 1 surveillance (including the kind or kinds of any devices to be used) and the information sought to be obtained by carrying out the Type 1 surveillance;
- (ii) ~~if known~~, the identity of any person who is to be the subject of the Type 1 surveillance;
- (iii) the identity of any person, other than that referred to in subparagraph (ii), who may be affected by the Type 1 surveillance or, if the identity of such person is not known, the description of any such person or class of such persons who may be affected by the Type 1 surveillance;
- (iv) ~~if known~~, particulars of any premises or any object or class of objects in or on or from which the Type 1 surveillance is to be carried out;
- (v) the proposed duration of the Type 1 surveillance;
- (vi) the nature of, and an assessment of the ~~immediacy~~ imminence and gravity of—
 - (A) where the purpose sought to be furthered by carrying out the Type 1 surveillance is that specified in section 3(1)(a)(i) of this Ordinance, the serious crime to be prevented or detected; or
 - (B) where the purpose sought to be furthered by carrying out the Type 1 surveillance is that specified in section 3(1)(a)(ii) of this Ordinance, the particular threat to public security;
- (vii) the benefits likely to be obtained by carrying out the Type 1 surveillance;
- (viii) an assessment of the impact (if any) of the Type 1 surveillance on any person referred to in subparagraph (iii);
- (ix) the likelihood that any information which may be subject to legal professional privilege, any confidential journalistic information or sensitive personal information will be obtained by carrying out the Type 1 surveillance; and
- (x) the reason why the purpose sought to be furthered by carrying out the Type 1 surveillance cannot reasonably be furthered by other less intrusive means;

- (x) set out all matters and facts in support of the reasonable suspicion specified in section 3 including the source of information or belief
- (xi) set out whether the subject of the interception has a criminal record, specifying the offences, if applicable
- and
- (c) identify by name and rank the applicant.

PART 3 APPLICATION FOR ISSUE OF EXECUTIVE AUTHORIZATION FOR TYPE 2 SURVEILLANCE

A statement supporting an application for the issue of an executive authorization for Type 2 surveillance is to—

(a) state which of the purposes specified in section 3(1)(a)(i) and (ii) of this Ordinance is sought to be furthered by carrying out the Type 2 surveillance and identify the serious crime sought to be prevented or detected or the threat to public security, whichever is applicable ;

(b) set out—

(i) the form of the Type 2 surveillance (including the kind or kinds of any devices to be used) and the information sought to be obtained by carrying out the Type 2 surveillance;

(ii) if known, the identity of any person who is to be the subject of the Type 2 surveillance;

(iii) the identity of any person, other than that referred to in subparagraph (ii), who may be affected by the Type 2 surveillance or, if the identity of such person is not known, the description of any such person or class of such persons who may be affected by the Type 2 surveillance;

(iv) if known, particulars of any premises or any object or class of objects in or on which the Type 2 surveillance is to be carried out;

(v) the proposed duration of the Type 2 surveillance;

(vi) the nature of, and an assessment of the immediacy and gravity of—

(A) where the purpose sought to be furthered by carrying out the Type 2 surveillance is that specified in section 3(1)(a)(i) of this Ordinance, the serious crime to be prevented or detected; or

(B) where the purpose sought to be furthered by carrying out the Type 2 surveillance is that specified in

- section 3(1)(a)(ii) of this Ordinance, the particular threat to public security;
- (vii) the benefits likely to be obtained by carrying out the Type 2 surveillance;
- (viii) an assessment of the impact (if any) of the Type 2 surveillance on any person referred to in subparagraph (iii);
- (ix) the likelihood that any information which may be subject to legal professional privilege will be obtained by carrying out the Type 2 surveillance; and
- (x) the reason why the purpose sought to be furthered by carrying out the Type 2 surveillance cannot reasonably be furthered by other less intrusive means;
- (x) set out all facts and all matters in support of the reasonable suspicion specified in section 3 including the source of information or belief
- (xi) set out whether the subject of the interception has a criminal record, specifying the offences, if applicable
- and
- (c) identify by name and rank the applicant.

PART 4

APPLICATION FOR RENEWAL OF ~~JUDICIAL~~ JUDGE' S AUTHORIZATION OR EXECUTIVE AUTHORIZATION FOR INTERCEPTION OR COVERT SURVEILLANCE

An affidavit or statement supporting an application for the renewal of a judicial authorization for interception or Type 1 surveillance or an executive authorization for Type 2 surveillance is to—

- (a) set out—
 - (i) whether the renewal sought is the first renewal and, if not, each occasion on which the judicial authorization or executive authorization has been renewed previously;

- (ii) any significant change to any information previously provided in any affidavit or statement under this Ordinance for the purposes of any application for the issue or renewal of the judicial authorization or executive authorization, or for the purposes of any application made further to an oral application for confirmation of the judicial authorization or executive authorization or its previous renewal;
 - (iii) the value of the information so far obtained pursuant to the judicial authorization or executive authorization;
 - (iv) the reason why it is necessary to apply for the renewal; and
 - (v) the proposed duration of the interception, Type 1 surveillance or Type 2 surveillance (as the case may be); and
- (b) identify by name and rank the applicant.
-

SCHEDULE 4 [ss. 32 & 63]

REQUIREMENTS FOR AFFIDAVIT FOR APPLICATION FOR ISSUE OF DEVICE RETRIEVAL WARRANT

An affidavit supporting an application for the issue of a device retrieval warrant for the retrieval of any of the devices authorized to be used under a prescribed authorization is to—

- (a) set out—
 - (i) the kind or kinds of the devices sought to be retrieved;
 - (ii) particulars of the premises or object from which the devices are to be retrieved, and the reason why the applicant considers that the devices are in or on such premises or object;
 - (iii) the estimated time required to complete the retrieval;
 - (iv) an assessment of the impact (if any) of the retrieval on any person; and
 - (v) the need for the retrieval; and
- (b) identify by name and rank the applicant.

SCHEDULE 5 [s. 64]

CONSEQUENTIAL AMENDMENTS

Post Office Ordinance

1. Warrant of Chief Secretary for Administration
for opening and delaying postal packets

Section 13 of the Post Office Ordinance (Cap. 98) is repealed.

2. Disposal of postal packets opened under
section 10, 12 or 13

(1) Section 14 is amended, in the heading, by repealing “, 12 or 13” and substituting “or 12”.

(2) Section 14 is amended by repealing “, 12 or 13” and substituting “or 12”.

3. Extension of sections 12, 13 and 14 to articles not transmissible
by post

(1) Section 15 is amended, in the heading, by repealing “, 13”.

(2) Section 15 is amended by repealing “, 13”.

Post Office Regulations

4. Regulation amended

Regulation 10 of the Post Office Regulations (Cap. 98 sub. leg. A) is amended by repealing “, 12, or 13” and substituting “or 12”.

Telecommunications Ordinance

5. Section substituted

Section 33 of the Telecommunications Ordinance (Cap. 106) is repealed and the following substituted—

“33. Orders for interception of messages for provision of facilities

(1) For the purpose of providing or making available facilities reasonably required for—

(a) the detection or discovery of any telecommunications service provided in contravention of any provision of this Ordinance or any regulation made under this Ordinance or any of the terms or conditions of a licence granted under this Ordinance; or

(b) the execution of prescribed authorizations for telecommunications interception that may from time to time be issued or renewed under the Interception of Communications and Surveillance Ordinance (of 2006), the Chief Executive may order that any class of messages shall be intercepted.

(2) An order under subsection (1) shall not of itself authorize the obtaining of the contents of any individual message.

(3) In this section—

“contents” (内容), in relation to any message, has the meaning assigned to it in section 2(5) of the Interception of Communications and Surveillance Ordinance (of 2006) in relation to a communication referred to in that section;

“prescribed authorization” (訂明授權) has the meaning assigned to it in section 2(1) of the Interception of Communications and Surveillance Ordinance (of 2006);

“telecommunications interception” (●●●●●●) has the meaning assigned to it in section 2(1) of the Interception of Communications and Surveillance Ordinance (of 2006).”.

Prevention of Bribery Ordinance

6. Public bodies

Schedule 1 to the Prevention of Bribery Ordinance (Cap. 201) is amended by adding—

“107. Commissioner on Interception of Communications and Surveillance.”.

Personal Data (Privacy) Ordinance

7. Section added

The Personal Data (Privacy) Ordinance (Cap. 486) is amended by adding—

“58A. Protected product and relevant records under Interception of Communications and Surveillance Ordinance

(1) A personal data system is exempt from the provisions of this Ordinance to the extent that it is used by a data user for the collection, holding, processing or use of personal data which are, or are contained in, protected product or relevant records.

(2) Personal data which are, or are contained in, protected product or relevant records are exempt from the provisions of this Ordinance.

(3) In this section—

“device retrieval warrant” (器材取出手令) has the meaning assigned to it by section 2(1) of the Interception of Communications and Surveillance Ordinance (of 2006);

“prescribed authorization” (訂明授權) has the meaning assigned to it by section 2(1) of the Interception of Communications and Surveillance Ordinance (of 2006);

“protected product” (受保護成果) has the meaning assigned to it by section 2(1) of the Interception of Communications and Surveillance Ordinance (of 2006);

“relevant records” (有關紀錄) means documents and records relating to—

(a) any application for the issue or renewal of any prescribed authorization or device retrieval warrant under the Interception of Communications and Surveillance Ordinance (of 2006); or

(b) any prescribed authorization or device retrieval warrant issued or renewed under that Ordinance (including anything done pursuant to or in relation to such prescribed authorization or device retrieval warrant).”.

Official Secrets Ordinance

8. Information related to commission of offences and criminal investigations

Section 17(2)(c), (d) and (e) of the Official Secrets Ordinance (Cap. 521) is repealed and the following substituted—

“(c) any information, document or article which is interception product within the meaning of the Interception of Communications and Surveillance Ordinance (of 2006); or

(d) any information relating to the obtaining of any interception product described in paragraph (c).”.

Explanatory Memorandum

The object of this Bill is to regulate the conduct of interception of communications and the use of surveillance devices by or on behalf of public officers.

2. The Bill contains 6 Parts and 5 Schedules.

Part 1—Preliminary

3. Part 1 provides for preliminary matters—

(a) Clause 2 contains the definitions with reference to which the provisions of the Bill are to be interpreted. In particular—

(i) “interception” is defined to mean the carrying out of any intercepting act in respect of communications, and for that purpose—

— “communication” is defined to mean any communication transmitted by a postal service or by a telecommunications system; and

— “intercepting act” is defined to mean the inspection of any of the contents of a communication, in the course of its transmission, by persons other than its sender or its intended recipient;

(ii) “covert surveillance” is defined to mean systematic surveillance carried out with the use of any surveillance device for the purposes of a specific investigation or operation where, among other conditions that apply, any

person who is the subject of the surveillance is entitled to a reasonable expectation of privacy; and, for the purposes of the Bill, covert surveillance is further divided into “Type 1 surveillance” and “Type 2 surveillance” as defined under their respective definitions; and

(iii) “department” is defined, in relation to interception cases, to mean the Customs and Excise Department, the Hong Kong Police Force, and the Independent Commission Against Corruption, and, in relation to covert surveillance cases, to mean the same departments as well as the Immigration Department.

(b) Clause 3 sets out the conditions for the issue or renewal, or the continuance, of prescribed authorizations under the Bill. Under those conditions, any interception or covert surveillance sought to be authorized should be carried out for the purpose of preventing or detecting serious crime or for the purpose of protecting public security, and should, upon taking into consideration various specified matters, also be proportionate to such purpose.

Part 2—Prohibition on Interception and Covert Surveillance

4. Part 2 contains the prohibition provisions—

(a) Clause 4 provides that no public officers shall, directly or through any other person, carry out any interception. This prohibition does not apply if the interception is carried out pursuant to a prescribed authorization, or is carried out in respect of telecommunications transmitted by specified radiocommunications, or is otherwise authorized, permitted or required to be carried out under any other enactments.

(b) Clause 5 provides that no public officers shall, directly or through any other person, carry out any covert surveillance. This prohibition does not apply if the covert surveillance is carried out pursuant to a prescribed authorization.

Part 3—Prescribed Authorizations, etc.

5. Part 3 contains provisions relating to prescribed authorization, and is divided into 6 Divisions—

(a) Division 1 (clauses 6 and 7) provides for the appointment and designation of panel judges and authorizing officers, being relevant authorities having functions to approve applications for the issue or renewal of prescribed authorizations, etc. under

Part 3—

(i) ~~Clause 6 provides for the appointment of 3 to 6 eligible judges as panel judges by the Chief Executive on the recommendation of the Chief Justice. It also p~~Provides that Schedule 2 applies to the procedures and other matters relating to panel judges.

(ii) Clause 7 provides for the designation of officers not below a rank equivalent to that of senior superintendent of police as authorizing officers by the head of the departments.

(b) Division 2 (clauses 8 to 13) provides for the issue of judicial authorizations for interception or Type 1 surveillance, on the application to a panel judge by an officer of a department with the approval of a directorate officer of that department, and further for the renewal of judicial authorizations. Subject to the conditions set out in clause 3, a judicial authorization may be issued or renewed for a maximum term of 3 months.

(c) Division 3 (clauses 14 to 19) provides for the issue of executive authorizations for Type 2 surveillance, on the application to an authorizing officer of a department by an officer of that department, and further for the renewal of executive authorizations. Subject to the conditions set out in clause 3, an executive authorization may be issued or renewed for a maximum term of 3 months.

(d) Division 4 (clauses 20 to 24) provides for the issue of emergency authorizations for interception or Type 1 surveillance by the head of departments in any emergency cases where it is not practicable for judicial authorizations to be obtained from panel judges. However, while the conditions set out in clause 3 also

apply to the issue of the emergency authorization, the emergency authorization is only to last for a maximum term of 48 hours and in any event is subject to confirmation on an application to a panel judge by an officer of the department concerned. Where the panel judge does not confirm the emergency authorization, he may order the revocation or variation of the emergency authorization, and may also order the destruction of any of the information obtained pursuant to the emergency authorization.

(e) Division 5 (clauses 25 to 28) provides for the alternative of making oral applications for the issue or renewal of prescribed authorizations in specified circumstances, notwithstanding the requirements for written applications otherwise applicable to prescribed authorizations under Part 3. Where any oral application is made, supporting information may be provided orally, and the determination in respect of the application may also be delivered orally. However, the determination under an oral authorization is also subject to confirmation on an application to the relevant authority by whom the oral application has been determined. Where the relevant authority does not confirm the prescribed authorization or the renewal issued or granted under the determination, he may order the revocation or variation of the prescribed authorization or renewal, and may also order the destruction of any of the information obtained pursuant to the prescribed authorization or renewal.

(f) Division 6 (clauses 29 to 37) contains general provisions applicable to prescribed authorizations. Clauses 29 to 31 deal with matters that may be authorized, required or provided for by prescribed authorizations. Clauses 32 to 37 then provide for the issue, after a prescribed authorization has ceased to have effect, of a device retrieval warrant for the retrieval of devices previously installed in or on premises or objects pursuant to the prescribed authorization. The application is to be made to a panel judge by an officer of a department, and on considering the application, the panel judge may issue a device retrieval warrant for a maximum term of 3 months.

Part 4—The Commissioner

6. Part 4 contains provisions relating to the Commissioner on Interception of Communications and Surveillance, and is divided into 5 Divisions—

(a) Division 1 (clauses 38 and 39) provides for the establishment of the office of the Commissioner and for his functions. The Commissioner is to be appointed by the Chief Executive on the recommendation of the Chief Justice. His functions are to oversee the compliance by departments and their officers with the relevant requirements (cf. definition of “relevant requirement” in clause 2), and in particular to perform functions set out in Divisions 2 to 4, and other functions prescribed by regulation made under clause 62 and generally by the Bill and by other enactments.

(b) Division 2 (clauses 40 and 41) provides for reviews conducted by the Commissioner on compliance by departments and their officers with the relevant requirements. The Commissioner is also to notify departments concerned of any case where he has made any findings that there has been failure by any department or any of its officers to comply with any relevant requirement.

(c) Division 3 (clauses 42 to 46) provides for examinations carried out by the Commissioner, on the application by any person who believes that he is the subject of any interception or covert surveillance carried out by a department. The Commissioner is to consider the case by adopting the judicial review principles and by reference to written submissions made to him. After consideration of the case, he is to notify the applicant whether he has found the case in the applicant’s favour, and may, if he thinks fit, make an order for the payment by the Government to the applicant of a sum of compensation, which may include compensation for injury to feelings. The Commissioner is also to notify the department concerned of any case where he has found the case in the applicant’s favour.

(d) Division 4 (clauses 47 to 50) provides for the submission by the Commissioner to the Chief Executive of annual reports containing

specified information, and then requires a copy of the reports to be laid on the table of the Legislative Council. The Commissioner may also from time to time make further reports to the Chief Executive, and may also make recommendations to the Secretary for Security and the departments on specified matters. (e) Division 5 (clauses 51 to 53) contains further provisions relating to the performance of functions by the Commissioner. The Commissioner may impose requirements on public officers and other persons to provide information to him, and may require officers of departments to prepare reports in respect of cases of interception or covert surveillance handled by the departments. In addition, the head of a department is to keep the Commissioner informed of any case in which he considers that there may have been any case of failure by the department or any of its officers to comply with any relevant requirement.

