

**For discussion  
on 3 March 2009**

## **Legislative Council Panel on Security**

### **Annual Report 2007 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance**

#### **Information Paper by the ICAC on issues arising from LPP Cases 1 to 4 in Chapter 5 of the Report**

#### **PURPOSE**

In response to the questions raised by Members of the Security Panel at its meeting held on 16 February 2009, this paper provides further information relating to the issues raised in Chapter 5 of the Annual Report 2007 (**the Report**) to the Chief Executive by the Commissioner on Interception of Communications and Surveillance (**C/ICS**).

#### **BACKGROUND**

2. During the special session of the Security Panel Meeting held on 16 February 2009, Members asked that further information be provided, including information regarding actions taken by the management of the ICAC (**the management**) against its officers arising from the cases in which information which might be subject to legal professional privilege (**LPP**) might have been obtained, as mentioned in Chapter 5 of the Report.

3. In view of the concern raised regarding whether the ICAC has infringed LPP in the four cases mentioned in the Report, it is relevant to note that in the Report, C/ICS has confirmed that only one of the four cases is a sure case where information subject to LPP was actually obtained. Having listened to the intercepted call in LPP Case 3, C/CIS “did not find that it

really contained information subject to LPP” (paragraph 5.70). He has also listened to the intercepted calls in LPP Case 4 and considered that “the panel judge (**PJ**) was over cautious in revoking the authorization” (paragraph 5.76).

4. Pursuant to Part 1 of Schedule 3 of the Interception of Communications and Surveillance Ordinance (**ICSO**), an affidavit supporting an application for the issue of a judge's authorization (**JA**) for interception must include an assessment by the applicant regarding the likelihood that any information which may be subject to LPP will be obtained by carrying out the interception. Depending on the assessment provided, the PJ will decide if further condition is imposed in approving the authorization. The further condition may require that the monitoring exercise be put on hold pending the PJ's re-assessment when information which may be subject to LPP is likely to be obtained. During the course of interception authorized to be carried out under a JA where no further condition is imposed, if any information which may be subject to LPP has been or is likely to be obtained, the matter must be reported to the PJ as a '*material change of circumstances*'. Paragraph 120 of the Code of Practice (**COP**) requires that any operation that is likely to involve LPP information must be brought to the attention of C/ICS.

### **Responsibility to Protect LPP**

5. The ICAC has long recognized the importance of protecting information which might be subject to LPP. Even before the enactment of the ICSO, the ICAC had adopted the practice of screening out any suspected LPP information and withholding the same from investigators. As a long-standing practice, information which might be subject to LPP is never included in the summaries compiled of information obtained from intercepted materials. Pursuant to a destruction policy designed to protect privacy and to minimize intrusion, the intercepted products and related records are destroyed soonest practicable within a specified period of time. Thus the notion that intercepted materials should not be kept any longer than necessary and that the summaries would not contain information which might be subject to LPP is already ingrained in the mind of ICAC officers responsible for such operations.

## **Responsibilities for ICSO Implementation**

6. With the enactment of ICSO, the destruction of intercepted products became a legal requirement. Section 59(2)(b) of ICSO and paragraphs 124 and 169<sup>1</sup> of COP further reinforced the need to destroy as soon as practicable any intercepted product that contains information which is subject to LPP. The ICAC recognizes the statutory functions of C/ICS under the ICSO including, in particular, his duties to oversee the compliance by law enforcement agencies (**LEA**) and their officers with the relevant requirements. The ICAC also recognizes that it is its responsibility to assist C/ICS in performing his functions and discharging his duties. At the same time, the ICAC notes that, as pointed out by C/ICS in paragraph 5.9 of the Report, “the ICSO and the COP are silent on the details of some practical aspects of how to deal with a situation where LPP information might possibly be obtained...”. LPP Cases 2 and 3 brought to the management’s attention the need to have clearer internal procedures for handling LPP-related records. In the aftermath of these two cases, taking into consideration of the advice given by C/ICS, the management subsequently implemented a set of detailed procedures for the guidance of ICAC officers (see paragraph 32(i) below).

