

For information  
on 2 July 2013

## **Legislative Council Panel on Security**

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

#### **PURPOSE**

This paper briefs Members on progress of the review on the Interception of Communications and Surveillance Ordinance (ICSO) and our legislative proposals.

#### **BACKGROUND**

2. Interception of communications and covert surveillance operations are critical to the capability of our law enforcement agencies (LEAs) in combating serious crime and protecting public security. The ICSO, enacted in August 2006, provides a statutory regime to regulate the conduct of interception of communications and covert surveillance by the LEAs. The operation of the ICSO regime has been smooth on the whole since the commencement of the ICSO. In discharging his oversight function, the former Commissioner on Interception of Communications and Surveillance (the Commissioner) made a number of recommendations to enhance the operation of the ICSO regime. For the majority of the recommendations especially those which improve on operational procedures and which do not require legislative amendments, we have already implemented them in the first instance and amended the Code of Practice (COP) as required. As to the recommendations which require legislative amendments, we have studied them carefully in the review of the ICSO.

3. Based on the recommendations of the former Commissioner, we have conducted two rounds of consultation in June and December 2011 with key stakeholders, including the legal professional bodies, law faculties of local universities, journalist associations and the Privacy Commissioner for Personal Data, on the legislative proposals. We have also sought comments from the Commissioner and the Panel Judges. Having taken into account the views received, we have decided to take forward a number of legislative proposals to strengthen the power of the Panel Judges and the Commissioner as well as to enhance the clarity of a number of provisions.

## LEGISLATIVE PROPOSALS

### **(1) Checking of Protected Products by the Commissioner**

4. In his Annual Report 2008, the former Commissioner proposed to amend the ICSO to require the preservation of intercept products and related records by the LEAs and to empower the Commissioner and his staff to check and listen to any intercept products, including special cases and cases involving the obtaining of information subject to legal professional privilege (LPP) or journalistic material (JM) (or a likelihood of obtaining such information or material) as well as other cases chosen by the Commissioner at random. In the Annual Report 2010, the former Commissioner further recommended that apart from authorizing the Commissioner and his staff to examine and listen to intercept products, they should also be given express power to inspect and listen to products of covert surveillance as and when necessary, including those with LPP information.

5. Section 53(1)(a) of the ICSO now empowers the Commissioner to require any public officer or any other person to provide him with any information, document or other matter in his possession or control for the purpose of performing any of his statutory functions, but there is no express provision in the ICSO empowering the Commissioner to have access to protected products<sup>1</sup>. Section 59 which makes provisions for the retention and destruction of protected products is not subject to section 53(1).

6. Under the ICSO regime, the obtaining of protected products by prescribed authorizations must be for the purpose of preventing or detecting serious crime or protecting public security, and the authorizing officers and Panel Judges must be satisfied that the necessity and proportionality tests are met before issuing the respective authorization. To strike a balance between combating serious crime and protecting the privacy of individuals, the ICSO regime contains stringent safeguards at all stages of the covert operations – from the initial application to the execution of the authorization, and throughout the oversight process. Under section 59 of the ICSO, LEAs are required to make arrangements to minimize the extent to which the protected products are disclosed, and all protected products are required to be destroyed as soon as their retention is not necessary for the relevant purposes of the prescribed

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<sup>1</sup> In section 2(1) of ICSO, “protected product” is defined to mean any interception product or surveillance product.

authorizations, and where a protected product contains LPP information and is obtained pursuant to a prescribed authorization for a telecommunications interception, it must be destroyed as soon as reasonably practicable. Therefore, it has been our policy that the disclosure of protected products must be kept to the minimum that is absolutely necessary for the purpose of prevention or detection of serious crime or the protection of public security. Any proposal to amend the Ordinance to expressly empower the Commissioner to have access to protected products, including those which contain, or are likely to contain, LPP information, will need to be balanced between the need to protect the privacy of communications and the right to confidential legal advice on the one hand and the need to facilitate the Commissioner's oversight functions on the other.

7. In his Annual Report 2011, the former Commissioner explained that whilst the checking of the products by the Commissioner and his staff would cause added intrusion to the subject's rights, the purpose is to ensure that the LEAs officers have done nothing wrong in the conduct of interception or covert surveillance against the subject. He considered that this is for protecting the subject's and the public's rights rather than undermining them. Further, the former Commissioner considered that the destruction requirement under section 59 should be made subject to the Commissioner's requirement to examine the interception or surveillance products. As to the responsibility of the Commissioner (or his designated staff) for safeguarding the protected products provided to him and ensuring compliance with the administrative arrangements and internal guidelines in this respect, the former Commissioner considered that there should be no difficulty for the Commissioner to issue disciplinary guidelines to which such designated staff should be subject.

