

**Bills Committee on
Interception of Communications and Surveillance Bill**

Notification of Subjects of Covert Operations

This paper sets out the Administration's response to suggestions for a mechanism for notifying the subjects of "wrongful" interception or covert surveillance.

General

2. The Bill already provides for strong safeguards to ensure that "wrongful" covert operations do not take place. Authorizations are only given where the necessary conditions are met. There are strict requirements regarding procedural compliance as well. The post-authorization reviews by the Commissioner on Interception of Communications and Surveillance (the Commissioner) and law enforcement agencies (LEAs) provide further protection against "wrongful" operations.

3. Nevertheless, taking into account suggestions for a mechanism under which we notify the subject in cases where the operation was "wrongfully" conducted, we have carefully considered the feasibility of such a notification mechanism in limited circumstances.

4. In drawing up our proposal, we have sought to take reference from the practice in comparable jurisdictions. Such practice varies, as follows -

- (a) Australia has no notification mechanism, nor a specific complaints mechanism under the relevant legislation.
- (b) The United Kingdom (UK) has a complaints mechanism but not a notification mechanism.
- (c) The United States (US) and Canada do not have an independent oversight authority or complaint mechanism, but there is a

notification requirement which –

- (i) is limited to crime cases (and does not cover security cases¹);
- (ii) covers only authorized interceptions or interceptions applied for; and
- (iii) provides for exceptions to the requirement, for example, to meet the needs of operation.

Notification in limited circumstances

5. We propose that we build on the provisions and mechanisms already in our Bill, and add a notification mechanism as follows –

- (a) Under the “complaints mechanism” in the Bill, the Commissioner is already required to conduct “examinations” to determine if “a prescribed authorization should have been, but has not been, issued or renewed” (clause 43(1)(b)). The determination will then be followed by a notice to the applicant (under either clause 43(2)(a) or clause 43(3)), stating whether he had found the case in the applicant’s favour.
- (b) The Bill already requires the Commissioner to conduct “reviews”, including reviews that he may conduct upon the receipt of various reports stipulated in the Bill. In the course of such reviews, the Commissioner may review the case to see, among other things, whether “a prescribed authorization should have been, but has not been, issued or renewed”. Currently, the findings will be notified to a department under clause 41, and a summary of such reviews and the number and the broad nature of any cases of irregularities identified therein will be covered in his annual report under clause 47.
- (c) We now propose that further to (b) above, the Commissioner may notify the subject of an operation, upon finding that “a prescribed authorization should have been, but has not been, issued or renewed”.

¹ Except under the Foreign Intelligence Surveillance Act of the US, where notification has to be made under specific circumstances (s 1806(j)).

- (d) The other provisions which now apply to “complaint” cases will also apply, i.e., the use of the judicial review principles in “examination” (clause 45(1)(a)); the arrangement for possible compensation (clause 43(2)(b)); that the Commissioner shall not give such notice nor award compensation for so long as he considers that this would be prejudicial to the prevention or detection of crime or the protection of public security (clause 43(5)), etc.

6. In considering whether “a prescribed authorization should have been, but has not been, issued or renewed”, the Commissioner is not confined to establishing the fact of whether a relevant authorization has been issued. In case an authorization is issued, he will also review the process by which the decision was reached to ensure that the application has been made in accordance with the prescribed procedures, as well as the implementation of the prescribed authorization to ensure that the authorization has been implemented in accordance with its terms. The Commissioner may therefore decide that there is a case to notify the subject –

- (a) if there has been an operation for which the department should have applied for an authorization but has not in fact done so;
- (b) if there has been an authorization but in the view of the Commissioner, e.g.,
 - (i) a higher level of authorization should have been applied for;
 - (ii) information that was available and that was likely to have affected the determination as to whether to issue the authorization was not provided to the authorizing authority; or
 - (iii) the operation does not comply with the terms contained in the authorization, e.g., it has been carried out on the wrong person, telephone number or address.

Under clause 45, the Commissioner shall conduct an examination applying the principles applicable by a court on an application for

judicial review.

7. It should be emphasized that the “mistakes” to which this notification arrangement is to apply should not be minor defects within the meaning of clause 60 of the Bill. And given that the regime should only apply to those who have been “wrongfully” subjected to interception or covert surveillance, no notification should be required if no interception or surveillance has in fact been carried out in respect of the intended subject, despite the error in question.

8. As for compensation, under clause 43(2)(b), the Commissioner may order the payment of compensation at the same time as notifying the subject without the need for him to make a claim himself. We now propose to revise the arrangement for both “complaint” and “notification” cases, so that –

- (a) the subject is asked if he wishes the Commissioner to consider compensation and if so,
- (b) he may submit representations to the Commissioner and
- (c) the Commissioner shall take (b) into account when considering the merit of the case in terms of payment of compensation under clause 43(2)(b) and (4).

9. Subject to Members’ views on the approach suggested above, we shall introduce the necessary Committee Stage Amendments.

General notification

10. We have previously explained the grounds against a general notification mechanism. In summary, the difficulties with a general notification scheme are –

- (a) Not all covert operations will result in arrests. The absence of any arrest resulting from such operations does not necessarily mean that the target is not involved in any threat to law and order or public security. It is further possible that while an operation has not led to the arrest of the target, he in fact continues to pose threats to the community for some time after the operation. Notifying the target in such cases would likely

serve to tip-off such person and his associates, making subsequent investigation with similar means more difficult.

- (b) In case the target is arrested and the investigation turns overt, disclosure of any details of such covert operations will still reveal information on the capability and modus operandi of our LEAs to the criminal and those in the same criminal syndicates, if any. This would not only reduce the chance of successfully conducting similar covert operations on the same criminals again, but enable criminals, especially those criminal syndicates which are becoming increasingly organized and sophisticated, to evade justice. For example, in a case where overt action was taken against several targets involved in a multi-party criminal venture on the basis of evidence secured through a highly sophisticated concealed device, any notification would assist them in identifying the modus operandi used by LEA. It would also cause them to eliminate the possibility of them having been betrayed by a member of their own and reduce the chances of them giving away each other when interviewed.
- (c) Even if the target turns out not being involved in a threat, informing him could raise suspicions among the real targets or otherwise prejudice an operation. For example, the target may be acquainted with those causing the threats, and thus inform them of the operations. This could occur in such cases where sibling/close associate/neighbour of a suspect is mistakenly targeted as the subject of the investigation. If the wrong target were to be notified of the mistaken operation, he would knowingly or unknowingly alert the real suspect if he mentions the notification to the suspect.
- (d) In order to protect the confidentiality of covert operations, the level of details that may be disclosed is limited. The benefit of notification would be small and might outweigh the disquiet caused.
- (e) A general notification requirement might require keeping all the relevant details in case notification might be needed. This would not be in keeping with the principle of destroying these details as soon as possible in order to protect privacy.

We remain, therefore, of the view that a general notification system is not appropriate.

Security Bureau
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