Part 5—Further Safeguards

7. Part 5 provides for further safeguards in respect of interception and covert surveillance carried out by departments—

(a) Under clauses 54 and 55, a department is to conduct regular reviews on the compliance by officers of the department with the relevant requirements, and on the performance by authorizing officers of the department of any function under the Bill. Any interception or covert surveillance carried out pursuant to a prescribed authorization is to be discontinued once the officer by whom a regular review is conducted, or the officer in charge of the operation, considers that the conditions set out in clause 3 are not met, or that the relevant purpose of the prescribed authorization has been achieved (cf. definition of “relevant purpose” in clause 2). In addition, the officer in charge of the operation may at any time cause the operation to be discontinued. In any case where any operation is discontinued, the relevant authority by whom the prescribed authorization authorizing the operation has been issued or renewed is to be notified, and then to revoke the prescribed authorization.

(b) Under clause 56, each department shall make arrangements to ensure that any product obtained pursuant to a prescribed authorization (cf. definition of “protected product” in clause 2) is to be dealt with in accordance with specified arrangements, in order to minimize the extent to which the product is disclosed or copied, or subject to unauthorized or accidental access, processing, erasure or other use, and to ensure its timely destruction.

(c) Under clause 57, each department is also 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 record is, to the extent that it relates to any prescribed authorization or device retrieval warrant, to be kept for a minimum term of 2 years after the prescribed authorization or device retrieval warrant ceases to have effect, and is in any event to be kept at least until any relevant pending or anticipated proceedings, etc. have been finally disposed of. The part of the record that relates to other matters is to be kept for a minimum term of 2 years.

(d) By virtue of clause 58, in any proceedings before any court (other than proceedings for specified offences (cf. definition of “relevant offence” in clause 58)), any product obtained pursuant to a prescribed authorization for interception of a communication transmitted by a telecommunications system (cf. definition of “telecommunications interception product” in clause 58) shall not be admissible in evidence and shall not be made available to any party, and any evidence or question which tends to suggest matters relating to any application for the issue or renewal of any relevant prescribed authorizations, and other related matters shall not be adduced or asked. However, the clause also provides that it does not prohibit disclosure in specified cases where the disclosure is required in the interests of justice, etc.

(e) Clause 59 further provides that the Secretary for Security is to issue a code of practice for the purpose of providing practical guidance to officers of the departments in respect of matters provided for in the Bill.

Part 6—Miscellaneous

8. Part 6 contains miscellaneous provisions dealing with minor defects of prescribed authorizations and device retrieval warrants, immunity, regulation, and amendment of schedules. In addition, clause 64 seeks to repeal the Interception of Communications Ordinance (Cap. 532) and to introduce consequential amendments to ordinances including the Post Office Ordinance (Cap. 98), the Telecommunications Ordinance (Cap. 106) and other appropriate ordinances. Further, clause 65 provides for a transitional arrangement so that, among other matters, any materials obtained by way of interception pursuant to an order issued or renewed under section 33 of the Telecommunications Ordinance (Cap. 106) before the commencement of the Bill as enacted are also subject to clauses 56 and 58 as if they were product obtained pursuant to a prescribed authorization.

《截取通訊及監察條例草案》

由吳靄儀議員動議的進一步修正案

條次

建議修正案

新條文

加入 –

“66. 日落條款

- (1) 除第(2)款另有規定外，第二部的第 4(2)款及第 4(3)款及第 5(2)款，以及第 3 部的所有條文，會於 2008 年 8 月 8 日停止生效。
- (2) 任何在 2008 年 8 月 8 日以前已發出、續期或確定的訂明授權、器材取出手令，及訂明授權內載有的事宜，會被視為在當日期滿而失效。
- (3) 專員須在 2008 年 8 月 8 日前的 15 個月內，對本條例的所有條文及其實施，及對《基本法》第 30 條所賦予的秘密通訊自由的影響，進行全面及獨立的公眾諮詢。專員須向行政長官提交報告述明諮詢結果及對檢討或取代本條例事宜提出建議。
- (4) 按第(3)款提述的專員的報告須於 2008 年 8 月 8 日前的 10 個月內提交立法會審閱。”

INTERCEPTION OF COMMUNICATIONS AND
SURVEILLANCE BILL

Committee Stage Amendments proposed by Hon James To as positioned July 14, 2006.
The CSAs are in bold italics and double crossing (in case of deletion) for Members' ease of reference.

A BILL

To

Regulate the conduct of interception of communications and the use of surveillance devices by or on behalf of public officers and to provide for related matters.

Enacted by the Legislative Council.

PART 1
PRELIMINARY

1. Short title

This Ordinance may be cited as the Interception of Communications and Surveillance Ordinance.

2. Interpretation

- (1) In this Ordinance, unless the context otherwise requires –
- “address” (地址), in relation to a communication transmitted by a postal service, includes a postal box address;
- ~~“authorizing officer” (授權人員), in relation to any department, means any officer designated under section 7 by the head of the department to be an authorizing officer;~~
- “code of practice” (實務守則) means the code of practice issued under section 59;
- “Commissioner” (專員) means the Commissioner on Interception of Communications and Surveillance appointed under section 38;
- “communication” (通訊) means –
- (a) any communication transmitted by a postal service; or
- (b) any communication transmitted by a telecommunications system;
- “communication transmitted by a postal service” (藉郵政服務傳送的通訊) includes a postal article;
- “conduct” (行為) includes any act or omission, and any series of acts or omissions or of acts and omissions;
- “conveyance” (運輸工具) means any vehicle, vessel, aircraft, hovercraft or other

conveyance;

“copy” (文本) –

- (a) in relation to any contents of a communication that have been obtained pursuant to a prescribed authorization for interception, means any of the following (whether or not in documentary form) –
 - (i) any copy, extract or summary of such contents ~~which identifies itself as such copy, extract or summary of such contents;~~
 - (ii) any record referring to the interception which is a record of the identity of any person who is the sender or intended recipient of the communication; or
- (b) in relation to any material that has been obtained pursuant to a prescribed authorization for covert surveillance, means any of the following (whether or not in documentary form) –
 - (i) any copy, extract or summary of the material ~~which identifies itself as such copy, extract or summary of the material;~~
 - (ii) any transcript or record made of the material ~~which identifies itself as such transcript or record made of the material;~~

“court” (法院), without prejudice to sections 6(3A) and 53 ~~53 and section 4 of Schedule 2~~ –

- (a) means a court as defined in section 3 of the Interpretation and General Clauses Ordinance (Cap. 1); and
- (b) includes a magistrate and a tribunal;

“covert surveillance” (秘密監察) –

- (a) means any ~~systematic~~ surveillance carried out with the use of any surveillance device or by an undercover agent or by any person on the instruction of or under the control of or with the cooperation of an officer of a department specified in Schedule 1 for the purposes of a specific investigation or operation, if the surveillance –
 - (i) is carried out in circumstances where any person who is the subject of the surveillance is entitled to a reasonable expectation of privacy;
 - (ii) is carried out in a manner calculated to ensure that the person is unaware that the surveillance is or may be taking place; and
 - (iii) is likely to result in the obtaining of any private information about the person; but
- (b) does not include ~~any such systematic surveillance to the extent that it constitutes interception under this Ordinance; –~~
 - (i) any spontaneous reaction to unforeseen events or circumstances; and
 - (ii) any such surveillance that constitutes interception under this Ordinance;

“data surveillance device” (數據監察器材) –

- (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;

“department” (部門) –

(a) in relation to interception (including any application for the issue or renewal of a prescribed authorization for interception, any prescribed authorization for interception and any other matter relating to interception), means a department specified in Part 1 of Schedule 1;

(b) in relation to covert surveillance (including any application for the issue or renewal of a prescribed authorization for covert surveillance, any prescribed authorization for covert surveillance and any other matter relating to covert surveillance), means a department specified in Part 2 of Schedule 1; or

(c) in relation to any other matter provided for in this Ordinance, means a department specified in Part 1 or 2 of Schedule 1;

“device” (器材) includes any instrument, apparatus and equipment;

“device retrieval warrant” (器材取出手令) means a device retrieval warrant issued under section 33 (and, where the context requires, includes a device retrieval warrant to be issued under that section);

“directorate officer” (首長級人員) means an officer not below a rank equivalent to that of chief superintendent of police;

“emergency authorization” (緊急授權) means an emergency authorization issued under Division 4 of Part 3 (and, where the context requires, includes an emergency authorization to be issued under that Division);

“enhancement equipment” (增強設備), in relation to a device, means any equipment used to enhance a signal, image or other information obtained by the use of the device;

“examination” (審查) means an examination (including consideration of the application for the examination) carried out under Division 3 of Part 4 (and, where the context requires, includes such an examination to be carried out under that Division);

“~~executive~~ District Court authorization” (~~行政區域法院~~授權) means an ~~executive~~ authorization issued or renewed by a judge of the District Court under Division 3 of Part 3 (and, where the context requires, includes an ~~executive~~ authorization to be issued or renewed by a judge of the District Court under that Division);

“function” (職能) includes power and duty;

“head” (首長), in relation to a department, includes any deputy ~~of the~~ head of the department;

“information system” (資訊系統) has the meaning assigned to it by section 2(1) of the Electronic Transactions Ordinance (Cap. 553);

“inspect” (查察) includes listen to, monitor and record;

“install” (裝設) includes attach;

“intercepting act” (截取作為), in relation to any communication, means the inspection of some or all of the contents of the communication, ~~in the course of its transmission by a postal service or by a telecommunications system,~~

- (i) by a person other than its sender or intended recipient or
- (ii) by a recipient who is an undercover agent or by any person on the instruction of or under the control of or with the cooperation of an officer of a department specified in Schedule 1;

“interception” (截取) –

- (a) in relation to any communication, means the carrying out of any intercepting act in respect of ~~the~~ that communication; or
- (b) when appearing in a context with no specific reference to any communication, means the carrying out of any intercepting act in respect of any communications;

“interception product” (截取成果) means any contents of a communication that have been obtained pursuant to ~~a prescribed authorization for~~ an interception, and includes a copy of such contents;

“journalistic content” (新聞內容) means any content of journalistic material;

“journalistic material” (新聞材料) has the meaning assigned to it by section 82 of the Interpretation and General Clauses Ordinance (Cap. 1);

~~“judicial judge’s Court of First Instance”~~ authorization” (司法法官原訟法庭授權) means a ~~judicial judge’s~~ an authorization issued or renewed by a judge of the Court of First Instance under Division 2 of Part 3 (and, where the context requires, includes a ~~judicial judge’s~~ an authorization to be issued or renewed by a judge of the Court of First Instance under that Division);

“listening device” (監聽器材) –

- (a) means any device used to overhear, listen to, monitor or record any conversation or words spoken to or by any person in conversation; but
- (b) does not include a hearing aid or similar device used by a person with impaired hearing to overcome the impairment;

“maintain” (維修), in relation to a device, includes –

- (a) adjust, ~~relocate~~ reposition, repair or service the device; and
- (b) replace the device when it is faulty;

“optical surveillance device” (視光監察器材) –

- (a) means any device used to record visually or observe any activity; but
- (b) does not include spectacles, contact lenses or a similar device used by a person with impaired sight to overcome the impairment;

“oral application” (口頭申請) means an oral application made under section ~~25(1)~~ 20(3);

~~“panel judge” (小組法官) means a judge appointed under section 6(1) to be a panel judge;~~

“postal article” (郵遞品) has the meaning assigned to it by section 2(1) of the

Post Office Ordinance (Cap. 98);

“postal interception” (郵件截取) means interception of any communication transmitted by a postal service;

“postal service” (郵政服務) means postal service ~~within the meaning of to~~ which the Post Office Ordinance (Cap. 98) applies;

“premises” (處所) includes any place and, in particular, includes –

- (a) any land or building;
- (b) any conveyance;
- (c) any structure (whether or not movable or offshore); and
- (d) any part of any of the premises described in paragraph (a), (b) or (c);

“prescribed authorization” (訂明授權) means a ~~judicial judge’s~~ Court of First Instance authorization, ~~an executive~~ a District Court authorization or an emergency authorization;

“Privacy Commissioner for Personal Data” (個人資料私隱專員) means the Commissioner as defined in the Personal Data (Privacy) Ordinance (Cap. 486) ;

“protected product” (受保護成果) means any interception product or surveillance product;

“public place” (公眾地方) –

- (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;

“public security” (公共安全) means the public security of Hong Kong, but does not include economic security;

“relevant authority” (有關當局) –

- (a) in relation to an application for the issue or renewal of a ~~Judicial judge’s~~ Court of First Instance authorization, means the ~~panel~~ judge of the Court of First Instance to whom the application is or has been made;
- (b) in relation to an application for the issue or renewal of ~~an executive~~ a District Court authorization, means the ~~authorizing officer~~ judge of the District Court to whom the application is or has been made; or
- (c) in relation to an application for the issue of an emergency authorization, means the head of a department to whom the application is or has been made;

“relevant purpose” (有關目的), in relation to a prescribed authorization, means the purpose sought to be furthered by carrying out the interception or covert surveillance concerned as described in section 3 for the purpose of the issue or renewal, or the continuance, of the prescribed authorization;

“relevant requirement” (有關規定) means any applicable requirement under –

- (a) any provision of this Ordinance;

- (b) the code of practice; or
- (c) any prescribed authorization or device retrieval warrant concerned;

“serious crime” (嚴重罪行) means any offence punishable –

- (a) in relation to the issue or renewal, or the continuance, of a prescribed authorization for interception, by a maximum penalty that is or includes a term of imprisonment of not less than 7 years; or
- (b) in relation to the issue or renewal, or the continuance, of a prescribed authorization for covert surveillance, by a maximum penalty that is or includes –
 - (i) a term of imprisonment of not less than ~~3~~ 7 years; ~~or~~
 - ~~(ii) a fine of not less than \$1,000,000;~~

“surveillance device” (監察器材) means –

- (a) a data surveillance device, a listening device, an optical surveillance device or a tracking device;
- (b) a device that is a combination of any 2 or more of the devices referred to in paragraph (a); or
- (c) a device of a class prescribed by regulation made under section 62 for the purposes of this definition;

“surveillance product” (監察成果) means any material obtained pursuant to a prescribed authorization for covert surveillance, and includes a copy of the material;

“telecommunications interception” (電訊截取) means interception of any communication transmitted by a telecommunications system;

“telecommunications service” (電訊服務) has the meaning assigned to it by section 2(1) of the Telecommunications Ordinance (Cap. 106);

“telecommunications system” (電訊系統) has the meaning assigned to it by section 2(1) of the Telecommunications Ordinance (Cap. 106);

“tracking device” (追蹤器材) means any electronic device used to determine or monitor the location of any person or any object or the status of any object;

~~“transmitted” (傳送) includes being transmitted;~~

“Type 1 surveillance” (第1 類監察) means any covert surveillance other than Type 2 surveillance;

“Type 2 surveillance” (第2 類監察), subject to subsections (3) and (3A), means any covert surveillance ~~to the extent~~ that –

- ~~(a) it is carried out with the use of a surveillance device for any purpose involving listening to, monitoring or recording words spoken or activity carried out by any person, and the person using the device is one –~~
 - ~~(i) who –~~
 - ~~(A) is the person speaking or carrying out the words or activity; or~~
 - ~~(B) is a person, or is included in a class of persons, by whom the~~

~~person described in sub-subparagraph (A) intends, or should reasonably expect, the words or activity to be heard or seen; or~~

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

~~(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 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~~

~~(b) it is carried out with the use of an optical surveillance device or a tracking device and, if the use of the device does not involve —~~

~~(i) entry onto any premises either physically or by electronic means without permission; or~~

~~(ii) interference with the interior of any conveyance or object without permission.~~

~~(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 nothing in this subsection affects any such entitlement of the person in relation to words spoken, written or read by him in a public place.~~

(3) For the purposes of this Ordinance, any covert surveillance which is Type 2 surveillance under the definition of “Type 2 surveillance” in subsection (1) is regarded as Type 1 surveillance if it is likely that any information which may be subject to legal professional privilege will be obtained by carrying it out.

(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.

~~(4) For the purposes of this Ordinance—~~

~~(a) a communication transmitted by a postal service is regarded as being in the course of the transmission if it is regarded as being in course of transmission by post under section 2(2) of the Post Office Ordinance (Cap. 98); and~~

~~(b) a communication transmitted by a telecommunications system is not~~

~~regarded as being in the course of the transmission if it has been received by the intended recipient of the communication or by an information system or facility under his control or to which he may have access, whether or not he has actually read or listened to the contents of the communication.~~

- (5) For the purposes of this Ordinance, the contents of any communication transmitted by a telecommunications system include any data produced in association with the communication.

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

(5B) For the purposes of this Ordinance, any act prescribed under Article 23 of the Basic Law, unless intended to be carried on by violent means (more than negligible), is not of itself regarded as a threat to public security.

- (6) For the purposes of this Ordinance –

- (a) an application is ~~also~~ 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);
- (b) information is ~~also~~ regarded as being provided orally if it is provided orally in person or provided by telephone, video conferencing or other electronic means by which words spoken can be heard (whether or not any part of the information is provided in writing); and
- (c) a determination (including the issue of a prescribed authorization or a renewed prescribed authorization and the giving of any reason) is ~~also~~ regarded as being delivered orally if it is delivered orally in person or delivered by telephone, video conferencing or other electronic means by which words spoken can be heard (whether or not any part of the determination is delivered in writing).

