

# 立法會 *Legislative Council*

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## **Panel on Security**

### **Background brief prepared by the Legislative Council Secretariat for the meeting on 6 July 2010**

#### **Review of the Interception of Communications and Surveillance Ordinance**

#### **Purpose**

This paper gives background information and summarizes relevant discussions of the Panel on Security ("the Panel") on the review of the Interception of Communications and Surveillance Ordinance (Cap. 589) ("ICSO").

#### **Background**

##### Interception of Communications and Surveillance Ordinance

2. According to Article 30 of the Basic Law, the needs of public security and the investigation of criminal offences are the only two grounds on which relevant authorities may inspect communications in accordance with legal procedures. ICSO, which came into force on 9 August 2006, provides for a stringent regulatory regime for the interception of communications and specified kinds of covert surveillance operations by public officers, to ensure that the law enforcement agencies ("LEAs") pay attention to and observe the privacy and other rights of the public while they combat crimes and protect public security.

3. Safeguards for privacy are provided under ICSO at various stages of operations conducted by LEAs, from the initial application, execution of the authorization, to the subsequent oversight. The salient features of the regulatory and monitoring mechanism established under ICSO are given in the following paragraphs.

##### *Authorization*

4. Before LEAs carry out any interception operations, they must first obtain an authorization from an authorizing authority which is either a panel judge appointed in accordance with ICSO or a designated senior LEA officer. While a judge's authorization is required for "more intrusive" covert surveillance operations, the authorizing authority for "less intrusive" covert surveillance operations is a senior officer of the LEA concerned.

### *Conditions for authorization*

5. The conditions for authorization are strictly defined under section 3 of ICSO. The purpose of the operation must be confined to the prevention or detection of serious crime or the protection of public security. Where serious crime is concerned, ICSO sets different thresholds for interception of communications and covert surveillance. Since the degree of intrusiveness of interception of communications is generally higher, only offences for which the maximum penalty is imprisonment of not less than seven years count as serious crime. As for covert surveillance, offences that count as serious crime is imprisonment of not less than three years or a fine of not less than one million dollars. In addition, the tests of proportionality and necessity must be met, including the requirement that the purpose of the operation cannot reasonably be fulfilled by other less intrusive means.

### *Execution*

6. During the execution of an authorization, LEAs must ensure that the conditions for the continuance of a prescribed authorization are complied with. ICSO also requires LEAs to continuously review the situation.

### *Products of operation*

7. The materials obtained by interception of communications and covert operations may contain sensitive private information about the targets and other innocent persons. Improper use or disclosure of such materials would result in a serious infringement of their privacy. ICSO therefore strictly regulates the handling of such materials by LEAs. ICSO expressly requires heads of LEAs to make arrangements to ensure that the extent to which such materials are disclosed, the extent to which they are copied and the number of such copies made should be limited to the minimum that is necessary; that all practicable steps are taken to ensure that such materials are protected against unauthorized or accidental access, processing or erasure; and that such materials are destroyed as soon as their retention is not necessary for the relevant purpose of the authorization.

### *Oversight mechanism*

8. In addition to the various safeguards mentioned above, throughout the entire process (whether before, during or after the operation), the compliance of LEAs with the relevant requirements is subject to independent oversight as well as LEAs' regular internal reviews. ICSO especially provides for a Commissioner on Interception of Communications and Surveillance ("the Commissioner"), who is a serving or former judge of the Court of First Instance or Court of Appeal, or a former permanent judge of the Court of Final Appeal.

9. The Commissioner has the power to review all relevant records of LEAs, to require any public officer or other person to answer any question and provide information, and to require any officer to prepare a report on any case. The Commissioner may make recommendations to the heads of LEAs, and to the Secretary for Security on what should be included in the Code of Practice issued by

the Security Bureau ("SB") under section 63 of ICSO for the purpose of providing practical guidance to law enforcement officers in respect of matters specified under ICSO. If deemed necessary, the Commissioner may report to the Chief Executive ("CE"), the Secretary for Justice, or one of the panel judges appointed under ICSO. LEAs are under a statutory obligation to report to the Commissioner any irregularities under ICSO.

10. The Commissioner also acts on complaints to determine whether any interception or covert surveillance has been carried out without proper authority. He may notify the applicant if he has found in the applicant's favour and order the Government to pay compensation. Furthermore, he may give notice and award compensation to the subject of an operation which has been carried out without proper authority even where the subject has not made any complaint. This serves as another powerful incentive for LEAs to comply with the relevant requirements.

