

## **Legislative Council Panel on Security**

### **Results of study of matters raised in the Annual Report 2015 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance**

#### **Purpose**

Pursuant to section 49 of the Interception of Communications and Surveillance Ordinance (the ICSO), the Commissioner on Interception of Communications and Surveillance (the Commissioner) submitted his Annual Report 2015 (the Report) to the Chief Executive in June 2016. This note sets out the Government's views on the matters raised in the Report.

#### **Background**

2. Interception of communications and covert surveillance operations are critical to the capability of our law enforcement agencies (LEAs) in combating serious crimes and protecting public security. The ICSO, enacted in August 2006 and amended in June 2016, provides a statutory regime for the conduct of interception of communications and covert surveillance by the LEAs. The Commissioner, appointed by the Chief Executive on the recommendation of the Chief Justice pursuant to section 39 of the ICSO, is responsible for overseeing the compliance by the LEAs with the relevant requirements of the ICSO.

3. The Report covers the period from 1 January 2015 to 31 December 2015 (the report period). The Chief Executive has caused a copy of the Report to be laid on the table of the Legislative Council on 30 November 2016.

4. The Security Bureau, in consultation with the LEAs concerned, has studied the matters raised in the Report.

#### **General Observations**

5. The ICSO provides a statutory framework for the conduct of interception of communications and covert surveillance that aims to strike a balance between the need for prevention and detection of serious crimes and the protection of public security on the one hand and the need for safeguarding the privacy and other rights of individuals on the other. It provides a stringent

regime with checks and balances to ensure that the LEAs' covert operations are carried out in accordance with the requirements of the ICSO.

6. During the report period, interception of communications and covert surveillance operations carried out by the LEAs continued to be subject to the tight regulation of the statutory framework under the ICSO. The LEAs, panel judges, and relevant parties provided the support and cooperation that the Commissioner needed to perform his oversight and review functions under the ICSO. Overall, the Commissioner was generally satisfied with the performance of the LEAs and their officers in their compliance with the requirements of the ICSO in 2015.

7. The Commissioner observed that the LEAs continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations. Besides, the LEAs were observed to have recognised the importance of protecting information which might be subject to legal professional privilege (LPP) or journalistic material, and continued to adopt a very cautious approach in handling these cases. The Commissioner also observed that the panel judges handled the applications carefully and applied stringent control over the duration of the authorisations. When it was assessed that there was a likelihood of involving LPP information, the panel judges would impose additional conditions if they granted the authorization or allowed it to continue. These additional conditions were stringent and effective in safeguarding the right of individuals to confidential legal advice.

### **The Commissioner's Findings**

8. Under section 54 of the ICSO, where the head of an LEA considers that there may have been any case of failure by the LEA or any of its officers to comply with any relevant requirement of the ICSO, he shall submit to the Commissioner a report with details of the case. Apart from the requirements of section 54, the LEAs are also required to report cases of irregularities or even simply incidents to the Commissioner for his consideration and scrutiny. The Commissioner stated in Chapter 6 of the Report that he received from the LEAs reports of non-compliance/irregularities/incidents relating to nine ICSO cases during the report period. The Commissioner also reported in Chapter 6 the follow-up of the two outstanding cases brought forward from the Annual Report 2014.

9. The Commissioner was disappointed to note one non-compliance case in 2015 concerning the conduct of Type 1 surveillance outside the ambit of the prescribed authorization. In that case, the prescribed authorization was issued

for Type 1 surveillance on the meetings among a number of subjects at public places, but the operation was carried out when two of the subjects were inside a private car. Since the subjects' meeting did not take place at a public place, the operation was unauthorized. The Commissioner considered that while there was no evidence to suggest any concealment of the potentially unauthorized covert surveillance by any of the LEA officers, the case revealed a number of unsatisfactory areas in the LEA concerned, including failure of the officers in exercising the necessary vigilance in performing ICSO-related duties and lack of a mechanism to ensure timely reporting and monitoring of covert surveillance operations.

10. As stated by the Commissioner, there was no finding that any of the other cases of irregularities/incidents was due to deliberate disregard of the statutory provisions, the Code of Practice or the control of surveillance devices. There was no sign of abuse of surveillance devices for any unauthorized purposes during the report period. Noting that there were occasions where officers were careless or not vigilant enough in conducting covert operations, the Commissioner stressed that the LEA officers must develop a responsible mindset and stay alert in the ICSO operations so as to ensure strict compliance with the requirements of the legislation.