~~(7) Without prejudice to section 54 of the Interpretation and General Clauses Ordinance (Cap. 1), any reference in this Ordinance to a panel judge or any officer of a department (however expressed) includes –~~

- ~~(a) where the person who has been such panel judge or officer is no longer holding office as such panel judge or officer, the person for the time being holding such office or appointed to act in or perform the functions of such office or lawfully performing the functions of such office; or~~
- ~~(b) where the person who is such panel judge or officer is unable to perform the functions of the office of such panel judge or officer, the person for the time being appointed to act in or perform the functions of such office or lawfully performing the functions of such office.~~

3. Conditions for issue, renewal or continuance of prescribed authorization

- (1) In this Ordinance, the conditions for the issue or renewal, or the continuance, of a prescribed authorization, are that, in the circumstances of the particular case –
- (a) the purpose sought to be furthered by carrying out the interception or covert surveillance concerned is that of –
- (i) preventing or detecting serious crime; or
- (ii) protecting public security; ~~and~~
- (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 is that specified in paragraph (a)(i), the particular serious crime to be prevented or detected; or
- (ii) where the purpose sought to be furthered by carrying out the interception or covert surveillance is that specified in paragraph (a)(ii), any activity which constitutes or would constitute the particular *imminent* threat to public security; and
- (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, ~~in operational terms,~~ 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; ~~and~~
- (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~~ *whether the issue or renewal or the continuance of a prescribed authorization can be justified in view of human rights factors, including –*
- (A) *the right to freedom and privacy protected by Article 30 of the Basic Law; and*
- (B) *the rights and freedoms protected in the Basic Law and the International Covenant on Civil and Political Rights*
- ~~that are relevant in the circumstances.~~
- (2) In this section, “relevant factors” (有關因素) means –
- (a) the immediacy and gravity of –
- (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 particular 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), the particular threat to public security; and
(b) the likely value and relevance, in relation to the purpose sought to be furthered by carrying out the interception or covert surveillance, of the information likely to be obtained by carrying it out.

PART 2

PROHIBITION ON INTERCEPTION AND COVERT SURVEILLANCE

4. Prohibition on interception

(1) Subject to subsection (2), ~~no~~ *Neither the Chief Executive, bureau heads insofar as they are not public servants nor any* public officer shall, directly or indirectly (whether through any other person or otherwise), carry out any interception in his public capacity.

(1A) Contravention to subsection (1) shall be an offence punishable with a maximum penalty of 2 years imprisonment.

(2) Subsection (1) does not apply to –

- (a) any interception carried out pursuant to a prescribed authorization;
- (b) any interception of telecommunications transmitted by radiocommunications (other than the radiocommunications part of a telecommunications network for the provision of a public telecommunications service by any carrier licensee under the Telecommunications Ordinance (Cap. 106)); and
- (c) any interception authorized, permitted or required to be carried out by or under any enactment other than this Ordinance (including any interception carried out in the course of the execution of an order of a court authorizing the search of any premises or the seizure of any evidence).

(3) In this section, “carrier licensee” (傳送者牌照持有人), “public telecommunications service” (公共電訊服務), “radiocommunications” (無線電通訊), “telecommunications” (電訊) and “telecommunications network” (電訊網絡) have the meanings respectively assigned to them by section 2(1) of the Telecommunications Ordinance (Cap. 106)._____.

5. Prohibition on covert surveillance

(1) Subject to subsection (2), ~~no~~ *Neither the Chief Executive, bureau heads insofar as they are not public servants nor any* public officer shall, directly or indirectly (whether through any other person or otherwise), carry out any covert surveillance in his public capacity.

(1A) Contravention to subsection (1) shall be an offence punishable with a maximum penalty of 2 years imprisonment.

(2) Subsection (1) does not apply to any covert surveillance carried out pursuant to a prescribed authorization.

PART 3
PRESCRIBED AUTHORIZATIONS, ETC.
Division 1 – Relevant Authorities

6. Panel judges

- ~~(1) The Chief Executive shall, on the recommendation of the Chief Justice, appoint 3 to 6 eligible judges to be panel judges for the purposes of this Ordinance.~~
- ~~(2) A panel judge shall be appointed for a period of 3 years, and may from time to time be reappointed.~~
- ~~(3) The Chief Executive may, on the recommendation of the Chief Justice, revoke the appointment of a panel judge for good cause.~~
- ~~(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.~~
- ~~(4) Schedule 2 applies to and in relation to the procedures of, and other matters relating to, a panel judge.~~
- ~~(4A) A person previously appointed as a panel judge may from time to time be further appointed as such in accordance with the provisions of this Ordinance that apply to the appointment of a panel judge.~~
- ~~(5) In this section, “eligible judge” (合資格法官) means a judge of the Court of First Instance.~~

6. Judges

- (1) For the purposes of this Ordinance, a judge refers either a judge of the Court of First Instance or a judge of the District Court.
- (2) Schedule 2 applies to and in relation to the procedures of, and other matters relating to, a judge.

7. Authorizing officers

~~The head of a department may designate any officer not below a rank equivalent to that of senior superintendent of police to be an authorizing officer for the purposes of this Ordinance.~~

Division 2 – Judicial Judge’s Court of First Instance Authorizations
Issue of judicial judge’s Court of First Instance authorizations

8. Application for judicial judge’s Court of First Instance authorization for interception or Type 1 surveillance

- (1) An officer of a department may apply to a ~~panel judge~~ a judge of the Court of First Instance for the issue of a ~~judicial judge's~~ an authorization for any interception or Type 1 surveillance to be carried out by or on behalf of any of the officers of the department.
- (2) The application is –
 - (aa) to be made ex parte;
 - (a) to be made in writing; and
 - (b) to be supported by an affidavit of the applicant which is to comply with the requirements specified in –
 - (i) in the case of a ~~judicial judge's~~ an authorization for interception, Part 1 of Schedule 3; or
 - (ii) in the case of a ~~judicial judge's~~ an authorization for Type 1 surveillance, Part 2 of Schedule 3.
- (3) An application may not be made under subsection (1) unless the making of the application has been approved by a directorate officer of the department concerned.

9. Determination of application for ~~judicial judge's~~ Court of First Instance authorization

- (1) Upon considering an application for the issue of a ~~judicial judge's~~ an authorization made under section 8, the ~~panel judge~~ of the Court of First Instance may, subject to subsection (2) –
 - (a) issue the ~~judicial judge's~~ authorization sought under the application, with or without variations; or
 - (b) refuse to issue the ~~judicial judge's~~ authorization.
- (1A) When considering the application in subsection (1), the judge of the Court of First Instance may invite the Privacy Commissioner for Personal Data to make submission as a special advocate in camera.
- (2) The ~~panel judge~~ of the Court of First Instance shall not issue the ~~judicial judge's~~ authorization unless he is satisfied that the conditions for its issue under section 3 have been met.
- (3) The ~~panel judge~~ of the Court of First Instance shall deliver his determination under subsection (1) by –
 - (a) in the case of subsection (1)(a), issuing the ~~judicial judge's~~ authorization in writing with reason; or
 - (b) in the case of subsection (1)(b), giving the reason for the refusal in writing.

10. Duration of ~~judicial judge's~~ Court of First Instance authorization

- ~~A judicial judge's~~ An authorization –
- (a) takes effect at the time specified by the ~~panel judge~~ of the Court of First Instance when issuing the ~~judicial judge's~~ authorization, which in any case is not to be earlier than the time when it is issued; and

- (b) subject to any renewal under this Division, ceases to have effect upon the expiration of the period specified by the ~~panel judge~~ of Court of First Instance when issuing the ~~judicial judge's~~ authorization, which in any case is not to be longer than the period of 3 months beginning with the time when it takes effect.

Renewal of ~~judicial judge's~~ Court of First Instance authorizations

11. Application for renewal of ~~judicial judge's~~ Court of First Instance authorization

(1) ~~At any time before a judicial judge's an~~ authorization ceases to have effect, an officer of the department concerned may apply to a ~~panel judge~~ of the Court of First Instance for the renewal of the ~~judicial judge's~~ authorization.

(2) ~~The application is –~~

(aa) to be made ex parte;

(a) ~~to be made in writing; and~~

(b) ~~to be supported by –~~

(i) a copy of the ~~judicial judge's~~ authorization sought to be renewed;

(ii) ~~a copy of any affidavit~~ copies of all affidavits provided under this Part for the purposes of any application for the issue or renewal of the ~~judicial judge's~~ authorization, or for the purposes of any application made further to an oral application for confirmation of the ~~judicial judge's~~ authorization or its previous renewal; and

(iii) an affidavit of the applicant which is to comply with the requirements specified in Part 4 of Schedule 3.

(3) An application may not be made under subsection (1) unless the making of the application has been approved by a directorate officer of the department concerned.

12. Determination of application for renewal of ~~judicial judge's~~ Court of First Instance authorization

(1) Upon considering an application for the renewal of ~~a judicial judge's an~~ authorization made under section 11, the ~~panel judge~~ of the Court of First Instance may, subject to subsection (2) –

(a) grant the renewal sought under the application, with or without variations; or

(b) refuse to grant the renewal.

(1A) When considering the application in subsection (1), the judge of the Court of First Instance may invite the Privacy Commissioner for Personal Data to make submission as a special advocate in camera.

(1B) When consider the application in subsection (1), the judge of the Court of First Instance shall take into account the total duration of the authorization.

(2) The ~~panel judge~~ of the Court of First Instance shall not grant the renewal

unless he is satisfied that the conditions for ~~its grant the renewal~~ under section 3 have been met.

(3) The ~~panel~~ judge of the Court of First Instance shall deliver his determination under subsection (1) by –

- (a) in the case of subsection (1)(a), issuing the renewed ~~judicial judge's~~ authorization in writing with reason; or
- (b) in the case of subsection (1)(b), giving the reason for the refusal in writing.

(4) ~~A judicial judge's~~ An authorization may be renewed more than once under this Ordinance.

13. Duration of renewal of ~~judicial judge's Court of First Instance~~ authorization

A renewal of ~~a judicial judge's~~ an authorization –

- (a) takes effect at the time when the ~~judicial judge's~~ authorization would have ceased to have effect but for the renewal; and
- (b) subject to any further renewal under this Division, ceases to have effect upon the expiration of the period specified by the ~~panel~~ judge of the Court of First Instance when granting the renewal, which in any case is not to be longer than the period of 3 months beginning with the time when it takes effect.

Division 3 – ~~Executive~~ District Court Authorizations ***Issue of ~~executive~~ District Court authorizations***

14. Application for ~~executive District Court~~ authorization for Type 2 surveillance

(1) An officer of a department may apply to ~~an authorizing officer of the department~~ a judge of the District Court for the issue of an ~~executive~~ authorization for any Type 2 surveillance to be carried out by or on behalf of any of the officers of the department.

(2) The application is –

(aa) to be made ex parte;

- (a) to be made in writing; and
- (b) to be supported by ~~a statement in writing made by~~ an affidavit of the applicant which is to comply with the requirements specified in Part 3 of Schedule 3.

15. Determination of application for ~~executive District Court~~ authorization

(1) Upon considering an application for the issue of an ~~executive~~ authorization made under section 14, the ~~authorizing officer~~ judge of the District Court may, subject to subsection (2) –

- (a) issue the ~~executive~~ authorization sought under the application, with or without variations; or
- (b) refuse to issue the ~~executive~~ authorization.

(1A) When considering the application in subsection (1), the judge of the District Court may invite the Privacy Commissioner for Personal Data to make submission as a special advocate in camera.

(2) The ~~authorizing officer~~ judge of the District Court shall not issue the ~~executive~~ authorization unless he is satisfied that the conditions for its issue under section 3 have been met.

(3) The ~~authorizing officer~~ judge of the District Court shall deliver his determination under subsection (1) by –

- (a) in the case of subsection (1)(a), issuing the ~~executive~~ authorization in writing with reason; or
- (b) in the case of subsection (1)(b), giving the reason for the refusal in writing.

16. Duration of ~~executive~~ District Court authorization

An ~~executive~~ authorization –

- (a) takes effect at the time specified by the ~~authorizing officer~~ judge of the District Court when issuing the ~~executive~~ authorization, which in any case is not to be earlier than the time when it is issued; and
- (b) subject to any renewal under this Division, ceases to have effect upon the expiration of the period specified by the ~~authorizing officer~~ judge of the District Court when issuing the ~~executive~~ authorization, which in any case is not to be longer than the period of 3 months beginning with the time when it takes effect.

Renewal of ~~executive~~ District Court authorizations

17. Application for renewal of ~~executive~~ District Court authorization

(1) At any time before an ~~executive~~ authorization ceases to have effect, an officer of the department concerned may apply to ~~authorizing officer of the department a~~ judge of the District Court for the renewal of the ~~executive~~ authorization.

(2) The application is –

(aa) to be made ex parte;

(a) to be made in writing; and

(b) to be supported by –

- (i) a copy of the ~~executive~~ authorization sought to be renewed;
- (ii) ~~a copy of any statement~~ copies of all statements affidavits provided under this Part for the purposes of any application for the issue or renewal of the ~~executive~~ authorization, or for the purposes of any application made further to an oral application for confirmation of the ~~executive~~ authorization or its previous renewal; and
- (iii) ~~a statement in writing made by~~ an affidavit of the applicant which is to comply with the requirements specified in Part 4 of Schedule 3.

18. Determination of application for renewal of executive District Court authorization

(1) Upon considering an application for the renewal of an ~~executive~~ authorization made under section 17, the ~~authorizing officer~~ *judge of the District Court* may, subject to subsection (2) –

(a) grant the renewal sought under the application, with or without variations; or

(b) refuse to grant the renewal.

(1A) When considering the application in subsection (1), the judge of the District Court may invite the Privacy Commissioner for Personal Data to make submission as a special advocate in camera.

(1B) When consider the application in subsection (1), the judge of the Court of First Instance shall take into account the total duration of the authorization.

(2) The ~~authorizing officer~~ *judge of the District Court* shall not grant the renewal unless he is satisfied that the conditions for ~~its grant~~ the renewal under section 3 have been met.

(3) The ~~authorizing officer~~ *judge of the District Court* shall deliver his determination under subsection (1) by –

(a) in the case of subsection (1)(a), issuing the renewed ~~executive~~ authorization in writing *with reason*; or

(b) in the case of subsection (1)(b), giving the reason for the refusal in writing.

(4) An ~~executive~~ authorization may be renewed more than once under this Ordinance.

19. Duration of renewal of executive District Court authorization

A renewal of an ~~executive~~ authorization –

(a) takes effect at the time when the ~~executive~~ authorization would have ceased to have effect but for the renewal; and

(b) subject to any further renewal under this Division, ceases to have effect upon the expiration of the period specified by the ~~authorizing officer~~ *judge of the District Court* when granting the renewal, which in any case is not to be longer than the period of 3 months beginning with the time when it takes effect.

Division 4 – Emergency Authorizations *Issue of emergency authorizations*

20. Application for emergency authorization for interception or Type 1 surveillance in case of emergency

(1) An officer (*not less than the rank of superintendent of police or equivalent*) of a department may apply to the head of the department for the issue of an emergency authorization for any interception or Type 1 surveillance to be carried out by or on behalf of any of the officers of the department, if he considers that –

- (a) there is immediate need for the interception or Type 1 surveillance to be carried out by reason of an imminent risk of –
 - (i) death or serious bodily harm of any person;
 - (ii) substantial damage to property;
 - (iii) serious threat to public security; or
 - (iv) loss of vital evidence; and
- (b) having regard to all the circumstances of the case, it is not reasonably practicable to apply for the issue of a ~~judicial judge's~~ Court of First Instance authorization for the interception or Type 1 surveillance.

(2) The application is –

- (a) to be made in writing; and
- (b) to be supported by a statement in writing made by the applicant which is to –
 - (i) set out the reason for making the application; and
 - (ii) comply with –
 - (A) in the case of an emergency authorization for interception, the requirements specified in Part 1 of Schedule 3 which are to apply to the statement as they apply to an affidavit referred to in section 8(2)(b); or
 - (B) in the case of an emergency authorization for Type 1 surveillance, the requirements specified in Part 2 of Schedule 3 which are to apply to the statement as they apply to an affidavit referred to in section 8(2)(b).

(3) An application for emergency authorization under subsection (1) may be made orally in person if, having regard to all circumstances of the case, it is not reasonably practicable to make an application in writing.

(4) Where an oral application is made, the application shall make an oral statement providing the required information specified in Part 2 of Schedule 3 as the case may be.

21. Determination of application for emergency authorization

(1) Upon considering an application for the issue of an emergency authorization made under section 20, the head of the department concerned may, subject to subsection (2) –

- (a) issue the emergency authorization sought under the application, with or without variations; or
- (b) refuse to issue the emergency authorization.

(2) The head of the department shall not issue the emergency authorization unless he is satisfied –

- (a) that section 20(1)(a) and (b) applies; ~~and~~
- (aa) that, where an oral application is made, section 20(3) applies; and
- (b) that the conditions for the issue of the emergency authorization under section

3 have been met.

(3) The head of the department shall deliver his determination under subsection (1) by –

- (a) in the case of subsection (1)(a), issuing the emergency authorization in writing with reason; or
- (b) in the case of subsection (1)(b), giving the reason for the refusal in writing.

22. Duration of emergency authorization

(1) An emergency authorization –

- (a) takes effect at the time specified by the head of the department concerned when issuing the emergency authorization, which in any case is not to be earlier than the time when it is issued; and
- (b) ceases to have effect upon the expiration of the period specified by the head of the department when issuing the emergency authorization, which in any case is not to be longer than the period of 48 hours beginning with the time when it takes effect.