11. Interception of communications and covert surveillance operations are by their nature secret. Nonetheless, to enhance transparency and accountability, ICSO provides that the Commissioner must submit an annual report to CE, who will cause it to be tabled before the Legislative Council ("LegCo"). The report will cover such matters as the various aggregate statistics and the compliance of LEAs with the relevant requirements of ICSO.

#### Review of ICSO

12. In the course of examination of the Interception of Communications and Surveillance Bill in 2006, the Administration undertook, inter alia, to -

- (a) provide the Panel with an updated version of the Code of Practice from time to time;
- (b) report to the Panel the outcome of the review of the intelligence management system of LEAs;
- (c) report to the Panel the results of the Administration's review on issues raised in the Commissioner's annual reports to CE; and
- (d) provide by the end of 2009 the Administration's report on its comprehensive review of the implementation of the whole ICSO, after the Commissioner submitted his second full-year report to CE by end June 2009.

#### **Relevant discussions of the Panel**

13. Since the commencement of ICSO on 9 August 2006, the Commissioner has submitted three annual reports to CE. The first one covered the period from 9 August 2006 to 31 December 2006, the second and third ones covered respectively the whole years of 2007 and 2008. SB, in consultation with LEAs concerned, had studied the matters raised therein and briefed the Panel at five meetings on the results of the Administration's study of matters raised in the annual reports.

14. The major views and concerns raised by members during previous deliberations are summarized below.

Protection of information subject to legal professional privilege and privacy of members of the public

15. Members expressed deep concern about how LEAs handled interception products involving information which might be subject to legal professional privilege ("LPP"). Members considered that LEAs should be mindful of the need to protect LPP in carrying out interception or surveillance operations, as failure to observe the requirements of ICSO regarding handling of LPP would have an adverse impact on LEAs' reputation.

16. The Administration responded that section 59(2)(b) of ICSO and paragraphs 124 and 169 of the Code of Practice provided adequate safeguards for protected products, including those containing information subject to LPP. ICSO and the Code of Practice required that any intercepted product containing information that was subject to LPP should be destroyed as soon as reasonably practicable.

17. Members were also concerned whether LEAs carried out interception in a responsible manner and complied closely with the requirements and spirit of ICSO to ensure that the intrusion into privacy of the subject of the prescribed authorization, albeit a suspected offender, would not be continued unless it was necessary and reasonable.

18. The Administration advised that the checks and balances built into the ICSO regime had struck a balance between protecting privacy and LPP, while allowing LEAs to carry out covert operations for the prevention and detection of serious crimes and the protection of public security in warranted circumstances. Whenever an application was made to the relevant authority (panel judge or authorizing officer) for a prescribed authorization, the relevant authority would assess whether the conditions for issue of the prescribed authorization as set out in section 3 of ICSO were met. Applications for renewal of prescribed authorizations were also subject to stringent requirements. As pointed out by the Commissioner in his Annual Report 2006, where the LEA concerned came to the view that circumstances did not warrant the continuation of an operation, it would proactively discontinue the operation and inform the panel judge concerned as soon as practicable. This would help protect the privacy of the individuals concerned.

19. Some members requested expanding the content of the Commissioner's annual report to include the numbers of applications received from and authorizations issued or renewed for respective LEAs, as well as more detailed information on renewal cases.

20. The Administration responded that it was concerned that the provision of too much information in the Commissioner's annual report might reveal the investigation capability of LEAs, and would be prejudicial to the prevention and detection of crime and the protection of public security. Notwithstanding this concern, the

Administration undertook to refer members' request to the Commissioner for consideration.

21. Hon James TO suggested that consideration should be given to engaging officers or organizations independent from any LEAs, such as the Office of the Commissioner on Interception of Communications and Surveillance, to be responsible for listening to interception products. In his view, this measure would serve as a safeguard against LEAs since staff members of the Commissioner's Office would screen out any suspected LPP information before passing it to the investigators. The Administration responded that it would consider the suggestion when conducting the comprehensive review of ICSO.

22. Some members noted from the Commissioner's Annual Report 2007 that some conversations containing LPP information or possible LPP information might touch on matters not directly related to legal advice but useful for crime prevention or detection purposes relating to the offence for which the prescribed authorization was granted or to other offences. They also noted that the Commissioner had raised a query on whether LPP information obtained in this manner could be used for criminal investigation purposes. These members sought clarification on whether information subject to LPP, if obtained, could be used for crime prevention or detection purposes.