### ***Views of the stakeholders and the Administration's proposal***

8. In the two rounds of consultation conducted by the Government, the stakeholders generally welcomed the proposal to strengthen the Commissioner's oversight functions and empower him to check the products of interception and covert surveillance as proposed. Some suggested that safeguards should be put in place to ensure that intrusion to personal data privacy, as a result of the extended power, is justified and kept to the minimum necessary, such as setting a threshold to define the circumstances or adopting an objective sampling method for conducting random checking, restricting the access to a limited number of persons, and maintaining the secrecy of protected products which should be destroyed as soon as they are no longer required. Stakeholders also

considered that the designated staff should be subject to compliance requirements and disciplinary arrangements in the event of non-compliance. One stakeholder took the view that under the ICSO, the Commissioner already has the power to listen to protected products which include LPP information, but has no objection to providing explicit power in the law.

9. We have also consulted the Commissioner on the checking proposal. He considers that it is a very important initiative. He is in support, and believes that the proposal is a necessary deterrence for those who would be minded to breach the requirements under the ICSO regime. However, the Commissioner does not agree to the suggestion of setting a threshold in the checking proposal as it would impose unnecessary restriction on the oversight authority of the Commissioner as empowered in section 53 of the ICSO and would be in direct conflict with the proposal that cases for checking be randomly selected.

10. Having considered the above, we propose to amend the ICSO as follows –

- (a) to make an express provision to empower the Commissioner, for the purpose of performing his functions under the ICSO, to require any public officer or any other person to provide “protected products” for his inspection irrespective of whether the products contain LPP information or not; and
- (b) as an integral part of the proposal, to amend the ICSO so that the existing statutory requirements to destroy protected products and products which contain LPP information will be subject to the Commissioner’s requirement that any of such products be preserved for his inspection. If the protected product is no longer of use after the Commissioner’s inspection, it should be destroyed or dealt with by the LEA in accordance with the provisions of the ICSO.

11. To implement the above, the Administration will work out the administrative arrangements with the Commissioner on the necessary safeguards, such as the selection of protected products for checking, the number and ranking of staff to assist the Commissioner to perform such duties, supervision and security measures to be followed by the designated staff and disciplinary arrangements in case of non-compliance with the internal guidelines.

## **(2) Power of Panel Judges and Authorizing Officers**

### **(A) Partial revocation of a prescribed authorization**

12. At present, the ICSO enables the relevant authority (i.e., a Panel Judge or an authorizing officer) to revoke a prescribed authorization in its entirety in the event of an arrest or discontinuance of operation by the LEA. However, there were cases where a prescribed authorization granted by a Panel Judge authorized the interception of two or more telecommunications services, and the LEA concerned subsequently discontinued the interception of only one of the services. There is no express provision in the ICSO providing for the partial revocation of a prescribed authorization. On the former Commissioner's recommendation, we propose to amend the ICSO to provide for the following –

- (a) an LEA may discontinue any or all parts of a prescribed authorization for interception or covert surveillance and shall report such to the relevant authority;
- (b) upon consideration of the discontinuance report submitted by the LEA, the relevant authority shall revoke any part or all of the authorization, as the case may be; and
- (c) partial revocation of a prescribed authorization for interception or covert surveillance by the relevant authority upon receipt of a report on the arrest of the subject.

### **(B) Revocation of a prescribed authorization after the submission of an REP-11 report**

13. One of the standard conditions specified by the Panel Judges on prescribed authorizations is that any initial material inaccuracy or material change in circumstances must be reported to the Panel Judges. In practice, the LEAs submit reports on any initial material inaccuracies or material changes in circumstances to the Panel Judges or authorizing officers, whilst there is no such express requirement in the ICSO. Further, the ICSO does not contain any express provision enabling a Panel Judge or an authorizing officer to revoke a prescribed authorization upon receipt of such a report.