(2) Without prejudice to any application under section 8 for the issue of any ~~judicial judge's~~ Court of First Instance authorization for the interception or Type 1 surveillance concerned, an emergency authorization may not be renewed under this Ordinance.

Application for confirmation of emergency authorizations

23. Application for confirmation of emergency authorization

(1) Where any interception or Type 1 surveillance is carried out pursuant to an emergency authorization, the head of the department concerned shall cause an officer of the department to apply to a ~~panel~~ judge of the Court of First Instance for confirmation of the emergency authorization, as soon as reasonably practicable after, and in any event within the period of 48 hours beginning with, the time when the emergency authorization takes effect.

(2) The application is –

(aa) to be made ex parte;

(a) to be made in writing; and

(b) to be supported by –

(i) a copy of the emergency authorization; and

(ii) an affidavit of the applicant which is to verify the contents of the statement provided under section 20(2)(b) for the purposes of the application for the issue of the emergency authorization.

(3) ~~If no~~ In default of any application being made for confirmation of the emergency authorization ~~is made~~ within the period of 48 hours referred to in subsection (1), the head of the department concerned shall –

- (a) cause the immediate destruction of any information obtained by carrying out the interception or Type 1 surveillance concerned, and any further

~~information or intelligence or record derived from such information to the extent that it could not have been obtained without carrying out the interception or Type 1 surveillance;~~ and

- (b) without prejudice to section 52, submit to the Commissioner a report with details of the case.

24. Determination of application for confirmation of emergency authorization

(1) Upon considering an application for confirmation of an emergency authorization as provided for in section 23(1), the ~~panel~~ judge of the Court of First Instance may, subject to subsection (2) –

- (a) confirm the emergency authorization; or
- (b) refuse to confirm the emergency authorization.

(1A) When considering the application in subsection (1), the judge of the Court of First Instance may invite the Privacy Commissioner for Personal Data to make submission as a special advocate in camera.

(2) The ~~panel~~ judge of the Court of First Instance shall not confirm the emergency authorization unless he is satisfied that section 21(2)(b) has been complied with in the issue of the emergency authorization. The judge of the Court of First Instance may invite the Commissioner of Privacy to assist him in arriving such conclusion.

(3) Where the ~~panel~~ judge of the Court of First Instance refuses to confirm the emergency authorization under subsection (1)(b), he may make one or more of the following orders –

- (a) in any case where the emergency authorization still has effect at the time of the determination, an order that the emergency authorization is, notwithstanding any other provision of this Ordinance –
 - (i) to be revoked upon the making of the determination; or
 - (ii) only to have effect subject to the variations specified by him, from the time of the determination;
- (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 ~~any information obtained by carrying out the interception or Type 1 surveillance concerned, to the extent –~~
 - (i) subject to subparagraph (ii), ~~that it could not have been obtained without carrying out the interception or Type 1 surveillance~~ any information obtained by carrying out the interception or Type 1 surveillance concerned, and any further information or intelligence or record derived from such information; 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, and any further information or intelligence or record derived from such information.

(4) Where the emergency authorization is revoked under subsection (3)(a)(i), the emergency authorization is, notwithstanding section 22(1)(b), to cease to have effect from the time of the revocation.

(5) The panel judge of the Court of First Instance shall deliver his determination under subsection (1) by –

- (a) in the case of subsection (1)(a), endorsing his confirmation on the emergency authorization in writing with reason; or
- (b) in the case of subsection (1)(b), giving the reason for the refusal and making any order under subsection (3) in writing.

~~Division 5 – Special Provisions for Oral Applications~~ ~~Oral applications~~

~~25. Oral application and its effect~~

~~(1) Notwithstanding the relevant written application provision, an application for the issue or renewal of a prescribed authorization under this Ordinance may be made orally, if the applicant considers that, having regard to all the circumstances of the case, it is not reasonably practicable to make the application in accordance with the relevant written application provision.~~

~~(2) Notwithstanding the relevant determination provision and without prejudice to the relevant conditions provision, where an oral application is made, the relevant authority shall not issue or grant the prescribed authorization or renewal sought under the application unless he is satisfied that, having regard to all the circumstances of the case, it is not reasonably practicable to make the application in accordance with the relevant written application provision.~~

~~(3) Notwithstanding the relevant document provision, where an oral application is made, the information required to be provided for the purposes of the application under the relevant document provision may be provided orally (and accordingly any requirement as to the making of any affidavit or statement does not apply).~~

~~(4) Notwithstanding the relevant written determination provision, where an oral application is made, the relevant authority may deliver the determination required to be delivered in respect of the application under the relevant determination provision by –~~

~~(a) issuing the prescribed authorization or the renewed prescribed authorization orally; or~~

~~(b) where he refuses to issue or grant the prescribed authorization or renewal sought under the application, giving the reason for the refusal orally.~~

~~(5) Except as otherwise provided in this Division, any oral application and any prescribed authorization or renewal issued or granted as a result of that application are for all purposes regarded as having the same effect respectively as an application made in writing and a prescribed authorization or renewal issued or granted as a result of that application, and the provisions of this Ordinance are, subject to necessary modifications, to apply accordingly.~~

~~(6) In this section—~~

~~“relevant conditions provision” (有關條件條文) means section 9(2), 12(2), 15(2), 18(2) or 21(2) (as may be applicable);~~

~~“relevant determination provision” (有關決定條文) means section 9(1), 12(1), 15(1), 18(1) or 21(1) (as may be applicable);~~

~~“relevant document provision” (有關文件條文) means section 8(2)(b), 11(2)(b), 14(2)(b), 17(2)(b) or 20(2)(b) (as may be applicable);~~

~~“relevant written application provision” (有關書面申請條文) means section 8(2)(a), 11(2)(a), 14(2)(a), 17(2)(a) or 20(2)(a) (as may be applicable);~~

~~“relevant written determination provision” (有關書面決定條文) means section 9(3), 12(3), 15(3), 18(3) or 21(3) (as may be applicable).~~

~~***Application for confirmation of prescribed authorizations or renewals issued or granted upon oral applications***~~

~~26. Application for confirmation of prescribed authorization or renewal issued or granted upon oral application~~

~~(1) Where, as a result of an oral application, the prescribed authorization or renewal sought under the application has been issued or granted, the head of the department concerned shall cause an officer of the department to apply to the relevant authority for confirmation of the prescribed authorization or renewal, as soon as reasonably practicable after, and in any event within the period of 48 hours beginning with, the time when the prescribed authorization or renewal takes effect.~~

~~(2) The application is—~~

~~(a) to be made in writing; and~~

~~(b) to be supported by—~~

~~(i) a record in writing containing all the information that would have been provided to the relevant authority in writing under the relevant written application provision had the oral application been made in writing;~~

~~(ii) where section 25(3) applies in relation to the oral application—~~

~~(A) where the relevant authority is a panel judge, an affidavit of the applicant which is to verify all the information provided pursuant to that section for the purposes of the oral application; or~~

~~(B) where the relevant authority is not a panel judge, a statement in writing made by the applicant setting out all the information provided pursuant to that section for the purposes of the oral application; and~~

~~(iii) where section 25(4) applies in relation to the oral application, a record in writing setting out the determination delivered pursuant to that section in respect of the oral application.~~

~~(3) If no In default of any application being made for confirmation of the prescribed authorization or renewal is made within the period of 48 hours referred to in subsection (1), then—~~

~~(a) in any case where the prescribed authorization or renewal still has effect upon the expiration of the period, the prescribed authorization or renewal is, notwithstanding any other provision of this Ordinance, to be regarded as revoked upon the expiration of the period; and~~

~~(b) in any case whether or not the prescribed authorization or renewal still has effect upon the expiration of the period, the head of the department concerned shall—~~

~~(i) cause the immediate destruction of any information obtained by carrying out the interception or covert surveillance concerned, to the extent that it could not have been obtained without carrying out the interception or covert surveillance; and~~

~~(ii) without prejudice to section 52, submit to the Commissioner a report with details of the case.—~~

~~(4) Where the prescribed authorization or renewal is regarded as revoked under subsection (3)(a), the prescribed authorization or renewal is, notwithstanding the relevant duration provision, to cease to have effect from the time of the revocation.~~

(4A) If, at the time of an application for confirmation of the prescribed authorization or renewal as provided for in 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) and lawfully performing the relevant functions of the office of that relevant authority; and

(b) the provisions of this section and section 27 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) or 19(b) (as may be applicable);~~

~~“relevant written application provision” (有關書面申請條文) means section 8(2)(a), 11(2)(a), 14(2)(a), 17(2)(a) or 20(2)(a) (as may be applicable).~~

27. Determination of application for confirmation of prescribed authorization or renewal issued or granted upon oral application

~~(1) Upon considering an application for confirmation of a prescribed authorization or renewal as provided for in section 26(1), the relevant authority may, subject to subsection (2)—~~

~~(a) confirm the prescribed authorization or renewal; or~~

~~(b) refuse to confirm the prescribed authorization or renewal.~~

~~(2) The relevant authority shall not confirm the prescribed authorization or renewal unless he is satisfied that the relevant conditions~~

~~provision has been complied with in the issue or grant of the prescribed authorization or renewal.~~

~~(3) Where the relevant authority refuses to confirm the prescribed authorization or renewal under subsection (1)(b), he may make one or more of the following orders—~~

~~(a) in any case where the prescribed authorization or renewal still has effect at the time of the determination, an order that the prescribed authorization or renewal is, notwithstanding any other provision of this Ordinance—~~

~~(i) to be revoked upon the making of the determination; or~~

~~(ii) only to have effect subject to the variations specified by him, from the time of the determination;~~

~~(b) in any case whether or not the prescribed authorization or renewal still has effect at the time of the determination, an order that the head of the department concerned shall cause the immediate destruction of any information obtained by carrying out the interception or covert surveillance concerned, to the extent—~~

~~(i) subject to subparagraph (ii), that it could not have been obtained without carrying out the interception or covert surveillance any information obtained by carrying out the interception or covert surveillance concerned; or~~

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

~~(4) Where the prescribed authorization or renewal is revoked under subsection (3)(a)(i), the prescribed authorization or renewal is, notwithstanding the relevant duration provision, to cease to have effect from the time of the revocation.~~

~~(5) The relevant authority shall deliver his determination under subsection (1) by—~~

~~(a) in the case of subsection (1)(a), issuing the prescribed authorization or the renewed prescribed authorization (being the prescribed authorization confirmed under that subsection or being in terms of the renewal confirmed under that subsection (as the case may be)) in writing; or~~

~~(b) in the case of subsection (1)(b), giving the reason for the refusal and making any order under subsection (3) in writing.~~

~~(6) In this section—~~

~~“relevant conditions provision” (有關條件條文) means section 9(2), 12(2), 15(2), 18(2) or 21(2)(b) (as may be applicable);~~

~~“relevant duration provision” (有關時限條文) means section 10(b), 13(b), 16(b), 19(b) or 22(1)(b) (as may be applicable).~~

~~28. Special case of emergency authorization issued as a result of oral application~~

~~(1) Where an emergency authorization is issued as a result of an oral application, sections 26 and 27 do not apply if—~~

~~(a) an application for confirmation of the emergency authorization as provided for in section 23(1) has been made to a panel judge within the period of 48 hours referred to in that section; and~~

~~(b) the application is supported by—~~

~~(i) a record referred to in section 26(2)(b)(i);~~

~~(ii) an affidavit of the applicant which is to verify the contents of the statement provided under section 20(2)(b) for the purposes of the application for the issue of the emergency authorization or, where section 25(3) applies in relation to the oral application, all the information provided pursuant to section 25(3) for the purposes of the oral application; and~~

~~(iii) a copy of the emergency authorization or, where section 25(4) applies in relation to the oral application, a record in writing setting out the determination delivered pursuant to that section in respect of the oral application.~~

~~(2) Notwithstanding section 23(2)(b), the application described in subsection (1)(a) and (b) is for all purposes regarded as an application duly made for confirmation of the emergency authorization as provided for in section 23(1), and the provisions of this Ordinance are to apply accordingly (subject to section 24(5)(a) being read as requiring the panel judge to deliver his determination under section 24(1) by issuing the emergency authorization (being the emergency authorization confirmed under section 24(1)(a)) in writing).~~

Division 6 – General Provisions for Prescribed Authorizations
*Matters authorized, required or provided for
by prescribed authorizations*

29. What a prescribed authorization may authorize or require under or by virtue of its terms, etc.

- (1) A prescribed authorization for interception may –
 - (a) in the case of a postal interception, contain terms that authorize one or both of the following –
 - (i) the interception of communications made to or from any premises or address specified in the prescribed authorization;
 - (ii) the interception of communications made to or by any person specified in the prescribed authorization (whether by name or by description); or
 - (b) in the case of a telecommunications interception, contain terms that authorize one or both of the following –
 - (i) the interception of communications made to or from any telecommunications service specified in the prescribed authorization;
 - (ii) the interception of communications made to or from any telecommunications service that any person specified in the prescribed authorization (whether by name or by description) is using, or is ~~likely~~ **reasonably expected** to use.
- (2) A prescribed authorization for covert surveillance may contain terms that authorize one or more of the following –
 - (a) the use of any surveillance devices in or on any premises specified in the prescribed authorization;
 - (b) the use of any surveillance devices in or on any object or class of objects specified in the prescribed authorization;
 - (c) the use of any surveillance devices in respect of the conversations, activities or location of any person specified in the prescribed authorization (whether by name or by description).
- (3) A prescribed authorization, ~~other than an executive authorization,~~ may contain terms that authorize the doing of anything reasonably necessary to conceal any conduct authorized or required to be carried out under the prescribed authorization, **provided that an assessment of the risk and damage arising from the concealment has been submitted before the determination of the authorization and that the nature of concealment so authorized must be specified in the authorization.**
- (4) A prescribed authorization, ~~other than an executive authorization,~~ may, if it is **reasonably** necessary for the execution of the prescribed authorization, contain terms that authorize the interference with any property (whether or not of any person who is the subject of the interception or covert surveillance concerned) **provided that an assessment of the risk and damage arising from the interference with any property has been submitted before the determination of the authorization and that the nature of interference so authorized must be specified in the authorization.**

- (5) A prescribed authorization, ~~other than an executive authorization,~~ may contain terms that require any person specified in the prescribed authorization (whether by name or by description), on being shown a copy of the prescribed authorization, to provide to any of the officers of the department concerned such reasonable assistance for the execution of the prescribed authorization as is specified in the prescribed authorization. provided that –
- (i) an assessment of the implication of assistance has been submitted before the determination of the authorization;
 - (ii) the nature of assistance so authorized must be specified in the authorization; and
 - (iii) no authorization shall require the specified person to incur any expense.
- (6) A prescribed authorization for interception ~~also~~ may contain terms that authorize ~~authorizes~~ –
- (a) the installation, use and maintenance of any devices required to be used in order to intercept any of the communications authorized to be intercepted under the prescribed authorization provided that if the device is to be installed or used in any private property,
 - (i) an assessment of the risk and damage arising from the installation and use of such device has been submitted before the determination of the authorization; and
 - (ii) the address and if ascertainable, the owner, tenant and occupier of such property must be specified in the authorization;
 - (b) the entry, by the use of reasonable force if necessary, onto any premises in order to carry out any conduct authorized or required to be carried out under the prescribed authorization provided that an assessment of the risk and damage arising from the entry has been submitted before the determination of the authorization;
- (6A) A prescribed authorization for interception also authorizes –
- ~~(a)~~ (a) the incidental interception of any communication which ~~it is necessary to intercept in order to intercept necessarily arises from the interception of any of the~~ communications authorized to be ~~intercepted~~ carried out under the prescribed authorization; and
 - ~~(b)~~ (b) where subsection (1)(a)(ii) or (b)(ii) is applicable, the provision to any person, for the execution of the prescribed authorization, of particulars of the addresses, numbers, apparatus or other factors, or combination of factors, that are to be used for identifying –
 - (i) in the case of subsection (1)(a)(ii), the communications made to or by the person specified in the prescribed authorization; or
 - (ii) in the case of subsection (1)(b)(ii), the communications made to or from any telecommunications service that the person specified in the prescribed authorization is using, or is likely to use.

