

Legislative Council Panel on Security

Review of the Interception of Communications and Surveillance Ordinance

PURPOSE

This paper briefs Members on the scope of the comprehensive review on the Interception of Communications and Surveillance Ordinance (ICSO) being conducted by the Administration.

BACKGROUND

2. Interception of communications and covert surveillance operations are critical to the capability of our law enforcement agencies (LEAs) in combating crime and protecting public security. The ICSO, enacted in August 2006, provides a statutory regime for the conduct of interception of communications and covert surveillance by the LEAs. The Administration has all along given full support to the panel judges and the Commissioner on Interception of Communications and Surveillance (the Commissioner) in discharging their functions. The operation of the ICSO regime has been smooth on the whole since the commencement of the ICSO in August 2006.

3. In discharging his oversight function, the Commissioner has made many invaluable recommendations to enhance the operation of the ICSO regime. For those recommendations which do not require legislative amendments, the Administration has implemented them as far as practicable and amended the Code of Practice as required. Regarding the remaining recommendations, the Administration will study them in detail in the comprehensive review of the ICSO.

THE REVIEW

4. The Administration has formed an inter-departmental working group to conduct the comprehensive review of the ICSO. In undertaking the review, we have taken into account the recommendations of the Commissioner and the operational experience of the LEAs. The ensuing paragraphs set out the major issues included in the review.

Power of Panel Judges and Authorizing Officers

5. The Commissioner has raised a number of observations and recommendations in his annual reports to enhance the power of panel judges and authorizing officers. For example, as the Commissioner pointed out, under section 34 of the ICSO, a panel judge may issue a device retrieval warrant authorizing the retrieval of any of the devices authorized to be used under a prescribed authorization. The Commissioner considers that in case a device retrieval warrant has been discontinued, say, because the relevant purpose was achieved or the circumstances have become impractical for the LEA to retrieve the device specified in the warrant, there is a need for the LEA to report the discontinuance to the panel judge for him to revoke the device retrieval warrant. However, there is no express provision in the ICSO with regard to the revocation of a device retrieval warrant. The Commissioner recommends that there should be express provision in the ICSO to require the LEA to report to the panel judge the discontinuance of a device retrieval warrant and for the panel judge to revoke the device retrieval warrant accordingly.

6. Another issue relates to the requirement under section 57(4) of the ICSO which provides that the relevant authority must revoke the prescribed authorization after receiving a report on the discontinuance of operation under section 57(3). The Commissioner found that there were a number of cases where the report of discontinuance reached the relevant authority at a time when the authorization had already expired, for instance, when the operation was discontinued one or two days before the natural expiry of the authorization and there were public holidays in between the discontinuance and the receipt of the report by the relevant authority. The Commissioner recommends that amendments to the ICSO be considered to cater for the “anomaly” where the relevant authority is obliged under section 57(4) to revoke a prescribed authorization which no longer has effect, when discontinuance report is received by the relevant authority after the natural expiration of a prescribed authorization.

7. Other major legislative proposals relating to the power of panel judges and authorizing officers include the lack of express provision to enable a panel judge to impose conditions as he considers fit when confirming an emergency authorization, partially revoking a prescribed authorization and revoking a prescribed authorization after considering an

REP-11 report¹ on material change in circumstances.

8. We share the Commissioner's views that it will be helpful to enhance the ICSO regime and introduce legislative provisions where necessary to cover the specific areas identified by the Commissioner. We shall work on the legislative proposals accordingly. For example, to strengthen the functions and powers of panel judges and authorizing officers, we shall consider imposing a statutory requirement on the LEAs to report material changes in circumstances to the panel judges or authorizing officers for all types of covert operations, and adding express provision to enable the panel judges and authorizing officers to revoke the authorizations upon receipt of such reports if they consider that the conditions in section 3 of the ICSO are no longer met. We shall also consider the Commissioner's recommendation of providing panel judges with the power to stay or suspend the revocation for a reasonable period of time so that the interception under the prescribed authorization that is to be revoked before the actual termination of the interception would not be considered unauthorized.