14. To strengthen the functions of Panel Judges and authorizing officers, we propose to amend the ICSO to –

- (a) impose a statutory obligation on the LEAs to report any initial material inaccuracies and material changes in circumstances to the relevant authority as soon as reasonably practicable for all types of prescribed authorizations during the validity of the authorizations;
- (b) upon receipt of these reports, the relevant authority should have express power –
  - (i) to revoke the authorizations in its entirety or in part if they consider that the conditions in section 3 of the ICSO are no longer met; and/or
  - (ii) to vary any terms and conditions specified in the prescribed authorizations; and/or
  - (iii) to impose conditions or further conditions subject to which the prescribed authorizations are to continue to have effect; and
- (c) to confer the express power set out in (b) above on the relevant authority upon receipt of a report on arrest submitted by the LEA concerned.

(C) Revocation of device retrieval warrant

15. The ICSO provides for the power of a Panel Judge to issue a device retrieval warrant authorizing the retrieval of any of the surveillance devices authorized to be used by an LEA under a prescribed authorization. The former Commissioner noted that there is no express provision in the ICSO with regard to the revocation of a device retrieval warrant. We propose to amend the ICSO as follows –

- (a) to impose a statutory obligation on the LEAs to report any initial material inaccuracies or any material changes in circumstances to the Panel Judges during the validity of a device retrieval warrant, and to empower the Panel Judges to impose or vary the terms and conditions or to revoke the warrant in its entirety or in part upon receiving such report; and

- (b) to require the LEAs to submit a discontinuance report to the Panel Judge if the LEA considers that it is no longer necessary to execute the device retrieval warrant in full or in part, and to empower the Panel Judge to revoke any part or all of the device retrieval warrant upon consideration of the report.

*(D) Conditions imposed on emergency authorizations*

16. There is no express provision in the ICSO enabling a Panel Judge to impose conditions when confirming an emergency authorization. We propose to amend the ICSO to the effect that a Panel Judge shall have express authority to vary the terms and conditions and to impose conditions or further conditions when confirming an emergency authorization and the emergency authorization so confirmed shall continue to have effect subject to any conditions imposed by the Panel Judge.

17. We also propose to amend the ICSO so that the relevant authority (i.e. Panel Judge or authorizing officer) shall have express authority to impose conditions when confirming a prescribed authorization issued or granted upon oral application.

***Views of the stakeholders and the Administration's proposal***

18. In our consultations, the stakeholders in general welcomed the proposed amendments to strengthen or clarify the powers of Panel Judges and authorizing officers. The proposals have incorporated suggestions from the Panel Judges and the Commissioner, and have their support. One stakeholder reserved comment on conditions to be imposed on emergency authorizations until the details of the "conditions" are known. In line with existing provisions of the ICSO, the "conditions" to be imposed on an emergency authorization would be determined by a Panel Judge having regard to the circumstances of the case and cannot be set out in the law. The Administration will proceed with the proposed legislative amendments.

**(3) The proper construction of the terms "relevant person" and "duration"**

19. Under the ICSO, if the Commissioner, in the performance of his statutory functions, considers that there is any case in which any interception or covert surveillance has been carried out by an LEA officer without the authority of a prescribed authorization, the Commissioner

shall give notice to the relevant person and indicate in the notice, among others, the duration of the unauthorized interception or covert surveillance. The former Commissioner pointed out that the meaning of “relevant person” and “duration” currently provided for in the law for the purpose of such notifications were unclear.

20. We propose to amend the ICSO as follows –
- (a) on “relevant persons”, to make it clear that the term would cover the intended subject or any person who has been wrongly treated as the intended subject in a prescribed authorization, as well as any person who has been treated as the intended subject in the case of an unauthorized operation which does not relate to any prescribed authorization; and
  - (b) on “duration”, to empower the Commissioner to notify the relevant person “the relevant period” (for example, the Commissioner may indicate in his notice to the relevant person that the unauthorized activity took place in “the first half of June 2011” or “mid-June 2011”) in which the case had taken place, in addition to the length of time concerned.

#### *Views of the stakeholders and the Administration’s proposal*

21. The stakeholders generally welcomed amendments to enhance clarity of the relevant provisions. The proposal has incorporated suggestions from the Commissioner and has his support. The Administration will proceed with the proposed legislative amendments.

#### **(4) Time gap between the revocation of the prescribed authorization and the actual discontinuance of the operation**

22. The former Commissioner raised concerns regarding the “technical” unauthorized operations resulting from the time gap between the revocation of a prescribed authorization and the actual discontinuance of an operation, which are unavoidable. In the former Commissioner’s view, the continuing interception or surveillance from the time of the revocation till the actual cessation of the operation constitutes an unauthorized activity even when it involves a few minutes only. While the LEAs have already worked out pragmatic measures to minimize the time gap as far as practicable, the former Commissioner proposed that the ICSO should be amended to allow the LEA, which faces revocation of a prescribed authorization for telecommunications interception, to cause the



disconnection of the facility concerned to be effected within a reasonable time after the revocation so as to render any interception taking place in between “revocation” and “disconnection” as not being unauthorized.