7. To implement the destruction policy, the interception system was designed in such a way that computerized recordings of intercepted products are automatically destroyed within a specified period by way of a pre-programmed mechanism which is a built-in function of the system. Special technical arrangements have to be made by a dedicated team if preservation of any recording is required. The summaries in paper format have to be destroyed manually within a specified period as soon as its retention is no longer necessary pursuant to the requirement of s.59(1)(c) of the ICSO.

8. Within the ICAC, the day-to-day supervision over the operation of the ICSO regime is the direct responsibility of an Assistant Director (**AD**),

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<sup>1</sup> The COP was first issued on 9.8.2006, revised on 29.10.2007 and further revised on 9.2.2009. The existing paragraph 124 was known as paragraph 121 in the 2006 edition and paragraph 124 in the 2007 edition; and paragraph 169 was known as paragraph 158 in the 2006 edition and paragraph 165 in the 2007 edition.

who, in 2007, was also tasked with other investigative and operational support duties. During the inspection visit by C/ICS, the AD and his team were responsible for assisting C/ICS in his examination and answering any queries during the course of the examination. The command structure of the Operations Department is such that the AD reports to the Director of Investigation (Government Sector) (**D/GS**) who in turn reports to the Head of Operations (**H/Ops**), who is directly responsible for the work of the Operations Department including that of the Director of Investigation (Private Sector). The Commissioner, Independent Commission Against Corruption (**C, ICAC**) has overall responsibilities over the performance of the Operations Department as well as the two other constituent departments of the ICAC. D/GS, H/Ops and ultimately C, ICAC as senior management of the ICAC all have responsibilities over ICSO implementation.

9. In 2007, one of the four Principal Investigators (**PIs**) under the command of the above-mentioned AD dealt with the implementation and administration of all matters relating to the ICSO. This PI was assisted by two Sections each headed by a Chief Investigator (**CI**). The actual day-to-day operation of ICSO matters was handled by these two Sections. In April 2008, a new Compliance Assurance Group, headed by a dedicated PI, was established. Although administratively the Compliance Assurance Group comes under the supervision of the AD, it conducts inquiries into alleged cases of 'irregularity' or 'non-compliance' independently of the AD and reports directly to D/GS. The relevant command structure for 2007 and 2009 are respectively provided in **Annex A-1** and **A-2**.

### **Circumstances Calling for Management Action**

10. ICAC officers are expected at all times to be diligent in carrying out their duties and demonstrate responsibility, a positive attitude and a standard of performance and conduct commensurate with their rank and experience. Officers involved in implementing ICSO are expected to be vigilant in dealing with information which may be subject to LPP. They must fully observe the requirements of the ICSO and the COP as well as the internal guidelines laid down by the ICAC, and they are expected to be

prompt and alert in responding to requests by C/ICS to facilitate the fulfilment of his statutory duties.

11. The administration of different management actions to deal with performance and misconduct issues depends on the circumstances of individual cases. In broad terms, acts which breach no specific rules or instructions but constitute inappropriate judgement, omissions or other inadequate performances will be dealt with by counselling and management advice. Any act which contravenes rules or instructions, where there is a blatant neglect of proper conduct and discipline, or which cast doubt on an officer's integrity, will be regarded as misconduct and dealt with by invoking the ICAC disciplinary procedures.

12. The terms and conditions of an ICAC officer's employment contract provides that C, ICAC may terminate the service of an officer or not renew his agreement if he is not satisfied with the conduct and performance of the officer. An officer is also liable to disciplinary action including dismissal if he wilfully refuses to perform his duties or in any manner misconducts himself. Detailed information on how the ICAC applies management actions and disciplinary procedures is at **Annex B**.

13. In respect of the LPP cases in issue, actions have been taken by the management against four ICAC officers in view of their inadequacies in performance or misconduct in violation of the relevant requirements as revealed in LPP Cases 2 and 3 as summarized in **Annex C**. Three officers were given advice whereas one officer was given both advice and warning. Relevant details of the two cases and the circumstances of taking such actions are set out in paragraphs 14 to 25 below. No management action against any officer was taken in respect of LPP Cases 1 and 4.

