

For information

**Administration's Response to the
Legislative Council Secretariat's Research Report on Parliamentary
Monitoring System on Intelligence Agencies in Selected Places**

PURPOSE

This paper sets out the Administration's response to the research report prepared by the Legislative Council (LegCo) Secretariat on "Parliamentary monitoring system on intelligence agencies in selected places" dated 30 May 2008, as requested by the LegCo Panel on Security.

BACKGROUND

2. The research report prepared by the LegCo Secretariat sets out the findings of a comparative study on certain aspects¹ of the mechanisms adopted by four selected overseas legislatures² and the LegCo in Hong Kong for monitoring government intelligence agencies, and points to the lack in Hong Kong of a mechanism comparable to those in the four selected overseas jurisdictions for monitoring local intelligence activities. At the meeting on 3 June 2008, the LegCo Panel on Security discussed whether Hong Kong should consider allowing LegCo to monitor the local government intelligence agencies, and requested the Administration to provide a response.

DIFFERENT SITUATION IN HONG KONG

3. The findings of the LegCo Secretariat's research should be viewed in context, having regard to the unique situation of Hong Kong: the intelligence activities that are subject to parliamentary oversight in the

¹ The following aspects of the monitoring mechanisms are discussed in the report—

- (a) nature, functions and powers;
- (b) composition and appointment;
- (c) accountability to the legislature;
- (d) access to sensitive information; and
- (e) public disclosure of sensitive information.

² The four overseas legislatures covered by the research are –

- (a) the House Permanent Select Committee on Intelligence of the House of Representatives of the United States Congress;
- (b) the Parliamentary Joint Committee on Intelligence and Security of the Parliament of Australia;
- (c) the Intelligence and Security Committee of the United Kingdom; and
- (d) the Security Intelligence Review Committee of Canada.

four selected overseas jurisdictions are distinctively different from the intelligence activities carried out by the Government agencies in Hong Kong. For the four selected overseas jurisdictions covered by the research, the parliamentary monitoring mechanisms primarily focus on intelligence activities that pertain to national security, with particular emphasis on the respective policies and functions of the national government relating to national defence and foreign affairs. This is not the case in Hong Kong. The intelligence gathering activities of our law enforcement agencies (LEAs), including the interaction with their overseas counterparts, are strictly confined to matters related to the maintenance of internal law and order. Effective controls and safeguards, both statutorily and administratively by way of internal guidelines of LEAs, are already in place to ensure that the gathering and handling of intelligence by LEAs in Hong Kong are conducted lawfully and properly.

CONTROLS OVER THE LEAS' INTELLIGENCE GATHERING AND HANDLING ACTIVITIES

LEAs' remit specified under law

4. The remit and duties of the LEAs are set out clearly under the law of Hong Kong³. Actions taken by the LEAs in the discharge of their law enforcement functions are governed strictly within the confines of the respective legislation. Specifically, the collection, processing and use of intelligence for law enforcement purpose are already subject to various applicable statutory provisions, including the relevant provisions of the Basic Law, the Hong Kong Bill of Rights Ordinance (Cap. 383), the Personal Data (Privacy) Ordinance (Cap. 486) and the Interception of Communications and Surveillance Ordinance (ICSO) (Cap. 589).

Stringent control over intrusive covert operations

5. The conduct of intrusive covert operations (which include both interception of communications and covert surveillance) by the LEAs, as one of the means to obtain intelligence, is regulated strictly by the ICSO. Under the statutory regime, all public officers are prohibited from carrying out any interception or covert surveillance operations, either directly or indirectly, or through any other person or otherwise, unless the

³ The relevant ordinances include the Police Force Ordinance (Cap. 232), the Independent Commission Against Corruption Ordinance (Cap. 204), the Customs and Excise Service Ordinance (Cap. 342), the Immigration Service Ordinance (Cap. 331), etc. In addition, the LEAs are also entrusted with various functions (and the associated powers) under different legislation, either by specific reference or implication.

operations are conducted pursuant to a prescribed authorization under the ICSO. Only designated LEAs⁴ are allowed to obtain authorisation from the relevant authority. The authority would be the panel judges in the case of interception and more intrusive covert surveillance, or designated senior officers of the LEAs in the case of less intrusive covert surveillance. Each operation must be fully justified for the purpose of preventing or detecting serious crime or protecting public security, and the tests of proportionality and necessity must be met. Comprehensive safeguards for the protection of products obtained from such operations are also provided under the ICSO.

6. As an independent statutory oversight authority under the regime, the Commissioner on Interception of Communications and Surveillance (C/ICS) is established under the ICSO to oversee the LEAs' compliance with relevant requirements. In addition to his oversight duties over the LEAs, C/ICS has a statutory duty to receive applications for examination from individuals who suspect that they are subjects of interception or covert surveillance, and to notify, as appropriate, the applicants and any other subjects if the covert operation had indeed been carried out by an officer of an LEA without the authority of a prescribed authorization. The statutory requirement for the tabling of C/ICS's Annual Report in LegCo also provides a means by which LegCo monitors the lawful and proper conduct of relevant covert operations carried out by the specified LEAs. As an illustration, the LegCo Panel on Security had two meetings with Security Bureau on C/ICS's Annual Report 2006 and also met with C/ICS directly. C/ICS's Annual Report 2007 was also tabled at the LegCo sitting of 11 February 2009.

Complaint system against alleged misconduct of LEAs

7. In addition to the legal confines or statutory control framework above, the LEAs are also made subject to a combination of statutory and administrative oversight mechanisms. Whilst C/ICS is the designated oversight authority in respect of covert operations carried out by the LEAs under the ICSO (see paragraph 6 above), complaints against improper use of personal data by the LEAs will be handled by another statutory authority, namely the Privacy Commissioner for Personal Data. Moreover, all LEAs have put in place departmental mechanisms for handling complaints from members of the public against their offices or staff. Individuals aggrieved by the actions of an LEA may lodge

⁴ Four LEAs are specified under the ICSO – i.e. Hong Kong Police Force, Independent Commission Against Corruption, Customs and Excise Department and Immigration Department. Among them, Immigration Department is only specified for covert surveillance operations.

complaints against the department concerned through the established complaint channels. An LEA officer who has exercised his powers improperly is subject to disciplinary action, and criminal sanction will be pursued if his conduct is in contravention of the criminal law.

SUITABILITY OF APPLYING PARLIAMENTARY OVERSIGHT

8. As explained in paragraph 3 above, the scope of intelligence activities carried out by the Government agencies in Hong Kong is very different from that of the intelligence activities in the four overseas jurisdictions under study which are subject to parliamentary oversight. The overseas oversight bodies covered by the research focus primarily on matters related to national security and defence, which are not applicable to Hong Kong. Hence, it would not be appropriate to impose the parliamentary oversight mechanism adopted in the four selected overseas jurisdictions in Hong Kong.

9. Rather, the intelligence gathering activities of our LEAs are restricted to matters related to the maintenance of law and order in Hong Kong, and they are already subject to stringent regulation, including the dual regulation by the statutory and administrative control mechanisms. LegCo is playing an important role under the existing control mechanism. It examines C/ICS's Annual Report, or discusses policy issues relating to maintenance of law and order at the Panel on Security, etc.

CONCLUSION

10. Having regard to the functions and powers of the LEAs in Hong Kong, and the various statutory and other safeguards that are already in place, we do not see the need for another oversight authority regarding the intelligence activities of the LEAs. That being the case, we will remain vigilant at all times to ensure the lawful and proper exercise of powers and execution of functions by the LEAs, and will consider measures to further improve on the control mechanisms if necessary.

Security Bureau
February 2009