

**INTERCEPTION OF COMMUNICATIONS AND
SURVEILLANCE BILL**

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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 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 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 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;

“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, by a person other than its sender or intended recipient;
- “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 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 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;

“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;

“relevant authority” (有關當局)—

- (a) in relation to an application for the issue or renewal of a judicial 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;

“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 subsection (3), 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

- (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.

(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 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
 - (b) the interception or covert surveillance is 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.
- (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 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 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), 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, 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.

(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 Authorizations

Issue of judicial authorizations

8. Application for judicial authorization for interception or Type 1 surveillance

(1) An officer of a department may apply to a panel judge for the issue of a 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.

(2) The application is—

(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 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 a 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 authorization

A 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 authorizations

11. Application for renewal of judicial authorization

(1) At any time before a judicial 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—

- (a) to be made in writing; and

- (b) to be supported by—
- (i) a copy of the judicial authorization sought to be renewed;
 - (ii) a copy of any 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 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 authorization

(1) Upon considering an application for the renewal of a judicial 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.

(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 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 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 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 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.

(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 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 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—

- (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 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).

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
- (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; 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 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 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—

(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 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) cause the immediate destruction of any information obtained by carrying out the interception or Type 1 surveillance concerned, 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)(b) has 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) 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 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.

- (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 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.
- (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).
- (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;
 - (b) 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; and
 - (ii) 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; 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; and
 - (ii) 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 prescribed authorization further authorizes the undertaking of any 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.

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 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 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 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.

(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 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) 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.

(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.

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 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 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.

(3) If, on an examination, the Commissioner makes a determination other than that referred to in subsection (2), 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) 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 1 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; and
 - (b) 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) give reasons for his determination;
- (b) give details of any interception or covert surveillance concerned; and
- (c) in the case of section 43(3), 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.

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.

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) 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

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 conditions for the continuance of the prescribed authorization under section 3 are not met; 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).

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.

(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 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 (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 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 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) 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 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

(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 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

SCHEDULE 2

[ss. 2, 6 & 63]

PROCEDURES OF, AND OTHER MATTERS RELATING TO,
PANEL JUDGE

1. **Provisions for consideration of applications
by panel judge**

(1) A panel judge shall consider any application made to him under this Ordinance in private.

(2) Without prejudice to subsection (1), the application may, where the panel judge 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 judge on the basis of written submissions made to him.

2. Further powers of panel judge

For the purpose of performing any of his functions under this Ordinance, a panel judge 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 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;
- (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 which may be subject to legal professional privilege 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
- (c) identify by name and rank the applicant.

PART 2

APPLICATION FOR ISSUE OF JUDICIAL 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;

- (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—
 - (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 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
- (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;
- (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; and
- (c) identify by name and rank the applicant.

PART 4

APPLICATION FOR RENEWAL OF JUDICIAL 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” (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).”.

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 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.