
FACT SHEET

Independent authorities overseeing the conduct of interception of communications in selected jurisdictions

1. Introduction

1.1 In Hong Kong, the conduct of interception of communications is regulated by the *Interception of Communications and Surveillance Ordinance (Cap. 589)* ("*ICSO*"). *ICSO* provides for the establishment of an office by the name of the Commissioner on Interception of Communications and Surveillance ("the Commissioner") and the appointment of an eligible judge to be the Commissioner to oversee the compliance by law enforcement agencies¹ and their officers with all relevant requirements under *ICSO*, the code of practice or any prescribed authorization or device retrieval warrant concerned. In the Annual Report 2008 to the Chief Executive, the Commissioner has suggested to amend *ICSO* to confer express authority on him and his staff to access and listen to interception products of their choice for deterrence against malpractice of law enforcement agencies in their operations of interception of communications². The Government responded that it would consider the suggestion when conducting the comprehensive review of *ICSO*.

¹ According to Schedule 1 to *ICSO*, law enforcement agencies include the Customs and Excise Department, Hong Kong Police Force and Independent Commission Against Corruption.

² Section 53(1)(a) of *ICSO* provides that the Commissioner may require any public officer or any other person to answer any question, and to provide any information, document or other matter in his or her possession or control to the Commissioner for the purpose of performing his or her functions under *ICSO*. Section 53(3) further provides that notwithstanding any other provision of *ICSO* or any other law, any person on whom a requirement is imposed by the Commissioner under subsection (1) shall comply with the requirement. However, there is no express provision in *ICSO* empowering the Commissioner to access and listen to interception products.

1.2 At the meeting held on 5 December 2011, the Panel on Security requested the Research Division to study the monitoring of interception of communications by independent oversight authorities in overseas jurisdictions, focusing on the power of these authorities to access and listen to interception products when carrying out their statutory functions. As such, this fact sheet aims to study the independent authorities established by the United Kingdom ("the UK"), Australia and Canada for overseeing the compliance by law enforcement and intelligence agencies with the relevant legislation in the conduct of interception of communications.

2. Independent authorities overseeing the conduct of interception of communications

2.1 In the UK, section 57 of the *Regulation of Investigatory Powers Act 2000* provides for the appointment of the Interception of Communications Commissioner ("ICC"), who must hold or have held a high judicial office, to oversee the use of interception powers by law enforcement and intelligence agencies³. In Australia, the *Telecommunications (Interception and Access) Act 1979* ("the TIA Act") empowers the Commonwealth Ombudsman⁴ to inspect the records of law enforcement agencies at least twice a year to ensure their compliance with the requirements to keep documents connected with the issue of warrants, keep records of interception and destroy restricted records. In Canada, the *Canadian Security Intelligence Service Act* provides for the appointment of the Inspector General of the Canadian Security Intelligence Service ("the Inspector General")⁵ for reviewing the operations of the Canadian Security Intelligence Service ("CSIS")⁶ and its compliance with the operational policies, including the operations of interception of communications for national security purposes. The Act also sets out the establishment of the Security Intelligence Review Committee for reviewing generally the performance by CSIS of its duties and functions, and investigating complaints from members of the public against any act or thing done by CSIS.⁷

³ ICC is appointed by the Prime Minister for a renewable term of three years.

⁴ The other responsibilities of the Commonwealth Ombudsman include: investigating complaints about Australian government agencies and making recommendations for resolving complaints; inspecting the accuracy and comprehensiveness of records on selected law enforcement activities; and conducting inquiries as requested by the government.

⁵ The Inspector General is a government officer reporting to the Deputy Minister of Public Safety.

⁶ CSIS is responsible for investigating threats, analyzing information and producing intelligence, and providing advice to protect Canada and its citizens.

⁷ In Canada, the conduct of interception of communications by law enforcement agencies is regulated by Part VI of the Criminal Code which does not provide for oversight of the use of interception powers by an independent authority.

2.2 The regulatory framework in the above jurisdictions studied empowers the independent oversight authorities to access information and records held by the intercepting agencies concerned. However, there appears to be no express provision in the relevant legislation empowering these authorities to access and listen to interception products from the literature review conducted for this study⁸.

2.3 The Research Division has written to the relevant authorities in Australia, Canada and the UK to enquire about whether there are any mechanisms or administrative arrangements enabling the independent oversight authorities to access and listen to interception products when carrying out their statutory functions. The Office of the Commonwealth Ombudsman of Australia replied that the *TIA Act* limited the circumstances under which the Commonwealth Ombudsman might discuss his or her inspection function in detail, and that the Office was not able to provide information on the subject matter except for information available in the public domain. As at publication of this fact sheet, no reply has been received from the relevant authorities in Canada and the UK.

2.4 The Table below compares the independent authorities overseeing the conduct of interception of communications in the overseas jurisdictions studied and that in Hong Kong in terms of:

- (a) relevant legislation;
- (b) responsible authorities;
- (c) statutory functions;
- (d) monitoring mechanism;
- (e) powers to access information; and
- (f) any express provision in the relevant legislation empowering them to access and listen to interception products.

