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**Paper for the House Committee Meeting
on 27 February 2015**

**Legal Service Division Report on
the Interception of Communications and
Surveillance (Amendment) Bill 2015**

I. SUMMARY

- 1. The Bill** The Bill amends the Interception of Communications and Surveillance Ordinance (Cap. 589) (ICSO) to provide for —

 - (a) revocation or partial revocation of device retrieval warrants;
 - (b) partial revocation of prescribed authorizations;
 - (c) variation of conditions in prescribed authorizations;
 - (d) protected product obtained after revocation of prescribed authorization as properly obtained;
 - (e) the report by a department head of a failure to comply with a relevant requirement that is not due to the department's fault;
 - (f) empowerment of the Commissioner to require the provision of protected products and to delegate the power to examine them; and
 - (g) other textual amendments and related matters.

- 2. Public Consultation** According to the Administration, the views of key stakeholders have been taken into account before drawing up the legislative proposals.

- 3. Consultation with LegCo Panel** The Panel on Security was briefed on the progress of review of ICSO and was consulted on the proposals to amend ICSO on 2 July 2013. Members raised no objection to the Administration's proposals.

- 4. Conclusion** Members may wish to form a Bills committee to study the Bill in detail.

II. REPORT

The date of First Reading of the Bill is 11 February 2015. Members may refer to the Legislative Council (LegCo) Brief (File Ref: SBCR 14/2/3231/94) issued by the Security Bureau on 4 February 2015 for further details.

Object of the Bill

2. The Bill amends the Interception of Communications and Surveillance Ordinance (Cap. 589) (ICSO) to provide for —

- (a) revocation or partial revocation of device retrieval warrants;
- (b) partial revocation of prescribed authorizations;
- (c) variation of conditions in prescribed authorizations;
- (d) protected product obtained after revocation of prescribed authorization as properly obtained;
- (e) the report by a department head of a failure to comply with a relevant requirement that is not due to the department's fault;
- (f) empowerment of the Commissioner to require the provision of protected products and to delegate the power to examine them; and
- (g) other textual amendments and related matters.

Background

3. According to paragraph 2 of the LegCo Brief, the former Commissioner on Interception of Communications and Surveillance has, in discharging his oversight function, made a number of recommendations to enhance the effectiveness of the ICSO regime. The Bill implements some of the former Commissioner's recommendations that require legislative amendments.

Main Provisions of the Bill

Power to check Protected Products

4. Section 53(1)(a) of ICSO is amended to enable the Commissioner on Interception of Communications and Surveillance (the Commissioner) to require the

provision of any protected product¹, whether or not it contains any information that is or may be subject to legal professional privilege. The intention is to empower the Commissioner to examine, inspect and listen to protected products including those which concern cases of non-compliance or irregularity and cases involving information that is subject to legal professional privilege (clause 13(1)).

5. A new section 53A is added to allow the Commissioner to delegate the Commissioner's power to examine protected products to an officer working in the Commissioner's office who is responsible to the Commissioner (clause 14).

Ensure destruction of product

6. Section 59(1)(c) is amended to ensure the destruction of a protected product that is no longer required by the Commissioner after checking and after its retention is no longer necessary for the relevant prescribed authorization² and for the purpose of enabling compliance with any further requirement of the Commissioner (clause 19).

7. Due to the time gap that may occur between the expiry of a prescribed authorization and the imposition of the Commissioner's requirement under section 53(1)(a), it is not clear whether the head of the department concerned may decide to destroy a protected product before the imposition of any requirement by the Commissioner.

Products obtained after revocation of prescribed authorization but before actual discontinuance of operation

8. A new section 65A is added to require the head of a department concerned to make arrangements to ensure that an interception or covert surveillance concerned or the relevant part of such interception or covert surveillance is discontinued as soon as possible. Any protected product obtained after the revocation of a prescribed authorization or the relevant part of it and before the interception or covert surveillance is discontinued is to be regarded as having been obtained pursuant to the prescribed authorization (clause 20).