### **LPP Cases 2 and 3**

14. LPP Cases 2 and 3 arose from the same investigation but were related to two separate telecommunications facilities (two separate telephone

lines). Actions were taken by the management against a total of four officers in these two cases:

- advice and warning were given to one Acting Investigator; and
- advice was given respectively to one AD, one PI and one CI.

15. The circumstances leading to LPP Cases 2 and 3 are set out in paragraphs 5.29 to 5.48 (LPP Case 2) and paragraphs 5.49 to 5.71 (LPP Case 3) of the Report. C/ICS and Members have respectively raised concern mainly on the following matters, namely, (a) non-compliance on the part of an listener; (b) non-preservation of the recorded intercepted product to verify the content of the REP-11 report; and (c) non-preservation of the summaries.

### **Irregularity and non-compliance on the part of an ICAC listener (LPP Case 2)**

16. ICAC investigation revealed that on a day in November 2007, a listener, an Acting Investigator, was conducting listening to various calls intercepted from a number of facilities. When he first listened to the first suspected LPP call (LPP Case 2), he did not realize that the call might contain LPP information. He continued to listen to 20 odd more calls. For the purpose of preparing summaries, he re-listened to a number of calls including the first suspected LPP call in the afternoon and it was only then that he realized that the call might contain LPP information.

17. The listener then reported the incident to his supervisor who, in compliance with one of the conditions of the JA, instructed him to put on hold the monitoring exercise pending re-assessment by the PJ (see paragraph 4 above). However, subsequent enquiries revealed that the listener had re-listened to a non LPP call after receiving the said instruction from his supervisor. The listener explained that the reason for re-listening to that particular call was that he was trying to clarify certain facts. He wrongly understood that he was permitted to re-listen to the calls which had already been listened to and which did not contain any suspected LPP information.

### **Actions Taken Against the ICAC listener Concerned**

18. With regard to his inability to identify the first suspected LPP call in the first instance (paragraph 16 refers), the Acting Investigator was strongly advised<sup>2</sup> by his supervising PI that he should exercise vigilance in carrying out his duties and should be mindful of any information which might be subject to LPP or of a journalistic nature. Such advice was given after taking into consideration of the circumstances in which he conducted the listening process and the absence of any previous adverse record in dealing with ICSO matters. With regard to his act of re-listening referred to in paragraph 17 above, the management considered that the conduct of the Acting Investigator constituted a breach of a condition imposed by the PJ and non-compliance with his supervisor's instruction. This constituted a case of misconduct. The Acting Investigator was issued a warning<sup>3</sup> by his AD for his apparent lack of vigilance in conducting telecommunications interception operation and having acted in a manner which constituted a 'non-compliance' with the requirement under the relevant JA.

### **Non-Preservation of Recorded Intercepted Products (first suspected LPP call) and Non-Preservation of Summaries (LPP Cases 2 & 3)**

19. In paragraph 5.33 of the Report, C/ICS stated that during his inspection visit to the ICAC in November 2007, he had required the preservation of all relevant records relating to the inadvertent obtaining of LPP information to facilitate his investigation of LPP Case 2, including the recorded intercepted product. In paragraph 5.47 of the Report, C/ICS commented that even if the Responsible Officer (**RO** – who was the AD referred to in paragraph 8 above) had misunderstood his requirement made in the inspection visit, the ICAC should know his requirement by the time it received his letter of 10 December 2007 which required the preservation of all such relevant records. In paragraph 12.7 of the Report, C/ICS concluded that he had not had sufficient evidence to justify a finding of recalcitrance or

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<sup>2</sup> See item 1 of Annex C

<sup>3</sup> See item 2 of Annex C

wilful obstruction on the part of the officers concerned and the effect was that his investigation of the main issue was obstructed or distracted and somewhat hindered and delayed.

