

**Panel on Security****Law Enforcement (Covert Surveillance Procedures) Order****Summary of concerns and queries raised by Members at the special meetings on 15 August and 4 October 2005**

<b>Major Area</b>	<b>Concerns and queries raised by Members</b>	<b>Administration's response</b>
1. Constitutionality and lawfulness of the Law Enforcement (Covert Surveillance Procedures) Order (the Order)	(a) Whether the Order was constitutional and lawful. (b) The issuance of the Order by CE was unconstitutional.	(i) The Order was issued by the Chief Executive of the Hong Kong Special Administrative Region (CE) under Article 48(4) of the Basic Law (BL48(4)).  (ii) Existing legislation provided that the commissioner or director concerned could direct and control the respective disciplined services, subject to the orders and control of CE. In the issuance of the Order, CE had not exceeded the power conferred by existing legislation.  (iii) Covert surveillance conducted by law enforcement agencies was constitutional, lawful and necessary for the maintenance of law and order.

<b>Major Area</b>	<b>Concerns and queries raised by Members</b>	<b>Administration's response</b>
	<p>(c) If evidence obtained in compliance with the Order was ruled inadmissible by the court, law enforcement agencies would suffer a greater impact.</p>	<p>(iv) Covert surveillance had long been one of the effective investigation techniques used by law enforcement agencies. Evidence thus obtained had been admitted by the court previously on many occasions.</p> <p>(v) The Order did not seek to introduce any new policy. It only regulated covert surveillance conducted by law enforcement agencies. The Order did not change the practices of law enforcement agencies in the retention, use and disposal of materials.</p> <p>(vi) The Order only reflected the provisions in the relevant legislation that the administration of the relevant disciplined services was subject to the orders and control of CE.</p> <p>(vii) The Order only introduced an interim measure before the enactment of the relevant legislation.</p>

Major Area	Concerns and queries raised by Members	Administration's response
	<p>(d) The Order could not create the legal procedures required under BL30.</p> <p>(e) Why the Order was not legislation, but could create legal procedures for the purposes of BL30.</p> <p>(f) How the Order could constitute legal procedures and substitute legislation.</p>	<p>(viii) BL30 provided that “the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences”. However, it did not require such procedures to be prescribed by law. The Order created legal procedures for the purposes of BL30. Law enforcement officers who carried out covert surveillance had to do so in compliance with the Order, which had been published for public information. Those who failed to do so would be subject to disciplinary actions.</p> <p>(ix) Legal advice indicated that the requirement regarding the legal procedures under BL30 could be met through the issuance of the Order by CE in accordance with BL48(4).</p>
	<p>(g) What was unconstitutional and unlawful would not become constitutional and lawful after the issuance of the Order.</p>	<p>(x) BL30 provided that the relevant authorities might inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences. However, it did not require such procedures to be prescribed by law. The Order provided for legal procedures for the purposes of BL30.</p>

Major Area	Concerns and queries raised by Members	Administration's response
	<p>(h) Whether any article in BL provided CE with the power to introduce interim measures pending enactment of legislation.</p> <p>(i) The Order would create legal procedure only if LegCo had delegated CE with the power to prescribe covert surveillance procedures by an executive order.</p>	<p>(xi) The Order, which did not have to be prescribed by law but had been promulgated, provided for legal procedures for the purposes of BL30. Existing legislation provided that the commissioner or director concerned could direct and control the respective disciplined services, subject to the orders and control of CE.</p>
	<p>(j) Whether the phrase "prescribed by law" in BL 39 referred to legislation or legal procedure.</p>	<p>(xii) Although BL39 provided that the rights and freedoms enjoyed by Hong Kong residents should not be restricted unless as prescribed by law, BL30 provided an exception on the freedom and privacy of communication of residents. There was no requirement in BL30 that the legal procedures had to be prescribed by law.</p>
	<p>(k) Although BL30 provided for a restriction on the freedom and privacy of communication of residents, BL39 provided that the rights and freedoms enjoyed by Hong Kong residents should not be restricted unless as prescribed by law. Why the Administration had imposed restriction on the rights of Hong Kong residents through the issuance of an executive order, instead of enacting legislation on covert surveillance.</p>	<p>(xiii) The Administration had always respected human rights and had done a lot in the protection of such rights since reunification. The Order did not deprive anyone of his rights. It only regulated covert surveillance conducted by law enforcement agencies. Covert surveillance had long been one of the effective investigation techniques used by law enforcement agencies. Evidence thus obtained had been admitted by the court on many occasions. The Administration had accorded top priority to the formulation of legislative proposals on covert surveillance.</p>