Protection of Legal Professional Privilege and Proactive Monitoring of Intercept Products and Related Records

9. The ICSO makes it clear that the obtaining of intercept products must be for the purpose of preventing or detecting serious crime or protecting public security, and the panel judges and authorizing officers must be satisfied that the proportionality and necessity tests are met before issuing the respective authorization. To strike a balance between combating serious crimes and protecting the privacy of individuals, the ICSO regime contains stringent safeguards at all stages of the covert operations – from the initial application to the execution of the authorization, and throughout the oversight process. Under section 59 of the ICSO, all intercept products are required to be destroyed as soon as their retention is not necessary for the relevant purpose of the prescribed authorization.

10. Among the safeguards applicable to the intercept products, the protection of “legal professional privilege” (LPP) stands out most prominently in the ICSO. LPP protects client-lawyer communications from disclosure to a client's prejudice. In regulating covert operations

¹ One of the standard conditions imposed by panel judges on prescribed authorizations is that all material changes in circumstances must be reported to the panel judges. LEAs report such material changes in circumstances to the panel judges through REP-11 reports.

conducted by the LEAs, the ICSO regime has put in place a stringent system with the strict purpose and intent to prevent the passing of any LPP materials to the investigators of the LEAs and prohibit any possible reference or use of the LPP materials for the investigation and certainly not in any legal proceedings. There are specific provisions in the ICSO and the Code of Practice for protecting LPP information. For example, schedule 3 to the ICSO requires the LEA officer applying for an authorization to set out in his affidavit the likelihood of the operation obtaining information which may be subject to LPP so that the relevant authority could take that into account in considering the application. Section 31 of the ICSO prohibits the conduct of covert operations in respect of lawyers except in exceptional circumstances (e.g. where the lawyer is a party to a serious crime or the communications concerned are conducted for the furtherance of a criminal purpose). Furthermore, section 59 of the ICSO requires that intercept product containing any information that is subject to LPP must be destroyed as soon as reasonably practicable. In addition, paragraph 120 of the Code of Practice requires that dedicated units separate from the investigation team must screen out any information protected by LPP, and to withhold such information from the investigators. It also requires the LEAs to notify the Commissioner of any covert operation that is likely to involve LPP information as well as other cases where LPP information has been obtained, albeit inadvertently.

11. It is a standard condition imposed by the panel judges in all prescribed authorizations that the LEAs should report any material changes in circumstances (which may include, for example, the inadvertent obtaining of information which might be subject to LPP). In addition, for authorizations which are assessed to have the likelihood of obtaining information which may be subject to LPP, the panel judge may further require the LEA to report to him any incident in which LPP information might have been obtained. When reporting such an incident to the panel judge, the LEA will give a summary in the REP-11 report of what has been obtained that could have a LPP dimension. An issue arises as to whether the panel judge should be empowered to listen to the intercept product concerned, if he so decides, when considering whether the conditions for the continuance of the interception are still met. While giving the panel judge such a power can serve the purpose of verifying the content of the REP-11 report made by the LEA, some see the need to balance this measure against the privacy and security implications.

12. In this regard, the Commissioner has proposed a checking

system whereby he and his designated officers be empowered to check the intercept product against the LEA's REP-11 report to ensure that the content of the report truly represents the intercept product as heard by the listener. Apart from checking cases of special interest, the Commissioner also proposes that they be empowered to check any other intercept products on a random basis so as to address the possibility that the LEA does not fulfil its duty and make a report to the panel judge and the Commissioner on the possible involvement of LPP information. The Commissioner believes that such a checking system also helps ensure that there is no unauthorized interception.

13. Section 53 of the ICSO now empowers the Commissioner to require any officer or any other person to provide him with any information for the purpose of performing his oversight function. Nevertheless, as there is no express provision in the ICSO empowering the Commissioner to listen to LPP or any intercept products, the Commissioner's proposal for his checking of intercept products would have to be considered in the context of legislative amendments to the ICSO.