Partial revocation of prescribed authorization

9. Under the existing ICSO, there is no express provision for the partial revocation of a prescribed authorization. Section 57 presently provides only for the revocation of a prescribed authorization by the relevant authority. It is amended to

¹ Protected product is defined in section 2 as any interception product or surveillance product. In the same section, interception product is defined as any contents of a communication that have been obtained pursuant to a prescribed authorization for interception, including a copy of such contents. Surveillance product is defined as any material obtained pursuant to a prescribed authorization for covert surveillance, and including a copy of the material.

² Prescribed authorization is defined in section 2(1) to mean a judge's authorization, an executive authorization or an emergency authorization.

enable the revocation of part of a prescribed authorization. The relevant authority is further empowered upon partial revocation of a prescribed authorization to vary any terms and conditions in the prescribed authorization or to specify any new conditions (clause 16).

10. Similarly, section 58 is amended to allow partial revocation of prescribed authorization upon arrest of the subject of interception or covert surveillance and upon such partial revocation, the variation of terms and conditions in the prescribed authorization or the specification of any new conditions (clause 17).

11. A new section 58A is added to allow revocation of prescribed authorization in whole or in part where there is a material inaccuracy in the information provided for the purposes of an application for the prescribed authorization made under ICSO or an application for renewal or confirmation or there has been a material change in the circumstances on the basis of which a prescribed authorization has been issued. The officer of the relevant department must make a report to the relevant authority as soon as reasonably practicable after becoming aware of such inaccuracy or change in circumstances (clause 18).

Revocation of device retrieval warrant

12. The existing ICSO has no provision for the revocation of a device retrieval warrant. A new section 38A is added to allow the revocation in whole or in part of a device retrieval warrant. The panel judge³ is also empowered to vary the terms or conditions of a warrant or to specify any new conditions in the warrant (clause 9).

Power to add new conditions

13. Sections 24 and 27 are amended to empower the panel judge to specify new conditions when refusing to confirm an emergency authorization or when refusing to confirm a prescribed authorization or renewal issued or granted upon oral application (clauses 6 and 8).

Reporting non-compliance to the Commissioner

14. Section 54 is amended by adding a new subsection (2) imposing a duty on the head of any department to submit to the Commissioner a report if the head considers that there may have been a failure to comply with a relevant requirement in a case handled by the department but the failure is not due to the fault of the department or any of its officers (clause 15).

³ A panel judge is one of the eligible judges appointed by the Chief Executive on the recommendation of the Chief Justice to be panel judges for the purposes of ICSO.

Other textual amendments

15. Section 48(1)(a) is amended to specify that the Commissioner must notify the relevant person the month and year from which the unauthorized interception or covert surveillance concerned began. The meaning of "relevant person" is clarified by a new subsection (7) (clause 12).

16. Two discrepancies in the Chinese text in sections 23 and 26 are being corrected (clauses 5 and 7).

Commencement

17. The Bill, if passed, would come into operation upon publication in the Gazette.

Public Consultation

18. According to the Administration, the views of key stakeholders, including the Commissioner, the Panel Judges, the legal professional bodies, journalist associations and the Privacy Commissioner for Personal Data, have been taken into account when drawing up the legislative proposals. The stakeholders generally welcomed the enhancement of the Commissioner's oversight functions and empowering the Commissioner to check protected products. Some considered that safeguards were required to protect personal data privacy so that any intrusion as a result of the extended power would be justified and kept to the minimum necessary.

Consultation with LegCo Panel

19. As advised by the Clerk to the Panel on Security, the Panel was briefed on the progress of review of ICSO and the key features of the proposed amendment bill on 2 July 2013. Members in general supported the proposed legislative amendments. However, some members raised a number of issues including the number and ranking of staff who would assist the Commissioner to check the protected products, the protection of privacy of individuals, and the penalty for unauthorized interception of communications by law enforcement officers. There was also a view that the scope of the review of ICSO should cover non-government sector.

Conclusion

20. Members may wish to form a Bills Committee to study the Bill in detail. The Legal Service Division has sought clarification from the Administration on a few drafting issues and would issue a further report if necessary.

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