<b>Major Area</b>	<b>Concerns and queries raised by Members</b>	<b>Administration's response</b>
2. Legislation on covert surveillance	(a) Whether there was a loophole in existing legislation which necessitated the issuance of the Order and the enactment of legislation on covert surveillance.	(i) The Order, which sought to set out existing practice in more transparent terms, was issued in view of public concerns arising from two relevant court cases. The authorisation of covert surveillance by suitably senior officers had been implemented without problems for many years.
	(b) Whether the crime situation and the views of the public at large reflected an urgent need for the issuance of the Order.	
	(c) What was the Administration's progress of work on the enactment of legislation on covert surveillance.	(ii) After the court had delivered the judgments in the two court cases, the Administration had conducted a lot of research and considered various options, including the enactment of legislation, for the way forward. As BL30 was applicable to the Government as well as individuals and the issue was a complicated one, it was not viable for the relevant legislation to be enacted within the 2004-05 legislative session. The Administration had thus decided to issue the Order in the interim.
	(d) When the Administration commenced its work on the drafting of the Order and when the legislative proposal governing covert surveillance would be introduced.	

<b>Major Area</b>	<b>Concerns and queries raised by Members</b>	<b>Administration's response</b>
	<p>(e) Whether the Administration would consider introducing legislation to regulate covert surveillance by the Government and that by the private sector on a separate basis.</p> <p>(f) The legislative proposal to be introduced should focus on the regulation of covert surveillance by the Government.</p>	<p>(iv) The Administration had an open mind on the suggestion of introducing legislation to regulate covert surveillance by the Government and that by the private sector on a separate basis.</p> <p>(v) There were divergent views on the issue in the community and the Administration had not taken a final view on the matter.</p>
<p>3. Impact of the Order on the relationship between the Administration, the Legislative Council (LegCo) and the judiciary</p>	<p>(a) Whether the Administration intended to demonstrate an executive-led government and change the mechanism for mutual check and balance among the executive authorities, the judiciary and the legislature through the issuance of the Order.</p> <p>(b) Whether the issuance of the Order would have a negative impact on the relations between the Administration and LegCo.</p> <p>(c) The issuance of the Order might set a precedent for the issuance of executive orders in place of legislation in the future.</p> <p>(d) The issuance of the Order had set a precedent for bypassing LegCo.</p>	<p>(i) The principle of an executive-led government was not laid down by CE, but by BL. The Administration had no intention to change the mechanism for mutual check and balance among the executive authorities, the judiciary and the legislature.</p> <p>(ii) As the Order was binding on law enforcement officers but not members of the public, it was not legislation and there was no question of the Administration bypassing LegCo.</p>

Major Area	Concerns and queries raised by Members	Administration's response
	(e) Whether the issuance of the Order amounted to contempt of the court, given that an appeal and a judicial review on the cases concerned were yet to be heard by the court.	(iii) The Administration respected the judges' views in the cases concerned. The Order was issued by CE under BL48(4) to address the concern of the public arising from the two District Court judgments and as to whether covert surveillance work undertaken by law enforcement agencies was lawful.
4. Consultation with the Executive Council (ExCo) and legal profession	(a) Whether the Administration had consulted ExCo and the legal profession on the contents of the Order.	(i) As the Order did not involve any new policy, there was not a need to consult ExCo before the Order was issued. However, all ExCo Members had been notified before the issuance of the Order.
5. Interception of communications	<p>(a) Why the Administration had not, after the report entitled "Privacy : Regulating the Interception of Communications" was published by the Law Reform Commission in 1996 and the White Bill entitled "Interception of Communications Bill" was published by the Administration in 1997, introduced legislation on interception of communications, but issued the Order in 2005.</p> <p>(b) Why there were substantial differences between the contents of the White Bill and the Order.</p>	(i) Covert surveillance and interception of communications were different investigation techniques. The proposals in the LRC report and the White Bill were related to interception of communications, whereas the Order was related to covert surveillance.