- (7) A prescribed authorization for covert surveillance ~~also~~ may contain terms that authorize ~~authorizes~~ –
- (a) where subsection (2)(a) is applicable –
- (i) the installation, use and maintenance of any of the surveillance devices authorized to be used under the prescribed authorization in or on the premises specified in the prescribed authorization provided that if the surveillance device is to be installed or used in any private property –
- (A) an assessment of the risk and damage arising from the installation and use of such device has been submitted before the determination of the authorization; and
- (B) the address and if ascertainable, the owner, tenant and occupier of such property must be specified in the authorization; and
- (ii) in the case of Type 1 surveillance, the entry, by the use of reasonable force if necessary, onto the premises, and onto any other premises adjoining or providing access to the premises, in order to carry out any conduct authorized or required to be carried out under the prescribed authorization provided that an assessment of the risk and damage arising from the entry has been submitted before the determination of the authorization;
- (b) where subsection (2)(b) is applicable –
- (i) the installation, use and maintenance of any of the surveillance devices authorized to be used under the prescribed authorization in or on the object, or an object of the class, specified in the prescribed authorization provided that if the surveillance device is to be installed or used in any private property –
- (A) an assessment of the risk and damage arising from the installation and use of such device has been submitted before the determination of the authorization; and
- (B) the address and if ascertainable, the owner, tenant and occupier of such property must be specified in the authorization; and
- (ii) in the case of Type 1 surveillance, the entry, by the use of reasonable force if necessary, onto any premises where the object, or an object of the class, is reasonably believed to be or likely to be, and onto any other premises adjoining or providing access to the premises, in order to carry out any conduct authorized or required to be carried out under the prescribed authorization provided that an assessment of the risk and damage arising from the entry has been submitted before the determination of the authorization; and
- (c) where subsection (2)(c) is applicable –
- (i) the installation, use and maintenance of any of the surveillance devices authorized to be used under the prescribed authorization, in or on any

premises where the person specified in the prescribed authorization is reasonably believed to be or likely to be provided that if the surveillance device is to be installed or used in any private property –

- (A) an assessment of the risk and damage arising from the installation and use of such device has been submitted before the determination of the authorization; and
- (B) the address and if ascertainable, the owner, tenant and occupier of such property must be specified in the authorization ; and

- (ii) in the case of Type 1 surveillance, the entry, by the use of reasonable force if necessary, onto the premises, and onto any other premises adjoining or providing access to the premises, in order to carry out any conduct authorized or required to be carried out under the prescribed authorization provided that an assessment of the risk and damage arising from the entry has been submitted before the determination of the authorization.

(8) A prescribed authorization may contain terms that authorize the undertaking of 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 –

- (a) the installation, use, maintenance and retrieval of any enhancement equipment for the devices;
- (b) the temporary removal of any conveyance or object from any premises for the installation, maintenance or retrieval of the devices or enhancement equipment and the return of the conveyance or object to the premises;
- (c) the breaking open of anything for the installation, maintenance or retrieval of the devices or enhancement equipment;
- (d) the connection of the devices or enhancement equipment to any source of electricity and the use of electricity from that source to operate the devices or enhancement equipment;
- (e) the connection of the devices or enhancement equipment to any object or system that may be used to transmit information in any form and the use of that object or system in connection with the operation of the devices or enhancement equipment; and
- (f) the provision of assistance for the execution of the prescribed authorization, provided that an assessment of the risk and damage arising from the above conduct has been submitted before the determination of the authorization.

30. What a prescribed authorization ~~further also~~ authorizes

A prescribed authorization ~~further also~~ authorizes the the retrieval of any of the devices authorized to be used under the prescribed authorization ~~undertaking of any conduct which it conduct, including the following conduct, that is necessary to undertake in order to~~ for and incidental to the carrying out of what is authorized

or required to be carried out under the prescribed authorization, and, without limiting the generality of the foregoing, such conduct includes –

- ~~(a) the retrieval of any of the devices authorized to be used under the prescribed authorization;~~
- ~~(b) the installation, use, maintenance and retrieval of any enhancement equipment for the devices;~~
- ~~(c) the temporary removal of any conveyance or object from any premises for the installation, maintenance or retrieval of the devices or enhancement equipment and the return of the conveyance or object to the premises;~~
- ~~(d) the breaking open of anything for the installation, maintenance or retrieval of the devices or enhancement equipment;~~
- ~~(e) the connection of the devices or enhancement equipment to any source of electricity and the use of electricity from that source to operate the devices or enhancement equipment;~~
- ~~(f) the connection of the devices or enhancement equipment to any object or system that may be used to transmit information in any form and the use of that object or system in connection with the operation of the devices or enhancement equipment; and~~
- ~~(g) the provision of assistance for the execution of the prescribed authorization.~~

30A. What a prescribed authorization may not authorize

(1) Notwithstanding anything in this Ordinance, unless exceptional circumstances exist –

- (a) no prescribed authorization may contain terms that authorize the interception of communications by reference to –
 - (i) in the case of a postal interception, an office or other relevant premises, or a residence, of a lawyer; or
 - (ii) in the case of a telecommunications interception, any telecommunications service used at an office or other relevant premises, or a residence, of a lawyer, or any telecommunications service known or reasonably expected to be known by the applicant to be ordinarily used by a lawyer for the purpose of providing legal advice to clients; and
- (b) no prescribed authorization may contain terms that authorize any covert surveillance to be carried out in respect of oral or written communications taking place at an office or other relevant premises, or a residence, of a lawyer.

(2) For the purposes of subsection (1), exceptional circumstances exist if the relevant authority is satisfied that there are reasonable grounds to believe –

- (a) that –
 - (i) the lawyer concerned;

- (ii) in the case of an office or other relevant premises of the lawyer, any other lawyer practising with him or any other person working in the office; or
- (iii) in the case of a residence of the lawyer, any other person residing in the residence, is a party to any activity which constitutes or would constitute a serious crime or a threat to public security; or
- (b) that any of the communications concerned is for the furtherance of a criminal purpose.
- (3) For the avoidance of doubt, a prescribed authorization does not authorize any device to be implanted in, or administered to, a person without the consent of the person *in writing*.
- (4) In this section –
- “lawyer” (律師) means a barrister, solicitor or foreign lawyer as defined in section 2(1) of the Legal Practitioners Ordinance (Cap. 159) who practices as such, or any person holding an appointment under section 3(1) of the Legal Aid Ordinance (Cap. 91);
- “other relevant premises” (其他有關處所), in relation to a lawyer, means any premises, other than an office of the lawyer, that are known or reasonably expected to be known by the applicant to be ordinarily used by the lawyer and by other lawyers for the purpose of providing legal advice to clients.

31. Prescribed authorization may be issued or renewed subject to conditions

(1) A prescribed authorization may be issued or renewed subject to any conditions specified in it that apply to the prescribed authorization itself or to any further authorization or requirement under it (whether granted or imposed under its terms or any provision of this Ordinance).

(2) *In the case of non-compliance with the specified conditions in subsection (1), the prescribed authorization shall cease to have effect from the time of non-compliance.*

Device retrieval warrants after prescribed authorizations having ceased to have effect

32. Application for device retrieval warrant

(1) Where a prescribed authorization has in any way ceased to have effect under this Ordinance, an officer of the department concerned may apply to a panel judge of the Court of First Instance for the issue of a device retrieval warrant authorizing the retrieval of any of the devices authorized to be used under the prescribed authorization if such devices –

- (a) have been installed in or on any premises or object, pursuant to the prescribed authorization; and
- (b) are still in or on such premises or object, or are in or on any other

premises or object.

(2) The application is –

(aa) to be made ex parte;

(a) to be made in writing; and

(b) to be supported by –

(i) a copy of the prescribed authorization; and

(ii) an affidavit of the applicant which is to comply with the requirements specified in Schedule 4.

33. Determination of application for device retrieval warrant

(1) Upon considering an application for the issue of a device retrieval warrant made under section 32, the ~~panel~~ judge of the Court of First Instance may, subject to subsection (2) –

(a) issue the device retrieval warrant sought under the application, with or without variations; or

(b) refuse to issue the device retrieval warrant.

(1A) When considering the application in subsection (1), the judge of the Court of the First Instance shall take into account the assessment of the risk and damage arising from the retrieval of such device to the premise or object.

(1B) If the judge of the Court of First Instance refuses to issue the device retrieval warrant in subsection (1)(b), he shall make an order directing the relevant head of the department to disable the function of the device.

(2) The ~~panel~~ judge of the Court of First Instance shall not issue the device retrieval warrant unless he is satisfied that section 32(1)(a) and (b) applies to the devices concerned.

(3) The ~~panel~~ judge of the Court of First Instance shall deliver his determination under subsection (1) by –

(a) in the case of subsection (1)(a), issuing the device retrieval warrant in writing with reason; or

(b) in the case of subsection (1)(b), giving the reason for the refusal in writing.

34. Duration of device retrieval warrant

A device retrieval warrant –

(a) takes effect at the time specified by the ~~panel~~ judge of the Court of First Instance when issuing the warrant, which in any case is not to be earlier than the time when it is issued; and

(b) ceases to have effect upon the expiration of the period specified by the ~~panel~~ judge of the Court of First Instance when issuing the warrant, which in any case is not to be longer than the period of 3 months beginning with the time when it takes effect.

35. What a device retrieval warrant may authorize under or by virtue of its terms, etc.

(1) A device retrieval warrant may authorize the retrieval of any devices specified in the warrant.

(2) A device retrieval warrant may contain terms that authorize the doing of anything reasonably necessary to conceal any conduct authorized to be carried out under the warrant, provided that an assessment of the risk and damage arising from the concealment has been submitted before the determination of the authorization and that the nature of concealment so authorized must be specified in the authorization.

(3) A device retrieval warrant may, if it is reasonably necessary for the execution of the warrant, contain terms that authorize the interference with any property (whether or not of any person who is the subject of the interception or covert surveillance concerned) provided that an assessment of the risk and damage arising from the interference with any property has been submitted before the determination of the authorization and that the nature of interference so authorized must be specified in the authorization.

36. What a device retrieval warrant ~~further also authorizes~~ may authorize or require under or by virtue of its terms, etc.

(1) A device retrieval warrant ~~further also authorizes~~ may contain terms that authorize the undertaking of ~~any conduct which it is necessary to undertake in order to carry out 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 ~~and, without limiting the generality of the foregoing, such conduct includes –~~

- (a) the retrieval of any enhancement equipment for the devices authorized to be retrieved under the warrant;
- (b) the entry, by the use of reasonable force if necessary, onto any premises where the devices or enhancement equipment is reasonably believed to be or likely to be, and onto any other premises adjoining or providing access to the premises, in order to retrieve the devices or enhancement equipment;
- (c) the temporary removal of any conveyance or object from any premises for the retrieval of the devices or enhancement equipment and the return of the conveyance or object to the premises;
- (d) the breaking open of anything for the retrieval of the devices or enhancement equipment; and
- (e) the provision of assistance for the execution of the warrant,

provided that an assessment of the risk and damage arising from the above conduct has been submitted before the determination of the authorization.

(2) A device retrieval warrant which authorizes the retrieval of any tracking devices also authorizes the use of the tracking devices and any enhancement equipment for the tracking devices solely for the purposes of the location and retrieval

of the tracking devices or enhancement equipment.

37. Device retrieval warrant may be issued subject to conditions

(1) A device retrieval warrant may be issued subject to any conditions specified in it that apply to the warrant itself or to any further authorization under it (whether granted under its terms or any provision of this Ordinance).

(2) In the case of non-compliance with the specified conditions in subsection (1), the warrant shall cease to have effect from the time of non-compliance.

PART 4

THE COMMISSIONER

Division 1 – The Commissioner and his Functions

38. The Commissioner

(1) There is hereby established an office by the name of the Commissioner on Interception of Communications and Surveillance.

(2) The Chief Executive shall, on the recommendation of the Chief Justice, subject to the approval of the Legislative Council, appoint an eligible judge to be the Commissioner.

(3) The Commissioner shall be appointed for a period of 3 years, ~~and may from time to time be reappointed.~~

(4) The Commissioner shall be entitled to such remuneration and allowances as are determined by the Chief Executive.

(5) The Chief Executive may, on the recommendation of the Chief Justice, subject to the approval of the Legislative Council, revoke the appointment of the Commissioner for good cause.

(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.

(6) In this section, “eligible judge” (合資格法官) means –

- (a) a Justice of Appeal of the Court of Appeal;
- (b) a judge of the Court of First Instance;
- (c) a former permanent judge of the Court of Final Appeal;
- (d) a former Justice of Appeal of the Court of Appeal; or
- (e) a former judge of the Court of First Instance.

39. Functions of Commissioner

The functions of the Commissioner are –

- (a) to oversee the overall implementation of this Ordinance (except the functioning of the Court of First Instance and the District Court relating to this Ordinance) and compliance by departments and their officers with the relevant requirements; and
- (b) without limiting the generality of paragraph (a), to –

- (i) conduct reviews under Division 2;
- (ii) carry out examinations under Division 3;
- (iia) investigate complaints made by any person in relation to any interception or surveillance carried out whether with or without authorization under Division 3A;
- (iib) give notifications to relevant persons under Division 3AB;
- (iii) submit reports to the Chief Executive and make recommendations to the Secretary for Security and heads of departments under Division 4;
- (iv) perform any further functions prescribed by regulation made under section 62 for the purposes of this subparagraph; and
- (v) perform such other functions as are imposed or conferred on him under this Ordinance or any other enactment.

Division 2 – Reviews by Commissioner

40. Reviews on compliance with relevant requirements

(1) The Commissioner shall conduct such reviews as he considers necessary on compliance by departments and their officers with the relevant requirements.

(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.

(2) Upon the conduct of any review under subsection (1) or (1A), the Commissioner shall record in writing –

- (a) details, as identified in the review, of any case of failure by any department or any of its officers to comply with any relevant requirement; and
- (b) any other finding he has made in the review.

41. Notifications to departments concerned, etc.

(1) The Commissioner shall notify the head of any department concerned of his findings in a review under section 40(2).

(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.

(3) Without prejudice to sections 47 and 48, the Commissioner may, whether before or after the head of the department has submitted a report to him under subsection (2), refer the findings and any other matters he thinks fit to the Chief Executive ~~or the Secretary for Justice or both~~ or any panel judge of the Court of

First Instance or any or all of them.

Division 3 – Examinations by Commissioner

42. Application for examination

- (1) A person may apply to the Commissioner for an examination under this Division, if he ~~believes~~ suspects –
- (a) that any communication transmitted to or by him has been intercepted by a department; ~~or~~
 - (b) that he is the subject of any covert surveillance that has been carried out by a department; or
 - (c) that he has sustained any damage arising from any interception or covert surveillance that has been carried out by a department.
- (2) The application is to be made in writing.

43. Examination by Commissioner

- (1) Where the Commissioner in the course of performing any of his functions under this Ordinance considers or suspects that there is any case in which any interception or covert surveillance has been carried out in contravention of this Ordinance, or receives an application under sections ~~42~~ 42(1)(a) and (b), he shall, subject to section 44, carry out an examination to determine –
- (a) whether or not the interception or covert surveillance alleged has taken place; and
 - (b) if so, whether or not ~~a prescribed authorization should have been, but has not been, issued or renewed under this Ordinance in relation to the interception or covert surveillance alleged.~~ the interception or covert surveillance alleged has been carried out without the authority of a prescribed authorization issued or renewed under this Ordinance.
- (1A) Where the Commissioner in the course of performing any of his functions under this Ordinance considers or suspects that there is any case in which any interception or covert surveillance has been carried out in contravention of this Ordinance, or receives an application under section 42(1)(c), he shall, subject to section 44, carry out an examination to determine –
- (a) whether or not the interception or covert surveillance alleged has taken place; and
 - (b) if so, whether or not the applicant has sustained damages arising from any interception or covert surveillance carried out by a department.
- (2) In the case of subsection (1), if, ~~if,~~ on an examination, the Commissioner determines that the interception or covert surveillance alleged has been carried out without the authority of a prescribed authorization issued or renewed under this Ordinance, he shall give notice to the applicant –

- (a) stating that –
 - (i) he has found the case in the applicant's favour and indicating whether the case is one of interception or covert surveillance;
 - (ii) the broad nature of the interception or covert surveillance;
 - (iii) the time when the interception or covert surveillance commences and the time when the interception or covert surveillance ends; and
 - (iv) the duration of the interception or covert surveillance; and
- (b) inviting the applicant to confirm whether the applicant wishes to seek an order for the payment of compensation under the application, and if so, to make written submissions to him for that purpose. a prescribed authorization should have been, but has not been, issued or renewed under this Ordinance in relation to the interception or covert surveillance alleged, he –
- (a) ~~shall give notice to the applicant stating that he has found the case in the applicant's favour; and~~
- (b) ~~may, if he thinks fit, make an order for the payment of compensation by the Government to the applicant.~~

(2A) In the case of subsection (1A), if, on an examination, the Commissioner determines that the interception or covert surveillance alleged has been carried out and that the applicant has sustained damages arising from the alleged interception or covert surveillance, he shall give notice to the applicant –

- (a) stating that he has found the case in the applicant's favour; and
- (b) inviting the applicant to confirm whether the applicant wishes to seek an order for the payment of compensation under the application, and if so, to make written submissions to him for that purpose.

(2BA) Upon receiving confirmation from the applicant that an order for the payment of compensation is sought, the Commissioner, upon taking into account any written submissions made to him for that purpose, may make any order for the payment of compensation by the Government to the applicant.

(2CB) The compensation ordered to be paid under subsection (2BA) may include compensation for injury of feelings.

(3) If, on an examination, the Commissioner makes a determination other than that referred to in subsections (2) or (2A), he shall give notice to the applicant stating that he has not found the case in the applicant's favour.

~~(4) The compensation ordered to be paid under subsection (2)(b) may include compensation for injury to feelings.~~

(5) Notwithstanding subsections (2), (2A), (2B) and (3), the Commissioner shall not give any notice or make any order under those subsections for so long as he considers that the giving of the notice or the making of the order (as the case may be) would be prejudicial to the prevention or detection of crime or the protection of public

security.

(6) The Commissioner shall not make a determination referred to in subsections (2) or (2A) in respect of an interception if the interception is within the description of section 4(2)(b) or (c).