23. The Administration responded that it had already made its stance clear to LEAs that any information subject to LPP was to remain privileged notwithstanding that it had been obtained pursuant to a prescribed authorization. As a matter of fact, ICSO required that any telecommunications interception product should not be admissible as evidence in any proceedings before any court and should not be made available to any party to these proceedings. LEAs must fully observe the requirements of ICSO in their handling of LPP matters.

24. Hon LEUNG Kwok-hung was of the view that penalty should be introduced for non-compliance with the provisions in ICSO or the Code of Practice. He suggested that the Administration should consider making the use of LPP information obtained through interception of telecommunications for any purposes a criminal offence.

#### Commissioner's power and authority to listen to interception product and the need for legislative amendments

25. Members were concerned about the queries regarding the legitimacy or propriety of the Commissioner's listening to interception products including those that contained, or might contain, LPP information, which had been lawfully obtained by LEAs, for the purposes of performing his functions under ICSO. Noting that the Commissioner had made a recommendation to the Administration for amending ICSO to give express power and authority to the Commissioner to listen to interception products held by LEAs, members asked whether the Administration was prepared to do so.

26. The Administration admitted that there was an absence of express and unambiguous provisions in ICSO empowering the Commissioner to listen to

interception products. It was also doubtful whether section 53(1)(a) regarding the power of the Commissioner to require any person to provide information for the purpose of performing his functions under ICSO could be construed as having the effect of empowering the Commissioner to listen to interception products. With the existence of legal uncertainty, the Commissioner considered that the safest way was to amend ICSO to allow the Commissioner and the staff designated by him to conduct the checking. The Administration advised that it would carefully consider the recommendations raised in the Commissioner's annual reports, including the one in connection with the Commissioner's authority to listen to interception products which required legislative amendments for implementation, during the comprehensive review of ICSO. The Administration noted that the Commissioner would cease listening to the recordings before it took any final decision on the matter. Nevertheless, LEAs would continue to preserve the recorded products containing LPP information or possible LPP information and other related materials for the purposes of the Commissioner's inquiry or performance of his oversight functions under ICSO.

#### Law enforcement officers' compliance with the statutory requirements

27. Some members were concerned that the cases of irregularities as reported in the Commissioner's Annual Report 2007 which involved inadvertent obtaining of LPP information had aroused grave concern in the community, including the legal sector, over law enforcement officers' understanding of and compliance with the relevant requirements under ICSO.

28. The Administration advised that although there were some instances of non-compliance with the requirements of ICSO by individual officers of LEAs, such non-compliance was mainly due to inadvertence, or the lack of thorough understanding of or familiarity with the relevant requirements of ICSO. While the Commissioner had identified some inadequacies of individual law enforcement officers in their handling of suspected LPP cases, he considered that such inadequacies were glitches at the initial stage of the implementation of the ICSO regime. The Commissioner had also stated in his Annual Report 2007 that he was satisfied that LEAs were on the whole compliant with the ICSO requirements, and that they had been cooperative in assisting the Commissioner in the performance of his oversight and other functions under ICSO.

29. Noting the Commissioner's comments in his Annual Report 2008 about the attitude of a law enforcement officer, which was described as "arrogant and presumptuous, bordering and recalcitrance", some members expressed grave concern about the overall attitude of law enforcement officers towards the Commissioner's oversight and review functions. These members enquired about the measures taken by the Administration to address the attitude problem among law enforcement officers and to ensure their strict compliance with ICSO and full cooperation with the Commissioner.

30. The Administration advised that it noted the Commissioner's comments about the attitude of a law enforcement officer in a reported case involving an irregularity due to system failure in effecting discontinuance resulting in the facilities covered by five prescribed authorizations being disconnected six to 18 minutes after the expiry

of the authorizations. Although the way how the officer responded to the Commissioner's enquiry appeared to be unsatisfactory, it was an isolated incident possibly due to the fact that the officer had not got used to the Commissioner's oversight authority. It should be noted that the Commissioner had stated in his Annual Report 2008 that the heads of LEAs had provided him with all the assistance he needed, enabling him to perform his review and oversight functions.

31. The Administration further advised that with the benefit of more practical experience gained in the implementation of ICSO, LEAs were more readily able to offer useful comments from the operational perspective in response to recommendations and suggestions made by the Commissioner for improving the checking mechanism. Regarding recommendations made by the Commissioner to LEAs, the LEAs concerned had accepted them in full or were actively identifying improvement measures to address the Commissioner's concerns. SB had also amended the Code of Practice, as and where appropriate, to resolve common issues that had implications across LEAs.