Major Area	Concerns and queries raised by Members	Administration's response
	<p>(c) Why the Interception of Communications Ordinance had not come into operation eight years after enactment.</p> <p>(d) What the Administration had done in the regulation of interception of communications since 1997.</p>	<p>(ii) The Administration was still conducting a review on interception of communications because it had accorded priority to other more pressing work in the past few years. Nevertheless, the Administration would consult the Panel on the way forward in respect of interception of communications within the 2005-06 legislative session.</p>
	<p>(e) Legislation on covert surveillance should be enacted as soon as possible. In view of the time constraint, a minimalist approach should be adopted and LegCo Members could be invited to enact such legislation expeditiously. Alternatively, the Interception of Communications Ordinance could be brought into force.</p> <p>(f) Why there was a need to issue the Order and enact legislation on covert surveillance, if covert surveillance was already constitutional and lawful. Why the Administration did not simply issue another executive order on interception of communications.</p> <p>(g) It was not appropriate to bring the Interception of Communications Ordinance into operation, as the Ordinance had not undergone any public consultation or study by a Bills Committee in the process of enactment.</p>	<p>(iii) The legislation to be enacted would cover both covert surveillance and interception of communications. The Order provided for legal procedures for the purposes of BL30. The Order was introduced merely as an interim measure and the Administration intended to introduce legislation governing covert surveillance.</p> <p>(iv) The Security Bureau had accorded top priority to the enactment of legislation on covert surveillance and interception of communications. The Administration hoped that the relevant legislation could be passed by LegCo within the 2005-06 legislative session</p>

Major Area	Concerns and queries raised by Members	Administration's response
6. Issues specific to provisions in the Order	<p>(a) Whether the seriousness of the offence concerned would be considered when deciding whether an authorisation should be granted.</p> <p>(b) There was no provision in the Order regarding the scope of authorisation, the safeguards for the materials obtained, the disposal of material obtained by covert surveillance and remedies for unauthorised surveillance or disclosure.</p> <p>(c) The rank of authorising officers should be raised to the directorate level.</p>	<p>(i) Requirement for such consideration had been laid down in the internal guidelines for the relevant law enforcement agencies.</p> <p>(ii) Issues relating to the monitoring mechanism and remedies would be considered in the relevant legislative proposal to be introduced. The disposal of material obtained by covert surveillance was not covered in the Order since there was no policy change in the area. However, it had been set out in the internal guidelines for law enforcement agencies that the material obtained should be disposed of in compliance with the Personal Data (Privacy) Ordinance (Cap. 486).</p>
	<p>(d) Consideration should be given to designating officers of different ranks for authorising different types of covert surveillance.</p> <p>(e) How the authorisation of covert surveillance could be monitored.</p> <p>(f) How the regular reviews referred to in section 16 of the Order were to be conducted.</p> <p>(g) What was the total number of Police officers at or above the rank of senior superintendent of Police.</p>	<p>(iii) Among some 200 officers at or above the rank of senior superintendent of police or equivalent, only less than 50 were designated as authorising officers. Nevertheless, the rank of authorising officers could be further reviewed in the examination of legislative proposals on covert surveillance.</p> <p>(iv) The number of authorising officers in the Police was much less than the total number of Police officers at or above the rank of senior superintendent of Police. Police officers not involved in covert surveillance were not designated as authorising officers.</p>