44. Grounds for not carrying out examination, etc.

(1) Where, before or in the course of an examination, the Commissioner considers –

- (a) that the application for the examination is received by the Commissioner more than ~~1 year~~ 5 years after the day on which the interception or covert surveillance is alleged to have taken place or, where the interception or covert surveillance is alleged to have taken place on more than 1 day, the last occasion on which it is alleged to have taken place, and that it is not unfair for him not to carry out the examination;
- (b) that the application is made anonymously;
- (c) that the applicant cannot, after the use of reasonable efforts, be identified or traced; or
- (d) that, having regard to all the circumstances of the case, the application is frivolous or vexatious or is not made in good faith, the Commissioner may refuse to carry out the examination or, where the examination has been commenced, to proceed with the carrying out of the examination (including the making of any determination further to the examination).

~~(2) Where, before or in the course of an examination, the Commissioner is satisfied that any relevant criminal proceedings are pending or are likely to be instituted, the Commissioner shall not carry out the examination or, where the examination has been commenced, proceed with the carrying out of the examination (including the making of any determination further to the examination) –~~

- ~~(a) in the case of any pending criminal proceedings, until they have been finally determined or finally disposed of; or~~
- ~~(b) in the case of any criminal proceedings which are likely to be instituted, until they have been finally determined or finally disposed of or, if applicable, until they are no longer likely to be instituted.~~

~~(3) For the purposes of subsection (2), criminal proceedings are, in relation to an examination, regarded as relevant if, but only if, the interception or covert surveillance alleged in the application for the examination is or may be relevant to the determination of any question concerning any evidence which has been or may be adduced in those proceedings.~~

45. Further provisions relating to examinations

(1) For the purposes of an examination, ~~the Commissioner shall –~~

- ~~(a) except as otherwise provided in this Ordinance, in determining whether any interception or covert surveillance has been carried out without the authority of a prescribed authorization issued or renewed under this~~

~~Ordinance, the Commissioner shall apply the principles applicable by a court on an application for judicial review; and~~

~~(b)~~ and subject to section 51(1), the Commissioner shall carry out the examination on the basis of written submissions made to him.

(2) Without prejudice to section 51(3), for the purposes of an examination, the applicant is not entitled to have access to any information, document or other matter compiled by, or made available to, the Commissioner in connection with the examination.

(3) Without prejudice to section 43(5), in giving notice to an applicant or making any order under section 43(2)~~(a), (2A), (2B)~~ or (3), the Commissioner shall not –

- (a) give reasons for his determination;
- (b) give details of any interception or covert surveillance concerned further to those mentioned in sections 43(2)(a) or (2A)(a); and or
- (c) in the case of section 43(3), indicate whether or not the interception or covert surveillance alleged has taken place.

if the giving of the information under subsections (a), (b) and (c) would be prejudicial to the prevention or detection of crime or the protection of public security.

46. Notifications to departments concerned, etc.

(1) Where, on an examination, the Commissioner makes a determination ~~under~~ referred to in sections 43(2) or 43(2A), he shall notify the head of the department concerned of the determination, including any order or findings he has made in the examination.

(2) On being ~~notified of the determination given the notification~~ 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 arising from the determination, 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.

(3) Without prejudice to sections 47 and 48, the Commissioner may, whether before or after the head of the department has submitted a report to him under subsection (2), refer the determination and any other matters he thinks fit to the Chief Executive or, the Secretary for Justice or both any panel judge of the Court of First Instance or any or all of them.

Division 3A – Powers of Commissioner

46A. Powers of Commissioner

The Commissioner shall have a general power –

(a) to investigate any complaint of alleged cases of interception or covert

- surveillance;
- (b) to require any department to investigate any person within that department, if he has reasonable grounds to believe that the person –
- (i) has provided false and misleading information in obtaining an authorization; or
 - (ii) has contravened provisions of this Ordinance,
- and to require a report from such department on the outcome of any investigation and any disciplinary action taken;
- (c) to investigate any complaint by any person alleged to have been aggrieved or adversely affected by –
- (i) the execution of any prescribed authorization;
 - (ii) any interception of covert surveillance without the authority of a prescribed authorization or in excess of any prescribed authorization; and
- (d) to conduct any investigation (including criminal, administrative and disciplinary) as he considers necessary into the conduct of any, person, apart from a judge of the Court of First Instance or a judge of the District Court, and refer any matter to the Director of Public Prosecutions upon conclusion of such investigation .

Division 3A – Notifications by Commissioner

46A.B. Notifications to relevant persons

(1) If, in the course of performing any of his functions under this Ordinance, the Commissioner considers that there is any case in which any interception or covert surveillance –

- has been carried out by a department without the authority of a prescribed authorization issued or renewed under this Ordinance;
 - (c) has been carried out by a department mistakenly or wrongfully; or
 - (d) has been carried out by a department in contravention of this Ordinance , subject to subsection (6), the Commissioner shall give notice to the relevant person –
- (a) stating that –
 - (i) there has been such a case and indicating whether the case is one of interception or covert surveillance;
 - (ii) the broad nature of the interception or covert surveillance;
 - (iii) the time when the interception or covert surveillance commences and the time when the interception or covert surveillance ends; and
 - (iv) the duration of the interception or covert surveillance; and
 - (b) informing the relevant person of his right to apply to the Commissioner for an examination in respect of the interception or covert surveillance.

(2) Where the relevant person makes an application for an examination in respect of the interception or covert surveillance within 6 months after receipt of the notice or within such further period as the Commissioner may allow, the Commissioner shall, notwithstanding anything in section 44(1)(a) but subject to the other provisions of section 44, make a determination referred to in sections 43(2) or 43(2A), and the provisions of this Ordinance are to apply accordingly.

(3) Notwithstanding subsection (1), the Commissioner shall not give any notice under that subsection for so long as he considers that the giving of the notice would be prejudicial to the prevention or detection of crime or the protection of public security.

(4) Without prejudice to subsection (3), in giving notice to a relevant person under subsection (1), the Commissioner shall not –

(a) give reasons for his findings; or

(b) give details of any interception or covert surveillance concerned further to those mentioned in subsection (1)(a).

(5) For the purposes of this section, in considering whether any interception or covert surveillance has been carried out without the authority of a prescribed authorization issued or renewed under this Ordinance, the Commissioner shall apply the principles applicable by a court on an application for judicial review.

(6) This section does not require the Commissioner to give any notice to a relevant person if –

(a) the relevant person cannot, after the use of reasonable efforts, be identified or traced;

(b) the Commissioner considers that the intrusiveness of the interception or covert surveillance concerned on the relevant person is negligible; or

(c) in the case of interception, it is within the description of section 4(2)(b) or (c).

(7) In this section, “relevant person” (有關人士) means any person who is the subject of the interception or covert surveillance concerned.

Division 4 – Reports and Recommendations by Commissioner

47. Annual reports to Chief Executive by Commissioner

(1) The Commissioner shall, for each report period, submit a report to the Chief Executive.

(2) A report for a report period is to set out, separately in relation to interception and covert surveillance –

(a) a list showing –

(i) the respective numbers 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;

(ii) the respective numbers of judge’s authorizations and executive authorizations renewed under this Ordinance

- during the report period, and the average duration of the respective renewals;
- (iii) 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;
 - (iv) 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;
 - (v) 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;
 - (vi) the respective numbers of 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;
 - (vii) the respective numbers of applications for the renewal of judge's authorizations and executive authorizations made under this Ordinance that have been refused during the report period;
 - (viii) 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
 - (ix) 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;
 - (x) the respective number of issued or renewed authorization for the purpose of preventing and detecting of serious crimes, and issued or renewed authorization for the purpose of protecting public security during the report period;.
 - (xi) the total number of telephone lines intercepted during the report period;
 - (xii) the total number of facsimile lines intercepted during the report period;
 - (xiii) total number of email accounts intercepted during the report period;
 - (xiv) the total number of Internet Protocol (IP) addresses

under surveillance during the report period;
(xv) the total number of persons who have been the subjects
of surveillance during the report period;
(xvi) the total number of premises under surveillance during
the report period.

~~(a) a list showing—~~

- ~~(i) the number of prescribed authorizations issued under this Ordinance during the report period, and the average duration of the prescribed authorizations;~~
- ~~(ii) the number of prescribed authorizations renewed under this Ordinance during the report period, and the average duration of the renewals;~~
- ~~(iii) the number of applications for the issue of prescribed authorizations made under this Ordinance that have been refused during the report period; and~~
- ~~(iv) the number of applications for the renewal of prescribed authorizations made under this Ordinance that have been refused during the report period;~~

—

(b) a list showing –

- (i) the major categories of offences for the investigation of which prescribed authorizations have been issued or renewed under this Ordinance during the report period; ~~and~~
(ia) the major categories of threats to public security of which prescribed authorizations have been issued or renewed under this Ordinance during the report period; and
- (ii) the number of persons arrested during the report period as a result of or further to any interception or covert surveillance carried out pursuant to a prescribed authorization;

(c) a list showing –

- (i) the number of device retrieval warrants issued under this Ordinance during the report period, and the average duration of the warrants; and
- (ii) the number of applications for the issue of device retrieval warrants made under this Ordinance that have been refused during the report period;

(d) a list showing –

- (i) a summary of reviews conducted by the Commissioner under section 40 during the report period;
- (ii) the number and broad nature of any cases of irregularities or errors identified in the reviews during the report period;

- (iii) the number of applications for examination that have been received by the Commissioner during the report period;
- (iv) ~~the respective numbers of notices given by the Commissioner under section 43(2) and section 43(3) during the report period further to examinations; a summary of the determinations of the Commissioner on examinations carried out during the report period; and~~
- (iva) the number of cases in which a notice has been given by the Commissioner under section 46A during the report period;
- (v) the broad nature of recommendations made by the Commissioner under sections 48, 49 and 50 during the report period; and
- (vi) the *respective* number of cases in which information subject to legal professional privilege *and in which content of journalistic material have* has been obtained in consequence of any interception or covert surveillance carried out pursuant to a prescribed authorization during the report period; and
- (vii) the *respective* number of cases of different departments in which disciplinary action 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 during the report period, and the broad nature of such action; and
- (e) an assessment on the overall *implementation of this Ordinance and the overall* compliance with the relevant requirements during the report period.

(3) The report is to be submitted within 6 months after the expiry of the report period.

(4) ~~Subject to subsection (5), the Chief Executive shall cause a copy of the report to be laid on the table of the Legislative Council.~~ 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.

(5) If the Chief Executive considers that the publication of any matter in the report referred to in subsection (4) would be prejudicial to the prevention or detection of crime or the protection of public security, he may, after consultation with the Commissioner, exclude such matter from the copy of the report to be laid on the table of the Legislative Council under that subsection.

(5A) The matter excluded in subsection (5) shall be reported to the Legislative Council under confidential cover.

(6) In this section, “report period” (報告期間), in relation to a report required to be submitted under subsection (1), means –

- (a) the period beginning on the commencement of this Ordinance and ending on 31 December in the same year; or
- (b) any of the succeeding periods of 12 months ending on 31 December.

48. Other reports to Chief Executive by Commissioner

(1) In addition to any report required to be submitted to the Chief Executive under section 47, the Commissioner may from time to time submit any further report to the Chief Executive on any matter relating to the performance of his functions under this Ordinance as he thinks fit.

(2) 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 (3) without the agreement of the Commissioner.

(3) If the Chief Executive considers that the publication of any matter in the report referred to in subsection (2) would be prejudicial to the prevention or detection of crime or the protection of public security, he may, after consultation with the Commissioner, exclude such matter from the copy of the report to be laid on the table of the Legislative Council under that subsection.

(4) The matter excluded in subsection (3) shall be reported to the Legislative Council under confidential cover.

49. Recommendations to Secretary for Security on code of practice

(1) If, in the course of performing any of his functions under this Ordinance, the Commissioner considers that any provision of the code of practice should be revised to better carry out the objects of this Ordinance, he may make such recommendations to the Secretary for Security as he thinks fit.

(2) Where the Commissioner makes any recommendations to the Secretary for Security under subsection (1), the Secretary shall notify the Commissioner and the Legislative Council of any exercise of power by him under section 59(3) to implement the recommendations, as soon as reasonably practicable after the recommendations have been made or, where the Commissioner has specified any period for the issue of the notification when making the recommendations, within that period.

50. Recommendations to departments

(1) If, in the course of performing any of his functions under this Ordinance, the Commissioner considers that any arrangements made by any department should be changed to better carry out the objects of this Ordinance or the provisions of the code of practice, he may make such recommendations to the head of the department as he thinks fit.

(2) Where the Commissioner makes any recommendations to the head of the

department 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 implement the recommendations, as soon as reasonably practicable after the recommendations have been made or, where the Commissioner has specified any period for submission of the report when making the recommendations, within that period.

(2A) The Commissioner 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 (2B).

(2B) If the Commissioner considers that the publication of any matter in the report referred to in subsection (2A) would be prejudicial to the prevention or detection of crime or the protection of public security, he may exclude such matter from the copy of the report to be laid on the table of the Legislative Council under that subsection.

(2C) The matter excluded in subsection (2B) shall be reported to the Legislative Council under confidential cover.

(3) Without prejudice to sections 47 and 48, the Commissioner may, whether before or after the head of the department has submitted a report to him under subsection (2), refer the recommendations and any other matters he thinks fit to the Chief Executive ~~or~~, the Secretary for Justice ~~or both or any panel judge~~ of the Court of First Instance or any or all of them.

Division 5 – Further Provisions Relating to Performance of Functions by Commissioner

51. Further powers of Commissioner

(1) For the purpose of performing any of his functions under this Ordinance, the Commissioner may –

(a) require any public officer or any other person, apart from any judge to answer any question, and to provide any information, document or other matter in his possession or control to the Commissioner, within the time and in the manner specified by the Commissioner when making the requirement; ~~and~~

(b) require any officer of a department to prepare any report on any case of interception or covert surveillance handled by the department, or on any class of such cases, within the time and in the manner specified by the Commissioner when making the requirement; and

(c) .require any head of department to take such remedial action and make compensation as he considers reasonable and necessary.

(1A) Non compliance with subsection (1A) shall be an offence with maximum penalty of 2 years imprisonment.

(1AB) 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 of the

documents or records kept under section 3 of Schedule 2.

(2) Notwithstanding any other provision of this Ordinance or any other law, any person on whom a requirement is imposed by the Commissioner under subsection (1) shall comply with the requirement.

(3) Except as otherwise provided in this Ordinance, the Commissioner shall not be required to produce in any court or to divulge or communicate to any court, or to provide or disclose to any person, any information, document or other matter compiled by, or made available to, him in the course of performing any of his functions under this Ordinance.

(4) Except as otherwise provided in this Ordinance, the Commissioner may determine the procedure to be adopted in performing any of his functions under this Ordinance.

52. General obligations of departments to report on non-compliance

Without prejudice to other provisions of this Part, where the head of any department considers that there may have been any case of —

(a) failure by the department or any of its officers to comply with any relevant requirement;

(b) contravention against this Ordinance; or

(c) submission of misleading and false information for the purpose of obtaining a prescribed authorization or for the purpose of implementing any provision of this Ordinance,

he shall submit to the Commissioner a report with details of the case.

53. Commissioner not regarded as court

In performing any of his functions under this Ordinance, the Commissioner is for all purposes not regarded as a court or a member of a court.

PART 5 FURTHER SAFEGUARDS

54. Regular reviews

(1) The head of each department shall make arrangements to keep under regular review the compliance by officers of the department with the relevant requirements.

(2) Without prejudice to subsection (1), where the head of any department has made any designation under section 7, he shall make arrangements for officers of a rank higher than those held by the authorizing officers of the department to keep under regular review the performance by the authorizing officers of any function under this Ordinance.

55. Discontinuance of interception or covert surveillance

(1) If, ~~in the course of or further to any regular review conducted under section~~

~~54(1) or (2)~~, the officer by whom ~~the~~ any regular review is or has been conducted under section 54(1) or (2) is of the opinion that ~~any-the~~ ground for discontinuance of a prescribed authorization exists, he shall, as soon as reasonably practicable after forming the opinion, cause the interception or covert surveillance concerned to be discontinued.

(2) Without prejudice to subsection (1), where a prescribed authorization has been issued or renewed under this Ordinance, the officer of the department concerned who is for the time being in charge of the interception or covert surveillance concerned –

- (a) shall, as soon as reasonably practicable after he becomes aware that ~~any-~~ the ground for discontinuance of the prescribed authorization exists, cause the interception or covert surveillance to be discontinued; and
- (b) may at any time cause the interception or covert surveillance to be discontinued.

(3) Where any officer has caused any interception or covert surveillance to be discontinued, whether under subsection (1) or (2), he shall, as soon as reasonably practicable after the discontinuance, cause a report on the discontinuance and the ground for the discontinuance to be provided to the relevant authority to whom an application under this Ordinance for the issue or renewal of the prescribed authorization concerned has last been made.

(4) Where the relevant authority receives a report under subsection (3), he shall, as soon as reasonably practicable after receiving the report, revoke the prescribed authorization concerned.

(5) Where any prescribed authorization is revoked under subsection (4), the prescribed authorization is, notwithstanding the relevant duration provision, to cease to have effect from the time of the revocation.

(5A) If, at the time of the provision of a report to the relevant authority under subsection (3), 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) and lawfully performing the relevant functions of the office of that relevant authority; and
- (b) the provisions of this section are to apply accordingly.

(6) For the purposes of this section, ~~a-the~~ ground for discontinuance of a prescribed authorization exists if –

- ~~(a)~~ (a) the conditions for the continuance of the prescribed authorization under section 3 are not met;
- (b) the specified conditions in section 31 are not met;
- (c) the application for, issuance or renewal of any prescribed authorization was in contravention of this Ordinance;
- (d) the interception or acts of covert surveillance carried out was in

excess of the prescribed authorization. ~~or~~

~~(b) the relevant purpose of the prescribed authorization has been achieved.~~

(7) 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 may be applicable).