14. Any proposal to amend the ICSO to require the preservation of all intercept products for a longer time than required for the relevant purpose of the prescribed authorization or for purposes other than the relevant purpose of the prescribed authorization would need to be justified and balanced against the need to protect the privacy of individuals. We are particularly mindful about the LEAs' statutory duty to protect products that may contain LPP information and access to such products because the right to confidential legal advice is a fundamental right protected by the Basic Law. We fully respect the need for the panel judges and the Commissioner to listen to the intercept products to enhance the performance of their functions. The more complex matter is to devise detailed measures and procedures that will restrict such power and function to the panel judges and the Commissioner's office, while the public remain assured that the arrangements will not add intrusion into their privacy, infringe their right to confidential legal advice or increase the risk of unauthorized disclosure or unintended leakage. We shall consult panel judges and the Commissioner on the detailed proposals.

Possible Involvement of Journalistic Material

15. The ICSO requires an applicant to state in the affidavit or statement in writing in support of an application the likelihood of obtaining information which may be contents of any journalistic material

(JM). The Commissioner observes that there is no formal or practical requirement for the LEAs to report to the Commissioner incidents where information which may involve JM has been obtained. At present, the LEAs are willing to and have taken it upon themselves to report to the Commissioner incidents which involve or likely to involve the obtaining of JM on their own initiative. This notwithstanding, we will consider whether and how practical guidelines should be set out to standardize the LEAs' handling and reporting of such incidents.

Mechanism for examination and notification by the Commissioner

16. The Commissioner has made a number of comments regarding the examination and notification mechanisms under sections 43 to 48 of the ICSO. For example, sections 44(6) and 48(3) of the ICSO stipulate that the Commissioner shall notify the relevant person of any interception or covert surveillance which has been carried out by an officer of a department without the authority of a prescribed authorization only when he considers that the giving of such a notice would not be prejudicial to the prevention or detection of crime or the protection of public security. However, if no notice is given to the applicant under the above scenario, especially after a prolonged period of time, the applicant may appreciate that he was or still is a subject of one or more statutory activities, albeit unauthorized and would accordingly take avoidance action. This situation is what section 44(6) of the ICSO is apparently aimed to prevent.

17. We accept that there is a need to enable the Commissioner to give an appropriately worded notice to the applicant under such a scenario without defeating the object of section 44(6). We shall consider how this concern as well as the other comments raised by the Commissioner regarding the examination and notification mechanisms should be addressed, such as reviewing section 45 of the ICSO on the need to give the Commissioner the legal basis for giving a notice under section 44(5) where the Commissioner is not going to proceed with the examination sought by the applicant because the situations covered by section 45(1) and 45(2) arise.

Time Gap between the Revocation under sections 24(3)(a)(i) and (4), 27(3)(a)(i) and (4) and 58 of the ICSO and the Actual Discontinuance of the Operation

18. The Commissioner has raised repeated concerns regarding the time gap between the revocation of a prescribed authorization and the

actual discontinuance of an operation resulting from the time required for the communication of the revocation to the officers responsible for discontinuing the operation. For instance, where an LEA provides an arrest report to a panel judge under section 58 of the ICSO and the panel judge revokes the prescribed authorization with immediate effect, the ongoing interception or surveillance carried out in the interim period between the time of the revocation and the actual cessation of the operation would, in the Commissioner's view, become an unauthorized activity. The same problem also arises in some other scenarios where an authorization is revoked before cessation of the operation.

19. To address the concerns, we have worked out pragmatic measures to minimize the time gap between the revocation of the prescribed authorization and actual cessation of the operation. We will need to consider a way to stipulate a reasonable time for completing the discontinuance process and ensuring that the operation conducted during the reasonable time gap will not be caught as irregularity.

Subject-based authorizations

20. Section 29(1)(b)(ii) of the ICSO provides the legal basis for the issue of subject-based authorizations by the panel judges. A subject-based authorization may authorize the interception of communications made to or from any facility that the subject is using or "is reasonably expected to use". The detailed procedures for the addition of facilities pursuant to a subject-based authorization are set out in paragraphs 109 - 110 of the Code of Practice, which require such an addition to be approved by an officer not below the rank equivalent to that of a senior assistant commissioner of police. The Code also requires the LEAs to report to the panel judges the determination of an application for inclusion of one or more facilities pursuant to a subject-based authorization, whether the determination is in favour of the applicant or not.