Major Area	Concerns and queries raised by Members	Administration's response
	(h) Whether there was a sufficient number of authorising officers in the Immigration Department (ImmD).	(v) Although there were less than five authorising officers in ImmD, such a number was adequate. It struck a balance between operational needs and the objective of keeping the number of authorising officers to a minimum.
	(i) What were the scope and definition of covert surveillance.	<p>(vi) Besides the Independent Commission Against Corruption, the Hong Kong Police Force, the ImmD and the Customs and Excise Department, covert surveillance might be conducted by some government departments such as the Food and Environmental Hygiene Department (FEHD). After the Order had come into operation, covert surveillance had to be conducted in compliance with the provisions in the Order. If FEHD wished to carry out covert surveillance as defined in the Order, it had to draw up internal guidelines for consideration by the Security Bureau or seek the assistance of the Police.</p> <p>(vii) Covert surveillance referred to any surveillance undertaken covertly while the subjects were unaware that they were under surveillance. Such surveillance would likely result in the obtaining of their private information.</p>

<b>Major Area</b>	<b>Concerns and queries raised by Members</b>	<b>Administration's response</b>
	(j) Why a judicial authorisation system had not been provided for in the Order.	(viii) The Administration had an open mind towards a judicial authorisation system. The issue could be further discussed when the legislative proposal on covert surveillance was introduced. A balance should be struck between the protection of individual rights and efficiency in the operations of law enforcement agencies.
	(k) Why legal professional privilege was not provided for in the Order.	(ix) As legal professional privilege was already well established under the common law, it was not provided for in the Order. However, reference to legal professional privilege was included in the internal guidelines. The Order did not change the law on legal professional privilege.
	(l) Whether the Order provided for the covert surveillance of offences under BL23 where legislation had not been enacted.	(x) Under the Order, covert surveillance would not be conducted for those BL23 offences that had yet to be created.  (xi) Some of the offences under BL23 had already been covered under existing legislation. Moreover, section 4 of the Order expressly excluded any covert surveillance which was already provided for under existing legislation.

Major Area	Concerns and queries raised by Members	Administration's response
7. Enforcement	<p>(a) Whether covert surveillance conducted before the issuance of the Order complied with the requirements under BL30.</p> <p>(b) Whether law enforcement officers would be in breach of the law, if they carried out covert surveillance before the enactment of legislation to regulate covert surveillance.</p> <p>(c) How law enforcement officers could act in accordance with the law, if they were only provided with internal guidelines.</p> <p>(d) How covert surveillance could be monitored with the existing legal framework. The Order would allow law enforcement officers to abuse their powers and infringe upon the freedom and privacy of communication of residents.</p>	<p>(i) Although the judge held in Criminal Case No. DCCC689 of 2004 that the evidence gathered through covert surveillance was unlawfully obtained, it should be noted that the ICAC officer concerned had not complied with ICAC's standing orders when obtaining such evidence. As the defendants had been convicted, the prosecution could not lodge an appeal regarding the question of whether the evidence concerned had been unlawfully obtained.</p> <p>(ii) All law enforcement officers had to act in accordance with the law and covert surveillance had long been one of the investigation techniques. Nevertheless, the monitoring of the authorisation of covert surveillance could be further studied in the examination of legislative proposals on covert surveillance.</p>
	<p>(e) Whether any abuse of covert surveillance had been identified in the past.</p>	<p>(iii) Covert surveillance had long been subject to internal monitoring, and the work of the law enforcement agencies concerned had generally been commended by the society. Nevertheless, the Administration had an open mind on the mechanism for monitoring covert surveillance. The Administration would listen to the views of the public on the issue when the legislative proposal on covert surveillance was examined.</p>

<b>Major Area</b>	<b>Concerns and queries raised by Members</b>	<b>Administration's response</b>
		<p>(iv) The Order only regulated covert surveillance. It did not provide law enforcement agencies with any new power.</p> <p>(v) There had not been any complaint about abuse of covert surveillance since reunification.</p>
	<p>(f) Whether CE could, through the issuance of an executive order, direct law enforcement officers to perform unlawful acts.</p>	<p>(vi) Law enforcement officers could not be directed to act in breach of the law.</p>
	<p>(g) Whether information obtained in covert surveillance would be provided to Mainland public security officials and state security officials.</p>	<p>(vii) Intelligence was exchanged with the law enforcement agencies of other jurisdictions in combating transnational crime.</p>

Council Business Division 2  
Legislative Council Secretariat  
26 January 2006