55A. Reports to relevant authorities 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 or that the specified conditions under section 31 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) and 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 may be applicable).

56. Safeguards for protected products

(1) Where any protected product has been obtained pursuant to any prescribed authorization issued or renewed under this Ordinance on an application by any officer of a department, the head of the department shall make arrangements to ensure –

(a) that the following are limited to the minimum that is necessary for the relevant purpose of the prescribed authorization –

(i) the extent to which the protected product is disclosed;

- (ii) the number of persons to whom any of the protected product is disclosed;
- (iii) the extent to which the protected product is copied; and
- (iv) the number of copies made of any of the protected product;
- (b) that all practicable steps are taken to ensure that the protected product is protected against unauthorized or accidental access, processing, erasure or other use; and
- (c) that the protected product is destroyed as soon as its retention is not necessary for the relevant purpose of the prescribed authorization.

(1A) Where any protected product described in subsection (1) contains any information that is subject to legal professional privilege, subsection (1)(c) is to be construed as also requiring the head of the department concerned to make arrangements to ensure that any part of the protected product that contains the information –

(a) in the case of a prescribed authorization for a postal interception or covert surveillance, is destroyed not later than 1 year after its retention ceases to be necessary for the purposes of any civil or criminal proceedings before any court that are pending or are likely to be instituted; or

(b) in the case of a prescribed authorization for a telecommunications interception, is as soon as reasonably practicable destroyed.

(2) For the purposes of this section, something is necessary for the relevant purpose of a prescribed authorization –

(a) in the case of subsection (1)(a), if –

(i) it continues to be, or is likely to become, necessary for the relevant purpose; or

~~(b)~~(ii) except in the case of a prescribed authorization for a telecommunications interception, it is necessary for the purposes of any civil or criminal proceedings before any court that are pending or are likely to be instituted; or.

(b) in the case of subsection (1)(c) –

(i) when it continues to be, or is likely to become, necessary for the relevant purpose; or

(ii) except in the case of a prescribed authorization for a telecommunications interception, at any time before the expiration of 1 year after it ceases to be necessary for the purposes of any civil or criminal proceedings before any court that are pending or are likely to be instituted.

57. Record keeping

(1) Without prejudice to section 56, each department shall keep a record which is to contain –

(a) in respect of each application for the issue or renewal of a prescribed

authorization under this Ordinance by any officer of the department, a record of –

- (i) the application (including a copy of any affidavit ~~or statement~~ provided under Part 3 for the purposes of the application); and
 - (ii) the determination in respect of the application by the relevant authority (including a copy of any prescribed authorization issued or renewed under Part 3 as a result of the application);
- (b) in respect of each application for confirmation of an emergency authorization by any officer of the department as provided for in section 23(1), a record of –
- (i) the application (including a copy of any affidavit provided under section 23(2)(b) ~~or, where section 28 applies, a copy of any record, affidavit or other document provided as described in section 28(1)(b),~~ for the purposes of the application); and
 - (ii) the determination in respect of the application by a ~~panel~~ judge of the Court of First Instance (including a copy of any endorsement made ~~or, where section 28 applies, a copy of any emergency authorization issued,~~ under section 24(5) as a result of the application);
- ~~(c) in respect of each application for confirmation of a prescribed authorization or renewal by any officer of the department as provided for in section 26(1), a record of –~~
- ~~(i) the application (including a copy of any record, affidavit or statement provided under section 26(2)(b) for the purposes of the application); and~~
 - ~~(ii) the determination in respect of the application by the relevant authority (including a copy of any prescribed authorization issued or renewed under section 27(5) as a result of the application);~~
- (d) a record of –
- (i) any case in which any interception or covert surveillance has been discontinued by any officer of the department under section 55; and (ii) any case in which any prescribed authorization has been revoked under section 55 further to the discontinuance;
- (e) in respect of each application for the issue of a device retrieval warrant under section 32 by any officer of the department, a record of –
- (i) the application (including a copy of any affidavit provided under section 32(2)(b) for the purposes of the application); and
 - (ii) the determination in respect of the application by a ~~panel~~ judge of the Court of First Instance (including a copy of any device retrieval warrant issued under section 33(3) as a result of the application);
- (f) a record of –

- (i) any case to which section 23(3) applies by reason that no application for confirmation of an emergency authorization is made within the period of 48 hours by any officer of the department;
 - ~~(ii) any case to which section 26(3) applies by reason that no application for confirmation of a prescribed authorization or renewal is made within the period of 48 hours by any officer of the department; and~~
 - (iii) any findings in respect of any other irregularities and errors identified or detected by any officer of the department, whether in any regular review conducted under section 54(1) and (2) or otherwise; and
 - (g) any record reasonably required to be kept by the department to enable the Commissioner to prepare reports for submission to the Chief Executive under section 47, or otherwise to perform any of his functions under this Ordinance.
- (2) The record kept under subsection (1) –
- (a) to the extent that it relates to any prescribed authorization or device retrieval warrant –
 - (i) is to be retained for a period of at least ~~2~~ 10 years after the day on which the prescribed authorization or device retrieval warrant (as the case may be) has ceased to have effect; and
 - (ii) without prejudice to subparagraph (i), where it has come to the notice of the department concerned that any relevant civil or criminal proceedings before any court are pending or are likely to be instituted, or any relevant review is being conducted under section 40, or, in the case of a prescribed authorization, any relevant application for an examination has been made under section 42, is to be retained –
 - (A) in the case of any pending proceedings, review or application, for a period of at least until 1 year after the pending proceedings, review or application has been finally determined or finally disposed of ~~or until the review has been completed or finally disposed of (as the case may be)~~; or
 - (B) in the case of any proceedings which are likely to be instituted, for a period of at least until 1 year after they have been finally determined or finally disposed of or, if applicable, for a period of until at least 1 year after they are no longer likely to be instituted; or
 - (b) to the extent that it does not relate to any prescribed authorization or device retrieval warrant, is to be retained for a period of at least ~~2~~ 10 years.

(3) For the purposes of subsection (2), any proceedings, review or application is, in relation to any part of a record that relates to any prescribed authorization or device retrieval warrant, regarded as relevant if, but only if –

- (a) the prescribed authorization or device retrieval warrant (as the case may be) is or may be relevant to the determination of any question for the purposes of the proceedings, review or application (as the case may be); or
- (b) in the case of a prescribed authorization, any protected product obtained pursuant to the prescribed authorization is or may be relevant to the determination of any question for the purposes of the proceedings, review or application (as the case may be).

~~58. Non-admissibility of telecommunications interception product~~

~~(1) Any telecommunications interception product shall not be admissible in evidence in any proceedings before any court other than to prove that a relevant offence has been committed.~~

~~(2) Any telecommunications interception product, and any particulars as to a telecommunications interception carried out pursuant to a relevant prescribed authorization, shall not be made available to any party to any proceedings before any court (other than any such proceedings instituted for a relevant offence).~~

~~(3) In any proceedings before any court (other than any such proceedings instituted for a relevant offence), any evidence or question which tends to suggest any of the following matters shall not be adduced or asked –~~

- ~~(a) that an application has been made for the issue or renewal of a relevant prescribed authorization, or the issue of a relevant device retrieval warrant, under this Ordinance;~~
- ~~(b) that a relevant prescribed authorization has been issued or renewed, or a relevant device retrieval warrant has been issued, under this Ordinance;~~
- ~~(c) that any requirement has been imposed on any person to provide assistance for the execution of a relevant prescribed authorization or a relevant device retrieval warrant;~~
- ~~(d) that any information has been obtained pursuant to a relevant prescribed authorization.~~

~~(4) Notwithstanding subsection (2), where, for the purposes of any criminal proceedings (whether being criminal proceedings instituted for an offence or any related proceedings), any information obtained pursuant to a relevant prescribed authorization and continuing to be available to the department concerned might reasonably be considered capable of undermining the case for the prosecution against the defence or of assisting the case for the defence –~~

- ~~(a) the department shall disclose the information to the prosecution; and~~
- ~~(b) the prosecution shall then disclose the information to the judge in an ex parte hearing that is held in private.~~

~~(4) This section is not to be construed as prohibiting the disclosure of any information that continues to be available for disclosure, to the extent that—~~
~~(a) the disclosure is made to ensure that a person conducting the prosecution of any offence has the information he needs to determine what is required of him by his duty to secure the fairness of the trial of that offence; or~~
~~(b) the disclosure is made to a judge alone in a case in which the judge has ordered the disclosure to be so made to him;~~
~~(5) A judge may only order a disclosure under subsection (4)(b) if he is satisfied that the disclosure is essential in the interests of justice;~~
~~(6) Where a judge orders a disclosure under subsection (4)(b), and in consequence of that disclosure he considers that it is essential in the interests of justice, he may—~~
~~The judge may, further to the disclosure to him of the information under subsection (4)(b), make such orders as he thinks fit for the purpose of securing the fairness of the proceedings.~~
~~direct the person conducting the prosecution of any offence to make for the purposes of the proceedings concerned any such admission of fact as the judge considers essential to secure the fairness of the trial of that offence;~~
~~(6A) Where any order is made under subsection (6) in any criminal proceedings, the prosecution shall disclose to the judge for any related proceedings the terms of the order and the information concerned in an ex parte hearing that is held in private;~~
~~(7) Notwithstanding subsection (6), no direction order made under that subsection authorizes or requires anything to be done in contravention of subsections (1), (2) and (3);~~
~~(8) In this section—~~
~~“judge” (法官), in relation to any proceedings, means the judge or magistrate before whom those proceedings are or are to be heard, or any other judge or magistrate having jurisdiction to deal with the matter concerned;~~
~~“party” (一方), in relation to any criminal proceedings, includes the prosecution;~~
~~“related proceedings” (—), in relation to any criminal proceedings, means any further proceedings (including appeal proceedings) arising from, or any proceedings preliminary or incidental to, those proceedings;~~
~~“relevant device retrieval warrant” (—有關器材取出手令) means a device retrieval warrant for the retrieval of any of the devices authorized to be used under a relevant prescribed authorization;~~
~~“relevant offence” (有關罪行) means any offence constituted by the disclosure of any telecommunications interception product or of any information relating to the obtaining of any telecommunications interception product (whether or not there are other constituent elements of the offence);~~
~~“relevant prescribed authorization” (—有關訂明授權) means a prescribed authorization for a telecommunications interception;~~
~~“telecommunications interception product” (—電訊截取成果) means any~~

~~interception product to the extent that it is~~

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~~(a) any contents of a communication that have been obtained pursuant to a relevant prescribed authorization; or~~

~~(b) a copy of such contents.~~

58A. Information subject to legal professional privilege to remain privileged

Any information that is subject to legal professional privilege is to remain privileged notwithstanding that it has been obtained pursuant to a prescribed authorization.

59. Code of practice

(1) The Secretary for Security shall issue a code of practice for the purpose of providing practical guidance to officers of the departments in respect of matters provided for in this Ordinance.

(2) Without limiting the generality of subsection (1), the Secretary for Security may in the code of practice specify the form of any application to be made to a panel judge under this Ordinance.

(3) The Secretary for Security may from time to time revise the whole or any part of the code of practice, in a manner consistent with his power to issue the code under this section, and, unless the context otherwise requires, any reference to the code of practice, whether in this Ordinance or otherwise, is to be construed as a reference to the code as so revised.

(4) Any officer of a department shall, in performing any function under or for the purposes of any provision of this Ordinance, ~~have regard to~~ **comply with** the provisions of the code of practice.

(5) A failure on the part of any person to comply with any provision of the code of practice –

(a) is for all purposes not of itself to be regarded as a failure to comply with any provision of this Ordinance; and

(b) without prejudice to paragraph (a), does not affect the validity of any prescribed authorization or device retrieval warrant.

PART 6 MISCELLANEOUS

60. Prescribed authorizations and device retrieval warrants not affected by minor defects

(1) A prescribed authorization or device retrieval warrant is not affected by any minor defect in it.

(2) Without ~~prejudice to limiting~~ the generality of subsection (1), any information (including any protected product) obtained pursuant to a prescribed authorization is not by reason only of any minor defect in the prescribed authorization to be rendered

inadmissible in evidence in any proceedings before any court.

(3) For the purposes of this section, any reference to minor defect, in relation to a prescribed authorization or device retrieval warrant, includes any defect or irregularity, other than a substantial defect or irregularity, in or in connection with –

- (a) the issue, or the purported issue, of that prescribed authorization or device retrieval warrant or of a document purporting to be that prescribed authorization or device retrieval warrant; or
- (b) the execution, or the purported execution, of that prescribed authorization or device retrieval warrant or of a document purporting to be that prescribed authorization or device retrieval warrant.

61. Immunity

(1) Subject to subsection (2), a person shall not incur any civil or criminal liability by reason only of –

- (a) any conduct carried out pursuant to a prescribed authorization or device retrieval warrant (including any conduct incidental to such conduct);
- (b) his performance or purported performance in good faith of any function under this Ordinance; or
- (c) his compliance with a requirement made or purportedly made under this Ordinance.

(2) Nothing in subsection (1) affects any liability that is or may be incurred by any person by reason only of –

- (a) any entry onto any premises without permission; or
- (b) any interference with any property without permission.

62. Regulation

The Chief Executive in Council may, subject to the approval of the Legislative Council, make regulations for –

- (a) the better carrying out of the purposes of this Ordinance; and
- (b) without limiting the generality of paragraph (a), prescribing any matter which this Ordinance provides is, or may be, prescribed by regulation made under this section.

63. Amendment of Schedules

The Chief Executive in Council may, ~~by notice published in the Gazette,~~ subject to the approval of the Legislative Council, amend Schedules 1, 2, 3 and 4 by notice published in the Gazette.

64. Repeal and consequential amendments

- (1) The Interception of Communications Ordinance (Cap. 532) is repealed.
- (2) The enactments specified in Schedule 5 are amended as set out in that Schedule.

65. Transitional arrangements

(1) Where any materials have been obtained by or on behalf of any department by carrying out any telecommunications interception pursuant to an order issued or renewed before the commencement of this Ordinance under the provision then in force as section 33 of the Telecommunications Ordinance (Cap. 106), sections 56 ~~applies~~ and 58 ~~apply~~, with necessary modifications, to the materials, to the extent that they are any of the contents of the communication intercepted or a copy of such contents, ~~and to the relevant matters~~ as if –

(a) the order were a prescribed authorization issued or renewed under this Ordinance, and accordingly –

(i) the materials were, for the purposes of sections 56 ~~and 58~~ ~~respectively~~, protected product and telecommunications interception product; and

(ii) the application for the issue or renewal of the order were an application for the issue or renewal of a prescribed authorization under this Ordinance; and

(b) the purpose sought to be furthered by carrying out the operation required to be carried out under the order were the relevant purpose of the order.

(2) Subsection (1) is in addition to and not in derogation of section 23 of the Interpretation and General Clauses Ordinance (Cap. 1).

(3) In this section –

“copy” (文本), in relation to any contents of a communication referred to in subsection (1), means any of the following (whether or not in documentary form) –

(a) any copy, extract or summary of such contents ~~which identifies itself as such copy, extract or summary of such contents;~~

(b) any record referring to the telecommunications interception referred to in subsection (1) which is a record of the identity of any person who is the sender or intended recipient of the communication.;

~~“relevant matters” (有關事宜) –~~

~~(a) in relation to section 58(2), means any particulars as to the telecommunications interception referred to in subsection (1); and~~

~~(b) in relation to section 58(3), means any evidence or question which tends to suggest any of the following matters –~~

~~(i) that an application has been made for the issue or renewal of the order referred to in subsection (1);~~

~~(ii) that the order has been issued or renewed;~~

~~(iii) that any requirement has been imposed on any person to provide assistance for the execution of the order;~~
~~(iv) that any information has been obtained pursuant to the order.~~

66. Expiry

This Ordinance shall expire 2 years from the date that this Ordinance takes effect unless renewed by a resolution passed by the Legislative Council.

SCHEDULE 1 [ss. 2 & 63] DEPARTMENTS

PART 1

DEPARTMENTS SPECIFIED FOR INTERCEPTION, ETC.

1. Customs and Excise Department
2. Hong Kong Police Force
3. Independent Commission Against Corruption

PART 2

DEPARTMENTS SPECIFIED FOR COVERT SURVEILLANCE, ETC.

1. Customs and Excise Department
2. Hong Kong Police Force
3. Immigration Department
4. Independent Commission Against Corruption

SCHEDULE 2 [ss. 2, 6, 51 & 63] PROCEDURES OF, AND OTHER MATTERS RELATING TO, ~~PANEL~~ JUDGES

1. Provisions for consideration of applications by ~~panel judge~~ judges of the Court of First Instance and judges of the District Court

~~(1) A panel judge shall consider any application made to him under this Ordinance in private.~~

~~(2) Without prejudice to subsection (1), the~~ Any application made to a panel judge of the Court of First Instance or a judge of the District Court under this Ordinance may, where the ~~panel judge of the Court of First Instance or the judge of the District Court~~ so directs, be considered at any place other than within outside the court precincts at any place other than the premises of a department.