20. The RO was demanded to give a written account on his version of the incident and his explanation for not preserving the relevant records relating to the suspected LPP information as required by C/ICS. According to the RO, during the inspection visit by C/ICS, a number of application documents including the REP-11 report concerning LPP Case 2 were examined. During the ensuing conversation, the RO heard from C/ICS who commented that the case had been properly handled. The RO also heard from C/ICS his advice regarding the handling of future discovery of suspected LPP information including documentation of all actions taken upon its discovery and that in the future all relevant records pertaining to the suspected LPP calls should be preserved to facilitate C/ICS's examination. However, the RO misunderstood C/ICS on two counts. First, he misunderstood that C/ICS was satisfied with the way LPP Case 2 was handled to the extent that the intercepted materials of that case needed not to be preserved any longer. In other words, he misunderstood that the preservation requirement only applied to 'future' cases (i.e. excluding LPP Case 2). Second, it did not occur to him that C/ICS required for preservation of all records relating to a LPP case, including the summaries. He thought C/ICS only required records which contained LPP-related information. He had all the while been under the impression that the summaries needed not to be preserved because they would not contain any LPP information. The PI and the CI who were also present in the inspection visit shared the RO's perception.

21. Owing to his wrongful understanding, the RO did not make special arrangement to preserve the recording containing the first suspected LPP call and so the recording was destroyed according to the system design on 26 November 2007. The RO, however, made special arrangement to preserve the recording of the second suspected LPP call (LPP Case 3) and he actually wrote to notify C/ICS on 28 November 2007 of such preservation. Because of his wrongful belief that there was no need to preserve the summaries for C/ICS's examination, he did not cause the destruction process of the summaries to be suspended.



22. On the basis of the facts known, the management saw no evidence of any deliberate attempt to block C/ICS's access to the protected products, or any ulterior motive on the part of the RO for not preserving the summaries. The management, however, considered the state of affairs to be unsatisfactory and that the ICAC officers concerned should be more vigilant in the discharge of their duties.

23. In considering the appropriate action to be taken against the officers involved in handling LPP Cases 2 and 3, the following factors are relevant :-

- (a) the explanation given by the RO for not meeting the requirements by C/ICS;
- (b) the prevailing destruction policy which demanded destruction "as soon as reasonably practicable";
- (c) whether there existed specific guideline / procedures for preserving intercepted products and related records;
- (d) in view of (b) and (c) above, whether the RO should reasonably be expected to meet the requirement of C/ICS for preservation of the relevant records; and
- (e) any wilful intent on the part of the RO in not meeting C/ICS's requirements.

The management considered that there was clear inadequacy and a lack of alertness on the part of the RO and his team but their performances did not constitute a misconduct. The RO was personally advised of his inadequacy by C, ICAC in the presence of D/GS and was reminded of the need to be vigilant. The same advice<sup>4</sup> was relayed to the PI and the CI assisting the RO.

24. Concurrently, based on experiences gained and comments and advice given by C/ICS, the management started to revise the procedures for handling discovery of suspected LPP information. The result is a new set of

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<sup>4</sup> See item 3 of Annex C

procedures which entails the retention of not only the recording of the suspected LPP call but also, in the case of a revocation by a PJ, all subsequent calls until the time of actual disconnection of the telecommunications facility; the summaries and other relevant records as required by C/ICS. In accordance with the requirement of C/ICS, all these materials would be kept for eighteen months or until the completion of his enquiry. Details of the measures taken to improve the implementation of ICSO are provided in paragraph 32 below.

25. The above mentioned problems first arose in 2007 (there being no LPP cases intercepted in 2006) when LEA officers still lacked experience in handling various scenarios involving LPP. The management considers that the RO and his team were too rigid in adhering to the internal destruction policy. The management also considers that they must be more alert to the requirements of C/ICS and be able to demonstrate their full co-operation with C/ICS in the discharge of his statutory functions and duties.

### **LPP Case 1**

26. In the main, two issues have been identified by C/ICS arising from LPP Case 1, namely, 'unauthorized interception of telecommunications for 105 minutes' and 'delaying matters by not submitting a case report to C/ICS'. The ICAC has provided further information and given its views over these issues in paragraphs 9 to 11 and 13 of its Information Paper prepared for the Security Panel Meeting on 16 February 2009.

27. While C/ICS considers that an unauthorized interception of 105 minutes did occur between the time of revocation (1115 hours) and time of disconnection (1300 hours), the ICAC notes that its officers only became aware of the revocation at 1125 hours. By 1130 hours, the cessation process was completed as far as the ICAC is concerned. The process to cause disconnection took time and the 'unauthorized interception' was unintentional.