### **The Commissioner's Recommendations to the Government**

11. Under sections 51 and 52 of the ICSO, the Commissioner may make recommendations to the Secretary for Security and the heads of the LEAs as and when necessary. During the report period, the Commissioner continued to give advice and recommendations on various procedural matters in the course of overseeing the LEAs' compliance with the requirements of the ICSO. The Commissioner's recommendations are summarised in Chapter 7 of the Report and are all accepted by the LEAs concerned. The key recommendations made by the Commissioner in the report period and the response of the Government are set out at **Annex**.

### **Conclusion**

12. The control regime under the ICSO has continued to operate smoothly during the report period. To tie-in with the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016 in June, the Secretary for Security has also revised the Code of Practice pursuant to section 63 of the ICSO. The revised Code of Practice took effect at the same time as the amendment Ordinance. Under the enhanced regime, the powers of the

panel judges and the Commissioner have been strengthened. Specifically, the Commissioner is provided with an express power to require the production of interception products and surveillance products obtained by the LEAs under the Ordinance for the Commissioner's inspection. The Government will continue to closely monitor the operation of the ICSO regime, and fully co-operate with the Commissioner and the panel judges, with a view to better carrying out the objects of the ICSO.

**Security Bureau**  
**November 2016**

**Response of the Government  
to the key recommendations made in the Annual Report 2015  
of the Commissioner on Interception of Communications and Surveillance (the Commissioner)**

	<b>Recommendations by the Commissioner</b>	<b>The Government's response</b>
<b>1.</b>	<b><i>Reporting of suspected legal professional privilege (LPP) calls to the panel judges (paragraph 7.2(a))</i></b>	
	To report to the panel judges all suspected LPP calls reported by listeners to their supervisors so that the panel judges can decide whether or not the calls contained any LPP information or indicated heightened LPP likelihood.	<ul style="list-style-type: none"><li>● <b>Recommendation accepted.</b> The recommendation has been adopted by the relevant LEAs.</li></ul>
<b>2.</b>	<b><i>Information on the subscriber of the facility proposed to be intercepted (paragraph 7.2(b))</i></b>	
	To provide, if the subscriber of the facility proposed to be intercepted is not the subject of interception, in the application an explanation on how the relationship between that subscriber and the subject is known to the LEA and information regarding any criminal record of the subscriber.	<ul style="list-style-type: none"><li>● <b>Recommendation accepted.</b> The recommendation has been adopted by the relevant LEAs.</li></ul>

	<p style="text-align: center;"><b>Recommendations by the Commissioner</b></p>	<p style="text-align: center;"><b>The Government's response</b></p>
<p><b>3.</b></p>	<p><b><i>Reason for discontinuance to be accurately stated in the discontinuance report (paragraph 7.2(c))</i></b></p>	
	<p>To state accurately in the discontinuance report the reason for discontinuance of an operation</p>	<ul style="list-style-type: none"> <li>● <b>Recommendation accepted.</b> The recommendation has been adopted by the LEAs.</li> </ul>
<p><b>4.</b></p>	<p><b><i>Computer log on removal of right of access to interception products (paragraph 7.2(d))</i></b></p>	
	<p>To develop a computer log on the timing of removal of the right of access to interception products so as to facilitate the Commissioner's verification.</p>	<ul style="list-style-type: none"> <li>● <b>Recommendation accepted.</b> The recommendation has been adopted by the relevant LEAs.</li> </ul>
<p><b>5.</b></p>	<p><b><i>Reporting of arrest of the subject through the prescribed form (paragraphs 6.25 and 7.2(e))</i></b></p>	
	<p>To report to the relevant authority under section 58(1) of the ICSO following the arrest of the subject through the prescribed form for reporting on arrest of subject so as to avoid the ambiguity as to whether the reporting requirement under that section has been complied with.</p>	<ul style="list-style-type: none"> <li>● <b>Recommendation accepted.</b> The recommendation has been adopted by the LEAs.</li> </ul>

	<b>Recommendations by the Commissioner</b>	<b>The Government's response</b>
<b>6.</b>	<b><i>Strong justifications to support prolonged interception operations (paragraph 7.2(f))</i></b>	
	To provide in an application strong justifications to support further renewal of an authorization in respect of prolonged interception operations.	<ul style="list-style-type: none"><li>● <b>Recommendation accepted.</b> The recommendation has been adopted by the relevant LEAs.</li></ul>