21. The Commissioner commented in one of his annual reports that there was no express provision in the ICSO for the addition of facilities or approving officer or his ranking, nor was there any definition of the scope or extent of facilities that could be so added. The Commissioner recommends that the ICSO should have an express provision on the ambit of facilities that can be added by the LEAs and the corresponding reporting requirements, so as to avoid any ambiguity in the legality of facilities added by the LEAs.

22. Taking into account the Commissioner's advice, we have incorporated suitable procedural requirements into the Code of Practice. We shall consider further whether we can provide for the detailed procedural requirements in the ICSO, bearing in mind the need to strike a balance between maintaining the necessary flexibility of subject-based authorizations and ensuring proper control on the issue of such authorizations.

Review of Panel Judge's Determination

23. At present, the ICSO does not provide for any mechanism for the LEA to apply to a panel judge for a review of the latter's determination. We shall explore the option of establishing a statutory review mechanism under which a panel judge may, upon application by an LEA, review his own determination. This would enable the LEAs to have an opportunity to explain their grounds for making the applications to the panel judges in person where necessary.

Other issues

24. On the Commissioner's advice, we shall also review the following provisions of the ICSO in the process of the review:

(a) Access to ICSO-related Records kept by Panel Judges

25. Section 53(2) of the ICSO empowers the Commissioner to request a panel judge to provide him with access to any of the documents or records kept under section 3 of schedule 2 to the ICSO. In performing his oversight function, the Commissioner has requested the panel judges to provide him with copies of certain types of documents kept under section 3 of schedule 2. However, the panel judges have doubts on whether the ICSO permitted them to provide any copy of the documents to the Commissioner on a routine basis in the absence of an express statutory provision authorizing them to do so. The Commissioner recommends that the issue be resolved by amending the ICSO to make express provision that a copy of documents kept under section 3 of schedule 2 to the ICSO could be made available to the Commissioner by the panel judges upon the Commissioner's request. In considering the Commissioner's proposal, we will need to take into account necessary technology and security arrangements in the regular transfer of large volumes of copies of the documents on a routine basis, the additional burden imposed on the offices of the panel judges, and the feasibility of other practical means that may satisfy the Commissioner's

concern in facilitating his oversight function.

(b) Title of the Ordinance and the Commissioner

26. The Commissioner has suggested that the ICSO be re-titled to eliminate any misunderstanding of the purposes of the ICSO and the functions of the Commissioner. The Commissioner has suggested that the titles be changed to become Protection Against Unlawful Interception of Communications or Surveillance Ordinance and the Commissioner on Protection against Unlawful Interception of Communications or Surveillance respectively.

(c) Provision of Information in the Annual Reports

27. Section 49(2) of the ICSO provides that the Commissioner's annual report to the Chief Executive is to set out various matters respectively in relation to interception and covert surveillance. Such information includes, for example, the number of persons arrested, the major categories of offences, etc. The Commissioner considers that the separate listing of such information respectively for interception and covert surveillance may be prejudicial to the prevention or detection of crime or the protection of public security. For example, setting out the major categories of offences respectively in relation to interception and covert surveillance may help criminal minds to evaluate what kind of investigation activity would more likely be employed by LEAs for a particular kind of offence.

(d) Discrepancy in the English and Chinese versions of section 26(1) of the ICSO

28. Section 26 of the ICSO provides for the application for confirmation of a prescribed authorization or renewal issued or granted upon oral application. The Commissioner observed that there was discrepancy in the meaning of the English and Chinese versions of section 26(1). While the English version provides that the head of department shall cause an officer to apply for confirmation of the prescribed authorization as soon as reasonably practicable after the time when the prescribed authorization or renewal is *issued or granted*, the Chinese version stipulates that such confirmation should be done as soon as reasonably practicable after the prescribed authorization or renewal has *taken effect*.

WAY FORWARD

29. The major proposals as set out in paragraphs 5 to 28 above summarized the advice of the Commissioner and suggestions of the LEAs. A number of the issues involve the panel judges, and we shall consult the panel judges on these issues. In considering the review, we shall strive to improve the operation of the ICSO regime without compromising the effectiveness of the LEAs in combating serious crimes and the privacy of individuals. We shall take into account the comments of Members, panel judges and the Commissioner in formulating the recommendations.

Security Bureau
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