28. The ICAC stood ready to provide a report in detail to C/ICS but in light of legal advice and in consultation with Security Bureau (SB), did not feel able to do so under section 54 of the ICSO (a non-compliance report). The ICAC provided such a report to C/ICS not long after he had made such requirement under section 53 of the ICSO. The reluctance to file such a report under section 54 of the ICSO was caused by an inconclusive discussion between the SB, Department of Justice (DOJ), C/ICS, the PJs and other LEAs over the power of the PJs to revoke a JA upon the receipt of an REP-11 report. The late submission of the report, however, was not the cause of the destruction of the intercepted materials and related records. The relevant materials had already been destroyed on 22 March 2007 in accordance with the then destruction policy before C/ICS visited the ICAC on 28 March 2007 to inspect this case and before he asked the ICAC to file a section 54 report in June 2007.

29. In LPP Case 1, the management saw no basis to take any action against any ICAC officer. Instead, the management had taken necessary actions to cause procedural changes to expedite the disconnection process.

#### **LPP Case 4**

30. The essential facts of LPP Case 4 are described in paragraphs 5.72 to 5.81 of the Report. C/ICS concluded that the “ICAC acted swiftly to disconnect the interception after it was notified of the panel judge’s revocation at 1729 hours. There can be no valid criticism that ICAC had delayed the steps taken to effect the disconnection”. C/ICS’s examination of ICAC’s processing of LPP Case 4 was completed in June 2008. By the time, ICAC had revised its procedures for handling situations in which suspected LPP information was obtained through interception. C/ICS was satisfied with these procedures and recommended that these procedures be adopted by other LEAs.

31. In LPP Case 4, no management action was taken against any ICAC officer.

## **MEASURES TAKEN TO IMPROVE THE IMPLEMENTATION OF THE ICSO**

32. In light of the experiences gained from past implementation of ICSO including in particular the insight gained from the handling of the LPP cases in 2007, and having reflected over the comments and advice received from C/ICS, the management has introduced the following improvement measures:

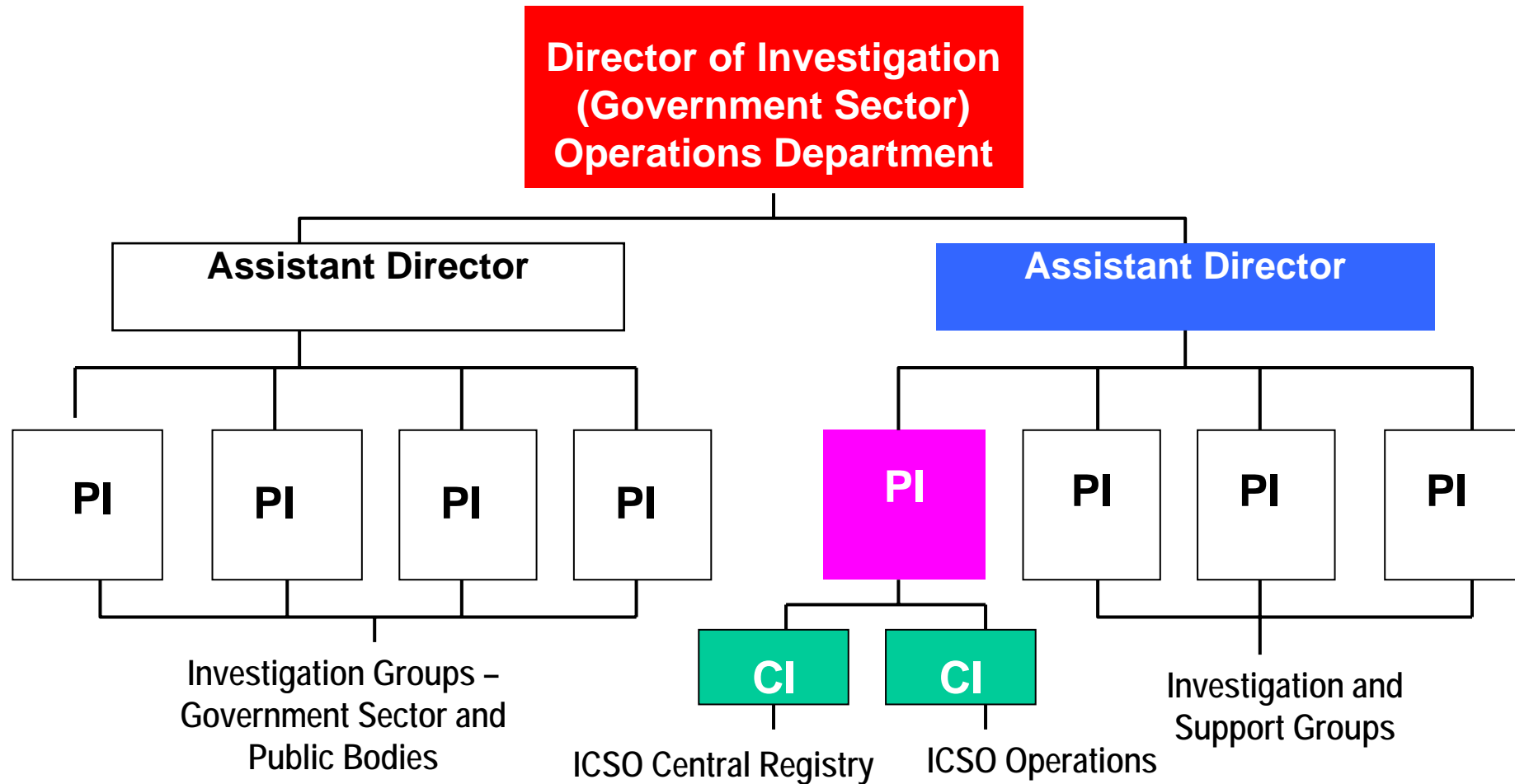
- i. New Procedure - Revising and refining the existing procedures in handling information which may be subject to LPP inadvertently obtained through telecommunications interception. A new set of procedures was adopted in January 2008 and these procedures are kept under constant review;
- ii. Training - Conducting training sessions, briefings and workshops to all concerned officers including new recruits with a view to enhancing their understanding of the legislative requirements in relation to ICSO duties. By the end of 2008, nine dedicated briefing sessions/workshops had been organized to coach listeners, frontline investigators and their supervisors on the implementation of the ICSO, including the operations of the new procedures. In addition, ICSO and its compliance have been incorporated as a training module at different stages of the training programme; and
- iii. Dedicated Group to deal with ICSO-related matters - with effect from April 2008, additional resources have been deployed and a new compliance assurance group, headed by a dedicated PI, has been in operation to ensure full compliance with the law and relevant requirements. He conducts inquiries into alleged 'irregularity' or 'non-compliance' independently of the AD and reports directly to D/GS .

