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Panel on Security

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 3 January 2012**

**Results of Study of Matters Raised in the Annual Report
to the Chief Executive by the Commissioner
on Interception of Communications and Surveillance**

Purpose

This paper summarizes past discussions by the Panel on Security ("the Panel") on the results of study of matters raised in the annual reports to the Chief Executive ("CE") by the Commissioner on Interception of Communications and Surveillance ("the Commissioner").

Background

2. Under section 49 of the Interception of Communications and Surveillance Ordinance (Cap. 589) ("ICSO"), the Commissioner shall, for each report period, submit a report to CE. The report is to be submitted within six months after the expiry of the report period. CE shall cause to be laid on the table of the Legislative Council ("LegCo") a copy of the report.

3. In the course of examination of the Interception of Communications and Surveillance Bill in 2006, the Administration undertook, inter alia, to report to the Panel the results of the Administration's study of matters raised in the Commissioner's annual report to CE.

Deliberations of the Panel

4. Since the commencement of ICSO on 9 August 2006, the Commissioner has submitted five annual reports to CE. The results of the Administration's study of matters raised in the five annual reports have been discussed at the Panel meetings on 6 November and 6 December 2007, 16 February, 3 March and 7 December 2009, 29 November 2010, and 5 and 6 December 2011. The deliberations of the Panel are summarized below.

Compliance with the statutory requirements by officers of the law enforcement agencies

5. Concern was raised about the overall attitude of law enforcement officers towards the Commissioner's oversight and review functions. Information was sought about the measures taken by the Administration and the Independent Commission Against Corruption ("ICAC") to address the attitude problem among law enforcement officers and to ensure their strict compliance with ICSO and full cooperation with the Commissioner.

6. According to the Administration, the Commissioner's comments in his Annual Report 2008 were related to the attitude of a law enforcement officer in a reported case. The case involved an irregularity due to system failure in effecting discontinuance which resulted in the facilities covered by five prescribed authorizations being disconnected six to 18 minutes later than the expiry of the authorizations. Although the way in which the officer responded to the Commissioner's enquiry appeared to be unsatisfactory, it was an isolated incident due possibly to the fact that the officer was not used to the Commissioner's oversight authority. With the benefit of more practical experience gained in the implementation of ICSO, law enforcement agencies ("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. The Security Bureau ("SB") had amended the Code of Practice ("CoP") and relevant forms used by LEAs, as and where appropriate, to resolve common issues that had implications across LEAs.

7. Members were informed that ICAC was committed to ensuring ICAC officers' full compliance with the ICSO requirements in conducting interception and covert surveillance. In tandem with the introduction of a package of improvement measures, a dedicated Compliance Assurance Group had been set up to deal with ICSO-related matters. Although investigations into the cases of irregularities or non-compliance had not revealed any evidence of bad faith on the part of ICAC officers, the ICAC management agreed that officers should have been more vigilant in the implementation of ICSO and in responding to the Commissioner's enquiries or requests. ICAC would continue to render full cooperation and support to the Commissioner to facilitate his performance of the statutory functions under ICSO.

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

8. Concern was raised 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.

9. Members noted that section 59(2)(b) of ICSO and CoP provided safeguards for protected products, including those containing information subject to LPP. ICSO and CoP required that any intercepted product containing information that was subject to LPP should be destroyed as soon as reasonably practicable.

10. Information was sought on whether there were guiding principles for law enforcement officers to decide whether or not to discontinue an interception, when they came to notice that the operation might cover a telecommunications service used at an office of a lawyer or any telecommunications service known or reasonably expected to be known to be ordinarily used by a lawyer for the purpose of providing legal advice to clients.