~~(3) The panel judge of the Court of First Instance or the judge of the District~~

Court may consider the application with or without a hearing as he considers appropriate.-

~~(3) Without prejudice to Division 5 of Part 3 of this Ordinance, nothing in this section prevents consideration of the application by the panel judge on the basis of written submissions made to him.~~

(4) Any hearing conducted by the ~~panel~~ judge of the Court of First Instance or by the judge of the District Court to consider the application is to be held in private.

2. Further powers of ~~panel~~ judges of the Court of First Instance and judges of the District Court

For the purpose of performing any of his functions under this Ordinance, a ~~panel~~ judges of the Court of First Instance and judges of the District Court may administer oaths and take affidavits.

3. Provisions for documents and records compiled by or made available to ~~panel~~ judge judges of the Court of First Instance or judges of the District Court

(1) A ~~panel judge~~ judge of the Court of First Instance or a judge of the District Court shall cause all documents and records compiled by, or made available to, him for any purpose related to the performance of any of his functions under this Ordinance to be kept in a packet sealed by his order, as soon as they are no longer immediately required for the purpose of performing any of his functions under this Ordinance.

(2) Notwithstanding subsection (1), a judge of the Court of First Instance or a judge of the District Court ~~panel judge~~ to whom any documents or records are made available in the circumstances described in that subsection shall –

(a) cause a copy of each of the documents or records so made available to him to be certified by affixing his seal to it and signing on it; and

(b) cause the copy so certified to be made available to the department concerned.

(3) Where any documents or records are kept in a packet under subsection (1) –

(a) the packet is to be kept in a secure place specified by a judge of the Court of First Instance or a judge of the District Court ~~panel judge~~;

(b) the packet may not be opened, and the documents or records may not be removed from the packet, except pursuant to an order of a panel judge made for the purpose of performing any of his functions under this Ordinance (including those performed at the request of the Commissioner under section 51(1A)); and

(c) the packet, and the documents or records, may not be destroyed except pursuant to an order of a judge of the Court of First Instance or a judge of the District Court ~~panel judge~~.

(4) Where any packet is opened pursuant to any order of a judge of the Court of First Instance or a judge of the District Court ~~panel judge~~ referred to in subsection (3)(b) –

(a) if any documents or records have been removed from the packet, the judge of

~~the Court of First Instance or the judge of the District Court panel judge~~ shall cause the documents or records to be returned to be kept in the packet, as soon as they are no longer immediately required for the purpose of performing any of his functions under this Ordinance; and

(b) the ~~judge of the Court of First Instance or the judge of the District Court= panel judge~~ shall cause the packet to be sealed by his order, as soon as access to the documents or records kept in it is no longer immediately required for the purpose of performing any of his functions under this Ordinance, and the provisions of subsection (3) apply, with necessary modifications, to the packet so sealed as they apply to the packet referred to in subsection (1).

(5) Nothing in this section prevents any of the documents and records referred to in subsection (1), or any copies of such documents and records, to be made available to the department concerned, ~~whether~~ for the purposes of any relevant written determination provision or ~~otherwise~~ pursuant to an order of a ~~judge of the Court of First Instance or a judge of the District Court=panel judge~~.

(6) In this section, “relevant written determination provision” (有關書面決定條文) means section 9(3), 12(3), 24(5) (whether with or without reference to section 28 of this Ordinance), 27(5) or 33(3) of this Ordinance.

4. Panel judge to act judicially but not regarded as court

~~In performing any of his functions under this Ordinance, a panel judge shall act judicially and have the same powers, protection and immunities as a judge of the Court of First Instance has in relation to proceedings in that Court, although he is for all purposes not regarded as a court or a member of a court.~~

SCHEDULE 3 [ss. 8, 11, 14, 17, 20 & 63] REQUIREMENTS FOR AFFIDAVIT OR STATEMENT FOR APPLICATION FOR ISSUE OR RENEWAL OF PRESCRIBED AUTHORIZATION FOR INTERCEPTION OR COVERT SURVEILLANCE

PART 1 APPLICATION FOR ISSUE OF ~~JUDICIAL JUDGE'S~~ COURT OF FIRST INSTANCE AUTHORIZATION FOR INTERCEPTION

An affidavit supporting an application for the issue of a ~~judicial judge's~~ *Court of First Instance* authorization for interception is to –

- (a) state which of the purposes specified in section 3(1)(a)(i) and (ii) of this Ordinance is sought to be furthered by carrying out the interception;
- (b) set out –

- (i) the form of the interception and the information sought to be obtained by carrying out the interception;
- (ii) if known, the identity of any person who is to be the subject of the interception;
- (iii) if known, particulars of the addresses, numbers, apparatus or other factors, or combination of factors, that are to be used for identifying any communication that is to be intercepted;
- (iv) the proposed duration of the interception;
- (v) ~~the nature of, and an assessment of the immediacy and gravity of~~ the following information –
 - (A) where the purpose sought to be furthered by carrying out the interception is that specified in section 3(1)(a)(i) of this Ordinance, the nature of, and an assessment of the immediacy and gravity of, the particular serious crime to be prevented or detected; or
 - (B) where the purpose sought to be furthered by carrying out the interception is that specified in section 3(1)(a)(ii) of this Ordinance, the nature of, and an assessment of the immediacy and gravity of, the particular threat to public security, and an assessment of the impact, both direct and indirect, of the threat on the security of Hong Kong, the residents of Hong Kong, or other persons in Hong Kong;
- (vi) the benefits likely to be obtained by carrying out the interception;
- (vii) an assessment of the impact (if any) of the interception on any person other than that referred to in subparagraph (ii);
- (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; ~~and~~
- (ix) the reason why the purpose sought to be furthered by carrying out the interception cannot reasonably be furthered by other less intrusive means; and
- (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 –
 - (A) any person set out in the affidavit under subparagraph (ii) has also been identified as the subject of the interception or covert surveillance concerned; or
 - (B) where the particulars of any telecommunications service have been set out in the affidavit under subparagraph (iii), the interception of any communication to or from that telecommunications service has also been sought, and if so, particulars of such application; and
- (c) identify by name, ~~and rank and post~~ the applicant and any officer of the department concerned approving the making of the application.

PART 2
APPLICATION FOR ISSUE OF ~~JUDICIAL JUDGE'S~~ COURT OF FIRST

INSTANCE
AUTHORIZATION FOR TYPE 1 SURVEILLANCE

An affidavit supporting an application for the issue of a ~~judicial judge's~~ Court of First Instance authorization for Type 1 surveillance is to –

- (a) state which of the purposes specified in section 3(1)(a)(i) and (ii) of this Ordinance is sought to be furthered by carrying out the Type 1 surveillance;
- (b) set out –
 - (i) the form of the Type 1 surveillance (including the kind or kinds of any devices to be used) and the information sought to be obtained by carrying out the Type 1 surveillance;
 - (ii) if known, the identity of any person who is to be the subject of the Type 1 surveillance;
 - (iii) the identity of any person, other than that referred to in subparagraph (ii), who may be affected by the Type 1 surveillance or, if the identity of such person is not known, the description of any such person or class of such persons who may be affected by the Type 1 surveillance;
 - (iv) if known, particulars of any premises or any object or class of objects in or on which the Type 1 surveillance is to be carried out;
 - (v) the proposed duration of the Type 1 surveillance;
 - (vi) ~~the nature of, and an assessment of the immediacy and gravity of the~~ following information –
 - (A) where the purpose sought to be furthered by carrying out the Type 1 surveillance is that specified in section 3(1)(a)(i) of this Ordinance, the nature of, and an assessment of the immediacy and gravity of, the particular serious crime to be prevented or detected; or
 - (B) where the purpose sought to be furthered by carrying out the Type 1 surveillance is that specified in section 3(1)(a)(ii) of this Ordinance, the nature of, and an assessment of the immediacy and gravity of, the particular threat to public security, and an assessment of the impact, both direct and indirect, of the threat on the security of Hong Kong, the residents of Hong Kong, or other persons in Hong Kong;
 - (vii) the benefits likely to be obtained by carrying out the Type 1 surveillance;
 - (viii) an assessment of the impact (if any) of the Type 1 surveillance on any person referred to in subparagraph (iii);
 - (ix) 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 Type 1 surveillance; ~~and~~
 - (x) the reason why the purpose sought to be furthered by carrying out the Type 1 surveillance cannot reasonably be furthered by other less intrusive means; and
 - (xi) if known, whether, during the preceding 2 years, there has been any application for the issue or renewal of a prescribed authorization in which any person set

- out in the affidavit under subparagraph (ii) has also been identified as the subject of the interception or covert surveillance concerned, and if so, particulars of such application; and
- (c) identify by name, ~~and~~ rank and post the applicant and any officer of the department concerned approving the making of the application.

PART 3
APPLICATION FOR ISSUE OF ~~EXECUTIVE~~ DISTRICT
COURT AUTHORIZATION
FOR TYPE 2 SURVEILLANCE

~~A statement~~ An affidavit supporting an application for the issue of a District Court ~~an executive~~ authorization for Type 2 surveillance is to –

- (a) state which of the purposes specified in section 3(1)(a)(i) and (ii) of this Ordinance is sought to be furthered by carrying out the Type 2 surveillance;
- (b) set out –
- (i) the form of the Type 2 surveillance (including the kind or kinds of any devices to be used) and the information sought to be obtained by carrying out the Type 2 surveillance;
 - (ii) if known, the identity of any person who is to be the subject of the Type 2 surveillance;
 - (iii) the identity of any person, other than that referred to in subparagraph (ii), who may be affected by the Type 2 surveillance or, if the identity of such person is not known, the description of any such person or class of such persons who may be affected by the Type 2 surveillance;
 - (iv) if known, particulars of any premises or any object or class of objects in or on which the Type 2 surveillance is to be carried out;
 - (v) the proposed duration of the Type 2 surveillance;
 - (vi) ~~the nature of, and an assessment of the immediacy and gravity of – the~~ following information –
 - (A) where the purpose sought to be furthered by carrying out the Type 2 surveillance is that specified in section 3(1)(a)(i) of this Ordinance, the nature of, and an assessment of the immediacy and gravity of, the particular serious crime to be prevented or detected; or
 - (B) where the purpose sought to be furthered by carrying out the Type 2 surveillance is that specified in section 3(1)(a)(ii) of this Ordinance, the nature of, and an assessment of the immediacy and gravity of, the particular threat to public security, and an assessment of the impact, both direct and indirect, of the threat on the security of Hong Kong, the residents of Hong Kong, or other persons in Hong Kong;
 - (vii) the benefits likely to be obtained by carrying out the Type 2 surveillance;
 - (viii) an assessment of the impact (if any) of the Type 2 surveillance on any person referred to in subparagraph (iii);

- (ix) 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 Type 2 surveillance; ~~and~~
 - (x) the reason why the purpose sought to be furthered by carrying out the Type 2 surveillance cannot reasonably be furthered by other less intrusive means; and
 - (xi) if known, whether, during the preceding 2 years, there has been any application for the issue or renewal of a prescribed authorization in which any person set out in the ~~statement~~ affidavit under subparagraph (ii) has also been identified as the subject of the interception or covert surveillance concerned, and if so, particulars of such application; and
- (c) identify by name, ~~and~~ rank and post the applicant.

PART 4
APPLICATION FOR RENEWAL OF ~~JUDICIAL JUDGE'S~~ COURT OF FIRST INSTANCE
AUTHORIZATION OR ~~EXECUTIVE~~ DISTRICT COURT AUTHORIZATION
FOR
INTERCEPTION OR COVERT SURVEILLANCE

An affidavit ~~or statement~~ supporting an application for the renewal of a ~~judicial judge's~~ Court of First Instance authorization for interception or Type 1 surveillance or a District Court ~~an executive~~ authorization for Type 2 surveillance is to –

- (a) set out –
 - (i) whether the renewal sought is the first renewal and, if not, each occasion on which the ~~judicial judge's~~ Court of First Instance authorization or a District Court ~~an executive~~ authorization has been renewed previously;
 - (ii) any significant change to any information previously provided in any affidavit ~~or statement~~ under this Ordinance for the purposes of any application for the issue or renewal of the ~~judicial judge's~~ Court of First Instance authorization or a District Court ~~an executive~~ authorization; ~~or for the purposes of any application made further to an oral application for confirmation of the judicial judge's authorization or executive authorization or its previous renewal;~~
 - (iii) an assessment of the value of the information so far obtained pursuant to the ~~judicial judge's~~ Court of First Instance authorization or a District Court ~~an executive~~ authorization;
 - (iv) the reason why it is necessary to apply for the renewal; and
 - (v) the proposed duration of the interception, Type 1 surveillance or Type 2 surveillance (as the case may be); and
- (b) identify by name, ~~and~~ rank and post the applicant and any officer of the department concerned approving the making of the application.

REQUIREMENTS FOR AFFIDAVIT FOR APPLICATION FOR ISSUE OF DEVICE RETRIEVAL WARRANT

An affidavit supporting an application for the issue of a device retrieval warrant for the retrieval of any of the devices authorized to be used under a prescribed authorization is to –

(a) set out –

- (i) the kind or kinds of the devices sought to be retrieved;
- (ii) particulars of the premises or object from which the devices are to be retrieved, and the reason why the applicant considers that the devices are in or on such premises or object;
- (iii) the estimated time required to complete the retrieval;
- (iv) an assessment of the impact (if any) of the retrieval on any person;
- (v) an assessment of the risk and damage arising from the retrieval of the devices before the termination of the authorization; and

(~~v~~vi) the need for the retrieval; and

(b) identify by name, ~~and~~ rank and post the applicant.

SCHEDULE 5 [s. 64] CONSEQUENTIAL AMENDMENTS

Post Office Ordinance

1. Warrant of Chief Secretary for Administration for opening and delaying postal packets

Section 13 of the Post Office Ordinance (Cap. 98) is repealed.

2. Disposal of postal packets opened under section 10, 12 or 13

(1) Section 14 is amended, in the heading, by repealing “, 12 or 13” and substituting “or 12”.

(2) Section 14 is amended by repealing “, 12 or 13” and substituting “or 12”.

3. Extension of sections 12, 13 and 14 to articles not transmissible by post

(1) Section 15 is amended, in the heading, by repealing “, 13”.

(2) Section 15 is amended by repealing “, 13”.

Post Office Regulations

4. Regulation amended

Regulation 10 of the Post Office Regulations (Cap. 98 sub. leg. A) is amended by repealing “, 12, or 13” and substituting “or 12”.

Telecommunications Ordinance

5. Section substituted

Section 33 of the Telecommunications Ordinance (Cap. 106) is repealed and the following substituted –

“33. Orders for interception of messages for provision of facilities

(1) For the purpose of providing or making available facilities reasonably required for –

(a) the detection or discovery of any telecommunications service provided in contravention of any provision of this Ordinance or any regulation made under this Ordinance or any of the terms or conditions of a licence granted under this Ordinance; or

~~(b) the execution of prescribed authorizations for telecommunications interception that may from time to time be issued or renewed under the Interception of Communications and Surveillance Ordinance (of 2006),~~ the Chief Executive may order that any class of messages shall be intercepted.

(2) An order under subsection (1) shall not of itself authorize the obtaining of the contents of any individual message.

(3) In this section –

“contents” (内容), in relation to any message, has the meaning assigned to it in section 2(5) of the Interception of Communications and Surveillance Ordinance (of 2006) in relation to a communication referred to in that section;

“prescribed authorization” (訂明授權) has the meaning assigned to it in section 2(1) of the Interception of Communications and Surveillance Ordinance (of 2006);

“telecommunications interception” (電訊截取) has the meaning assigned to it in section 2(1) of the Interception of Communications and Surveillance Ordinance (of 2006).”.

Prevention of Bribery Ordinance

6. Public bodies

Schedule 1 to the Prevention of Bribery Ordinance (Cap. 201) is amended by adding –
“107. Commissioner on Interception of Communications and Surveillance.”.

Personal Data (Privacy) Ordinance

7. Section added

The Personal Data (Privacy) Ordinance (Cap. 486) is amended by adding –

“58A. Protected product and relevant records under Interception of Communications and Surveillance Ordinance

(1) A personal data system is exempt from the provisions of this Ordinance to the extent that it is used by a data user for the collection, holding, processing or use of personal data which are, or are contained in, protected product or relevant records.

(2) Personal data which are, or are contained in, protected product or relevant records are exempt from the provisions of this Ordinance.

(3) In this section –

“device retrieval warrant” (器材取出手令) has the meaning assigned to it by section 2(1) of the Interception of Communications and Surveillance Ordinance (of 2006);

“prescribed authorization” (訂明授權) has the meaning assigned to it by section 2(1) of the Interception of Communications and Surveillance Ordinance (of 2006);

“protected product” (受保護成果) has the meaning assigned to it by section 2(1) of the Interception of Communications and Surveillance Ordinance (of 2006);

“relevant records” (有關紀錄) means documents and records relating to –

(a) any application for the issue or renewal of any prescribed authorization or device retrieval warrant under the Interception of Communications and Surveillance Ordinance (of 2006); or

(b) any prescribed authorization or device retrieval warrant issued or renewed under that Ordinance (including anything done pursuant to or in relation to such prescribed authorization or device retrieval warrant).”.

Official Secrets Ordinance

8. Information related to commission of offences and criminal investigations

Section 17(2)(c), (d) and (e) of the Official Secrets Ordinance (Cap. 521) is repealed and the following substituted –

“(c) any information, document or article which is interception product within the meaning of the Interception of Communications and Surveillance Ordinance (of 2006); or

(d) any information relating to the obtaining of any interception product described in paragraph (c).”.