## **WAY FORWARD**

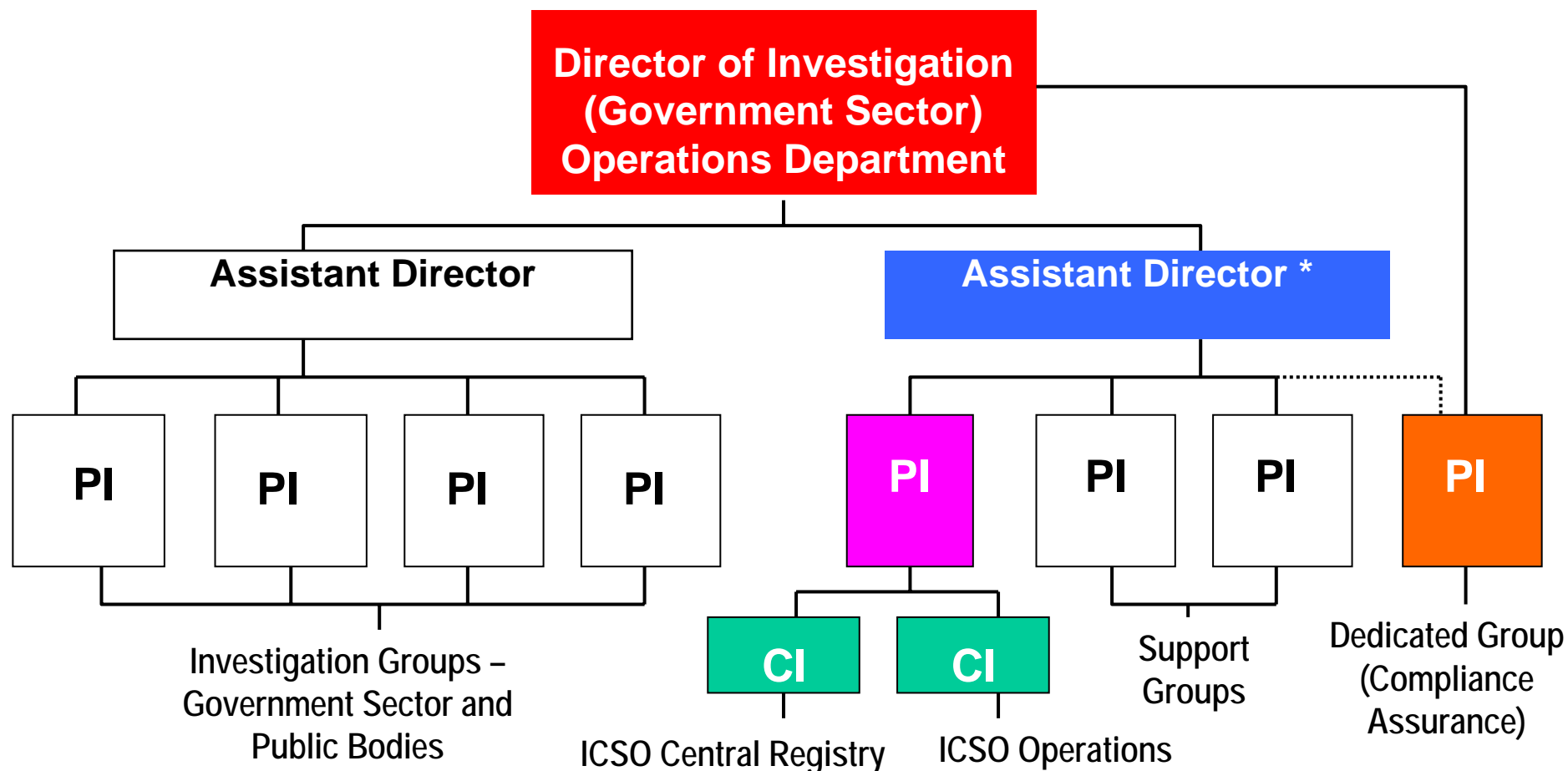
33. The ICAC welcomes the comments and suggestions by C/ICS and Members of the Legislative Council and will reflect further on them, whilst remaining vigilant in discharging its duties in relation to ICSO. The ICAC will continue to work closely with the Administration to address issues of common concern including, inter alia, the clarification of relevant legal provisions. It is hoped that outstanding issues identified since the implementation of the ICSO will be satisfactorily addressed in the forthcoming comprehensive review on ICSO. Clarification of these issues will be highly beneficial to the frontline officers concerned. In respect of cases which involve LPP information, the ICAC will adhere to the procedures mentioned in paragraph 32 (i) above and, where we need advice on ICSO implementation, will make extra efforts to consult C/ICS, DOJ and the Administration.

**Independent Commission Against Corruption**  
**2 March 2009**

Command Structure under Director of Investigation (Government Sector)  
of the Operations Department, ICAC in 2007



**Command Structure under  
Director of Investigation (Government Sector)  
of the Operations Department, ICAC in 2009**



\* Since January 2008, the investigative duties of the AD have been transferred to another investigation branch. In April 2008, a dedicated group, headed by a PI, was established and although administratively comes under the supervision of the AD, it conducts inquiries into alleged 'irregularity' or 'non-compliance' independently and reports directly to Director of Investigation (Government Sector).