11. Members were advised that officers were always reminded that they should exercise extreme care when making possible applications that concerned the premises and telecommunications services used by a lawyer. A risk assessment must be conducted if the interception might acquire information that might be subject to LPP. Officers were also reminded that LPP would apply if a lawyer was giving legal advice to a person who was suspected of having committed a criminal offence. Unless officers were fully satisfied that the

exceptional circumstances under section 31 of ICSO existed, they should not make an application for an authorization targetting these premises and telecommunications services. In all such exceptional cases, a panel judge's authorization must be obtained and justification for the proposed interception or covert surveillance should be provided in the affirmation or affidavit supporting the application.

12. There was a suggestion that the content of the Commissioner's annual report should be expanded 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.

13. According to the Administration, 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 would refer members' request to the Commissioner for consideration.

Journalistic material

14. Members noted that in 2009, the Commissioner received two reports, which involved three prescribed authorizations, on inadvertent obtaining of information which contained journalistic material. Information was sought about the measures to protect the source and content of the journalistic material. There was a view that the Administration should have a clear and well defined policy regarding the protection of journalistic material against access by LEAs for the purpose of investigation.

15. According to the Administration, ICSO required an applicant seeking authorization for interception or covert surveillance to state in the affidavit or statement in writing in support of the application the likelihood that any information which might be subject to legal professional privilege, or might be the contents of any journalistic material, would be obtained by carrying out the interception or covert surveillance. This allowed the relevant authority to take account of these factors when considering whether the issue of a prescribed authorization met the conditions set out in ICSO. For those cases which were assessed by a panel judge to have journalistic material implications, additional conditions were imposed to better protect the freedom of the media.

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

16. Members noted that the Commissioner had recommended since 2009 the amendment of ICSO to expressly authorize the Commissioner and his staff to examine and listen to interception products, and to inspect and listen to products of covert surveillance as and when necessary. While the Administration had been requested to adopt the proposal since 2009, no action had been taken to implement the recommendation. Members noted the Commissioner's concern that as most cases of non-compliance or irregularity had been reported by LEAs on a voluntary basis, expressly providing the Commissioner or his staff with the power to listen to interception products would enable the discovery of contravention of ICSO by LEAs and provide the necessary deterrence against any malpractice or concealment by LEAs. Some members called on the Administration to introduce amendments to ICSO as soon as possible and examine how the Commissioner's request for listening to interception products could be addressed, such as through administrative arrangements, in the interim.

17. According to the Administration, it had no objection in principle to the Commissioner's proposal of empowering him to listen to interception products. However, such power was not granted to similar supervisory authorities in other common law jurisdictions. The Administration was currently undertaking a comprehensive review of ICSO and consultation was being made with key stakeholders, including the legal professional bodies and panel judges. It would consider the recommendation in the context of the review. The Administration undertook to report to the Panel on its proposals to amend ICSO in the first half of 2012 after the review.

Differences in the interpretation of provisions in the legislation

18. Concern was raised over LEAs and panel judges having 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. Concern was also raised over whether LEAs were challenging the rule of law, the power of panel judges and the views of the Commissioner. There was a 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.

19. According to the Administration, the annual reports had revealed that there was occasional disagreement between LEAs and the Commissioner on the interpretation of certain provisions of ICSO. However, there was no question of LEAs being disrespectful to panel judges or the Commissioner. 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 amended CoP where appropriate to address the issues identified in the annual reports.

Political monitoring

20. 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.

21. The Administration advised members 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.

Relevant papers

22. A list of the relevant papers on the Legislative Council website is in the **Appendix**.

**Relevant papers on
Results of Study of Matters Raised in the Annual Report
to the Chief Executive by the Commissioner
on Interception of Communications and Surveillance**

Committee	Date of meeting	Paper
Panel on Security	6.11.2007 (Item V)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	6.12.2007 (Item I)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	16.2.2009 (Item I)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	3.3.2009 (Item IV)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	7.12.2009 (Item I)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	6.7.2010 (Item III)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	29.11.2010 (Item I)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	5.12.2011 (Item I)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	6.12.2011 (Item VII)	<u>Agenda</u> <u>Minutes</u>