#### Differences in the interpretation of provisions in the legislation

32. Members were concerned that LEAs and panel judges held different interpretations on a number of provisions in ICSO, such as the power of panel judge to revoke an authorization that had been granted, to impose additional conditions when confirming an emergency authorization and to revoke a device retrieval warrant. Some members queried whether LEAs were challenging the rule of law, the power of panel judges and the views of the Commissioner. They took the view that if LEAs questioned the power of the panel judge to revoke the prescribed authorization, LEAs should seek remedy from the court, such as to quash the panel judge's decision of revocation or his refusal to allow the continuance of the prescribed authorization or to seek for a declaration of a proper interpretation of the statutory provision.

33. The Administration responded that although the annual reports had revealed that there was occasional disagreement between LEAs and the Commissioner on the interpretation of certain provisions of ICSO, there was no question of LEAs being disrespectful to panel judges or the Commissioner. In the LPP case referred to in the Commissioner's Annual Report 2007, the LEA concerned had accepted the panel judge's view and discontinued the covert operation as soon as reasonably practicable.

34. The Administration reiterated that LEAs had adopted pragmatic measures to address the Commissioner's concerns and resolve the differences in views between them regarding the power of panel judge to revoke an authorization. SB had also amended the Code of Practice where appropriate to address the issues identified in the annual reports. As some of the Commissioner's recommendations arose from different interpretations of certain provisions in ICSO, the Administration would consider those recommendations in detail when it conducted the comprehensive review of ICSO. The review would provide an opportunity for the Administration to identify further legislative improvements to ICSO.

35. The Administration stressed that notwithstanding the possible need to refine ICSO when the Administration next reviewed the legislation, the issues raised by the

Commissioner in his annual reports had either been dealt with by pragmatic solutions, such as revision of the Code of Practice, or did not have any substantial impact on the operation of the existing regime.

### Political monitoring

36. Some members were concerned whether law enforcement officers would carry out interception of communications for political monitoring under the name of crime investigation. They suggested that the Commissioner should consider disclosing in his annual report any political monitoring identified.

37. The Administration stressed that law enforcement officers had always conducted interception and covert surveillance operations strictly in accordance with the law and only for the purpose of prevention or detection of crime or protection of public security. There was no question of covert operations under ICSO being conducted for political monitoring. The Administration reiterated that the scope of information to be included in the annual report was a matter for the Commissioner. The Administration would convey the views of members to the Commissioner for his consideration.

### **Latest development**

38. At the meeting on 7 December 2009, the Administration informed members that it had embarked on a comprehensive review of ICSO. The Administration would revert to the Panel on the preliminary outcome of the review on 6 July 2010.

### **Relevant papers**

39. Members may wish to refer to the following minutes of meetings and papers for details of the discussions -

#### Minutes

- (a) minutes of the meeting of the Panel on Security on 6 November 2007 (LC Paper No. CB(2)707/07-08);
- (b) minutes of the meeting of the Panel on Security on 6 December 2007 (LC Paper No. CB(2)1496/07-08);
- (c) minutes of the meeting of the Panel on Security on 16 February 2009 (LC Paper No. CB(2)1208/08-09);
- (d) minutes of the meeting of the Panel on Security on 3 March 2009 (LC Paper No. CB(2)1420/08-09);
- (e) minutes of the meeting of the Panel on Security on 7 December 2009 (LC Paper No. CB(2)1778/09-10);

Papers

- (f) Administration's paper entitled "Results of study of matters raised in the Annual Report 2006 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance" (LC Paper No. CB(2)181/07-08(03));
- (g) Administration's responses to issues raised at the Panel meeting held on 6 November 2007 (LC Paper No. CB(2)462/07-08(01)).
- (h) Administration's paper entitled "Results of study of matters raised in the Annual Report 2007 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance" (LC Paper No. CB(2)808/08-09(01));
- (i) Information paper provided by Independent Commission Against Corruption in response to issues raised in Chapter 5 of the Annual Report 2007 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance for the special meeting on 16 February 2009 (LC Paper No. CB(2)889/08-09(01));
- (j) Information paper provided by Independent Commission Against Corruption in response to issues raised by members at the special meeting on 16 February 2009 (LC Paper No. CB(2)990/08-09(01));
- (k) Administration's paper entitled "Results of study of matters raised in the Annual Report 2008 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance" (LC Paper No. CB(2)396/09-10(01)); and
- (l) Information paper prepared by the Independent Commission Against Corruption in response to issues raised in the Annual Report 2008 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance for the special meeting on 7 December 2009 (LC Paper No. CB(2)467/09-10(01)).

40. The above minutes of meetings and papers are available on the website of LegCo (<http://www.legco.gov.hk>).