⁸ The Government has made a similar observation and stated that it is "not aware of such powers being granted to similar supervisory authorities in other common law jurisdictions enabling these authorities or their staff to listen to intercept products". See Security Bureau (2011b).

Table – Comparison of independent authorities overseeing the conduct of interception of communications

	The United Kingdom	Australia	Canada	Hong Kong
Relevant legislation	<i>Regulation of Investigatory Powers Act 2000 ("RIPA")</i> .	<i>Telecommunications (Interception and Access) Act 1979 ("the TIA Act")</i> .	<i>Canadian Security Intelligence Service Act ("the CSIS Act")</i> .	<i>Interception of Communications and Surveillance Ordinance (Cap. 589) ("ICSO")</i> .
Responsible authorities	The Interception of Communications Commissioner ("ICC").	The Commonwealth Ombudsman ("the Ombudsman").	The Inspector General of the Canadian Security Intelligence Service ("the Inspector General") and the Security Intelligence Review Committee ("SIRC").	The Commissioner on Interception of Communications and Surveillance ("the Commissioner").
Statutory functions	ICC is responsible for reviewing: <ul style="list-style-type: none"> (a) the Secretary of State's role in issuing interception warrants⁽¹⁾; (b) the compliance of the procedures adopted by intercepting agencies with <i>RIPA</i>; and (c) the adequacy of arrangements for ensuring the interception products are properly handled and protected. 	Monitoring compliance by law enforcement agencies with the statutory requirements to keep documents connected with the issue of warrants, keep records of interception and destroy restricted records.	The Inspector General is responsible for reviewing the operational activities of the Canadian Security Intelligence Service ("CSIS") and monitoring the compliance by CSIS with its operational policies. SIRC is responsible for reviewing generally CSIS's performance of its duties and functions.	Overseeing compliance by law enforcement agencies and their officers with the relevant requirements under <i>ICSO</i> , the code of practice or any prescribed authorization or device retrieval warrant concerned.

Note: (1) *RIPA* requires that interception of communications can only be authorized by a warrant signed by a Secretary of State and authorization can only be given in the interests of national security, for preventing or detecting serious crime, or safeguarding the economic well-being of the UK.

Table – Comparison of independent authorities overseeing the conduct of interception of communications (cont'd)

	The United Kingdom	Australia	Canada	Hong Kong
Monitoring mechanism	Visiting relevant public authorities and law enforcement agencies to scrutinize selected interception warrants and the related documents, and submitting an annual report to the Prime Minister who will lay the report before Parliament.	Inspecting the records of relevant law enforcement agencies at least twice a year and reporting the results of inspection to the Attorney-General.	<p>The Inspector General reviews the annual report submitted by the Director of CSIS to the Minister of Public Safety ("the Minister") and submits a certificate to the Minister stating the extent to which he or she is satisfied with the report and any contraventions of the <i>CSIS Act</i> that he or she has identified. The Inspector General also conducts reviews upon the request of the Minister or SIRC.</p> <p>SIRC conducts in-depth reviews on selected issues about the past operations of CSIS and investigates complaints against any act done by CSIS. SIRC submits an annual report on its activities to the Minister who will lay the report before Parliament.</p>	<ul style="list-style-type: none"> • Conducting reviews that the Commissioner considers necessary or reviews on cases that law enforcement agencies have reported to him or her in accordance with the requirements of <i>ICSO</i>; and • Carrying out examinations upon applications by any persons who suspect that their communications have been intercepted or that they are subject to covert surveillance by an officer of a law enforcement agency.

Table – Comparison of independent authorities overseeing the conduct of interception of communications (cont'd)

	The United Kingdom	Australia	Canada	Hong Kong
Powers to access information	According to section 58 of <i>RIPA</i> , any persons who are involved in requesting and carrying out interception must provide ICC with any documents and information that he or she may require for carrying out his or her statutory functions.	According to section 86 and 87 of the <i>TIA Act</i> , the Ombudsman is entitled to have full and free access to all records of the law enforcement agency concerned; and may require an officer of the agency concerned to provide information and answer questions relevant to the inspection.	Section 31 of the <i>CSIS Act</i> empowers the Inspector General to have access to any information under the control of CSIS that relates to the performance of the duties and functions of the Inspector General. Section 39 of the <i>CSIS Act</i> empowers SIRC to have access to any information under the control of CSIS and the Inspector General that relates to the performance of the duties and functions of SIRC ⁽²⁾ .	Section 53(1)(a) of <i>ICSO</i> provides that the Commissioner may require any public officer or any other person to answer any question, and to provide any information, document or other matter in his or her possession or control to the Commissioner for the purpose of performing his or her functions under <i>ICSO</i> .
Any express provision in the relevant legislation empowering the oversight authority to access and listen to interception products	No, based on the literature review conducted for this study.			

Note: (2) The Inspector General and SIRC cannot access records or information in records that describe the individual or collective decisions and policy making process of Ministers or Cabinet.

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Hong Kong

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30 December 2011
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