**Management Actions and Disciplinary Procedures**

1. The ICAC observes government rules and regulations in the application of management action to correct and deter flaws found in performance and acts of misconduct in a timely manner. These actions include administering management advice, and instituting summary or formal disciplinary action, depending on the circumstances of individual cases. Management actions taken against an officer will provide a point of reference for the purposes of appointment, promotion and contract renewal.
2. A management advice is issued by a supervisory officer if an officer is less than efficient or productive in general conduct, ability, temperament or attitude to work. The shortcoming should normally be dealt with as soon as it is observed either by speaking to the officer or writing to him. Normally management advice is issued by an officer one rank higher than the officer receiving the advice.
3. Minor misconduct or minor infringements of government rules, official instructions, codes or departmental practices will be dealt with by invoking summary disciplinary action of verbal or written warnings. Verbal warnings may be used for minor and isolated cases of misconduct where an officer has not been warned previously. Written warning may be used for cases of minor misconduct where an officer commits the same misconduct on more than one occasion, or several different actions of misconduct over a short period of time, or where the circumstances and gravity of the case so warrant.
4. Formal disciplinary action resulting in punishment ranging from reprimand, serious reprimand, financial penalty, reduction in rank, termination of service or dismissal is administered in accordance with the provisions and procedures stipulated in the Public Service (Administration) Order against an officer in the event of repeated minor misconduct, serious misconduct or criminal conviction. Formal disciplinary action will normally be instigated against an officer for misconducts related to abuse of official position, willful or



intentional neglect of official instructions, conflict of interest, or acts that reflects badly on the integrity of the officer.

5. For both summary and formal disciplinary proceedings, the principles of natural justice must be followed. Any officer who is aggrieved by any disciplinary action by the ICAC may, within 14 days of the award of the punishment, appeal through their line of command to the Commissioner, ICAC. An aggrieved officer may also opt to seek other remedies including legal redress by instituting proceedings against the Commissioner, ICAC.

**Management and Disciplinary Actions Taken against ICAC Officers Arising from Suspected LPP Cases 2 and 3**

**(Chapter 5, Annual Report 2007 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance)**

<b>Item</b>	<b>LPP Case No.</b>	<b>ICAC officer receiving advice/warning</b>	<b>Date of advice/warning</b>	<b>Brief facts leading to the taking of administrative/disciplinary actions</b>	<b>Advice/warning given</b>	<b>Remarks and reference in Chapter 5 of C/ICS's Report</b>
1.	2	Acting Investigator  ICSO duty: Listener	7.1.2008 (Advice)	The listener had failed to identify that information which might be subject to LPP was contained in an intercepted call to which he listened.	The officer was strongly advised to be vigilant in carrying out his duties of a listener and must be mindful of any information which might be subject to LPP or of a journalistic nature.	This matter is subject to review pending completion of C/ICS's investigation on this case. (para. 5.35 of the Report)
2.	2	Acting Investigator (the same listener as above)  ICSO duty: Listener	20.6.2008 (Warning)	The listener had continued to listen to the interception facility, contrary to the instruction of his supervisor and had breached the further conditions imposed by the panel judge in approving the respective authorization.	The officer was warned for apparent lack of vigilance in conducting telecommunications interception operation and having acted in a manner which constituted a 'non-compliance' under the ICSO.	C/ICS has not made any decision pending completion of his review on this case. (para 5.48 of the Report)

Item	LPP Case No.	ICAC officer receiving advice/warning	Date of advice/warning	Brief facts leading to the taking of administrative/disciplinary actions	Advice/warning given	Remarks and reference in Chapter 5 of C/ICS's Report
3.	2 & 3	Assistant Director  ICSO duty: Responsible Officer	29.2.2008 (Advice)	While dealing with C/ICS's requirement of preserving the tape and relevant records of an interception case from which information that may be subject to LPP was obtained, the officer had failed to appreciate the requirement and had allowed the recording and summaries to be destroyed in accordance with established procedures.	There is clear inadequacy on the part of the Responsible Officer and his team in failing to comprehend C/ICS's requirement. It is the responsibility of the law enforcement agency to comply with C/ICS's requirement and where in doubt, the officer should take the initiative to verify what C/ICS's requirement entails.	This advice was given to the officers concerned with ICSO duties to ensure their full compliance with the requirement of C/ICS regarding the preservation of all relevant records in facilitating inquiries conducted by him. (para 5.38 of the Report)
Principal Investigator	29.2.2008 (Advice)					
Chief Investigator  ICSO duty: Team members assisting the Responsible Officer in C/ICS's inspection visit	29.2.2008 (Advice)					