23. We propose to amend the ICSO to the effect that if a prescribed authorization has been revoked by the relevant authority in its entirety or in part, the LEA shall take immediate steps to discontinue the interception or covert surveillance in question *as soon as reasonably practicable*. Any interception or surveillance products obtained during the time gap shall be deemed to have been obtained pursuant to a prescribed authorization for the purposes of the ICSO so that these products would have to be dealt with in accordance with the provisions of the ICSO, and the LEAs should refrain from gaining access to the products concerned once they have received notice of the revocation. To provide practical guidance to LEA officers in complying with the proposed statutory requirement, the Code of Practice would stipulate a timeframe within which discontinuation should normally be effected and prescribe the authority responsible for approving any extension of the benchmark timeframe. Any LEA which fails to discontinue the operation within the stipulated benchmark timeframe would be required to submit report to the Commissioner for such unauthorized actions.

#### ***Views of the stakeholders and the Administration’s proposal***

24. The proposal has incorporated suggestions from the Commissioner and has his support. One stakeholder recommended that consultation should take place between the Commissioner and the LEAs on a maximum timeframe within which the interception/surveillance must be terminated, which will balance the operational realities with modern communication technology. One stakeholder considered that the discontinuance be required to be “immediately” or “as soon as possible” and such requirement be expressly stated in the ICSO.

25. We note that it is practically not possible for the LEAs to discontinue the operations “immediately” after the revocation of the prescribed authorization, and the term “*reasonably practicable*” is proposed as it is commonly adopted in the ICSO in regulating the LEAs. The Administration will proceed with the proposed legislative amendments. We agree that the benchmark timeframe to be set in the Code of Practice should be decided in consultation with the Commissioner.

**(5) Reporting of non-compliance to the Commissioner**

26. The ICSO provides that where the head of any of the LEAs considers that there may have been any case of failure by the LEA or any of its officers to comply with any relevant requirement, he shall submit to the Commissioner a report with details of the case. In circumstances where the head of an LEA considers that there is non-compliance but does not consider that the non-compliance is due to the failure by the LEA or any of its officers to comply with the relevant requirements. In these circumstances, the LEA would submit an incident report to the Commissioner as a matter of practice.

27. The former Commissioner suggested that appropriate amendments be made to the ICSO to impose a duty on the LEA heads requiring them to report to him promptly any cases of non-compliance with the relevant requirements which come to their attention, regardless of whether or not it is due to the fault of the LEA or its officers. We suggest amending the ICSO to the effect that the LEAs shall report to the Commissioner any cases of non-compliance with the relevant requirements which come to their attention irrespective of whether or not the LEAs consider that such non-compliance are due to their fault, so that the Commissioner could verify any claims made by the LEAs that the non-compliance in a particular case is not due to their fault if he wishes.

***Views of the stakeholders and the Administration's proposal***

28. Stakeholders who expressed views welcomed the proposal. The proposal has incorporated suggestions from the Commissioner and has his support. The Administration will proceed with the proposed legislative amendments.

**(6) Discrepancy in the English and Chinese versions of a provision in the ICSO**

29. The former Commissioner observed that there is a discrepancy in the meaning of the English and Chinese versions of a provision concerning confirmation of a prescribed authorization issued or granted upon oral application in the ICSO. While the English version provides that the head of department shall cause an officer to apply for confirmation of the prescribed authorization as soon as reasonably practicable after the time when the prescribed authorization or renewal is *issued or granted*, the Chinese version stipulates that such application for confirmation should be made as soon as reasonably practicable after the prescribed authorization or renewal *has taken effect*. We propose to

rectify the discrepancy between the English and Chinese versions by amending the Chinese text of the provision to refer to “the time when the prescribed authorization or renewal is *issued or granted*”.

***Views of the stakeholders and the Administration’s Proposal***

30. Stakeholders who expressed views welcomed this proposal. The proposal has the support of the Commissioner. The Administration will proceed with the proposed legislative amendments.

**NEXT STEPS**

31. The Administration has commenced the law drafting process for an amendment bill, and will continue to engage the Commissioner and the Panel Judges during the law drafting process.

Security Bureau  
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