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Panel on Security

**Background brief prepared by the Legislative Council Secretariat
for the meeting on 2 July 2013**

Review of the Interception of Communications and Surveillance Ordinance

Purpose

This paper gives background information and summarizes relevant discussions of the Panel on Security ("the Panel") on the review of the Interception of Communications and Surveillance Ordinance (Cap. 589) ("ICSO").

Background

Interception of Communications and Surveillance Ordinance

2. ICSO, which came into force on 9 August 2006, provides for a regulatory regime for the interception of communications and specified kinds of covert surveillance operations by public officers to ensure that law enforcement agencies ("LEAs") observe the privacy and other rights of the public while they combat crimes and protect public security. The salient features of the regulatory and monitoring mechanism established under ICSO are outlined in the following paragraphs.

Authorization

3. Before LEAs carry out any interception operations, they are required to obtain an authorization from an authorizing authority which is either a panel judge appointed in accordance with ICSO or a designated senior LEA officer. While a judge's authorization is required for "more intrusive" covert surveillance operations, the authorizing authority for "less intrusive" covert surveillance operations is a senior officer of the LEA concerned.

4. The conditions for authorization are defined under section 3 of ICSO. The purpose of the operation must be confined to the prevention or detection of serious crimes or the protection of public security. In addition, the tests of proportionality and necessity, including the requirement that the purpose of the operation cannot reasonably be fulfilled by other less intrusive means, had to be met.

Execution

5. During the execution of an authorization, LEAs must ensure that the conditions for the continuance of a prescribed authorization are complied with. ICSO also requires LEAs to continuously review the situation.

Oversight mechanism

6. ICSO provides for a Commissioner on Interception of Communications and Surveillance ("the Commissioner"), who has the power to review all relevant records of LEAs, to require any public officer or other person to answer any question and provide information, and to require any officer to prepare a report on any case. The Commissioner may make recommendations to the heads of LEAs, and to the Secretary for Security on what should be included in the Code of Practice ("CoP") issued by the Security Bureau ("SB") under section 63 of ICSO. The Commissioner also acts on complaints to determine whether any interception or covert surveillance has been carried out without proper authority.

7. ICSO provides that the Commissioner must submit an annual report to CE, who will cause it to be tabled before the Legislative Council ("LegCo"). The report will cover such matters as various aggregate statistics and the compliance of LEAs with the relevant requirements of ICSO.

Deliberations of the Panel

Appointment of senior judges as panel judges

8. Some members opposed the present arrangements of appointing senior judges as panel judges for the purpose of considering applications for prescribed authorizations to conduct interception and covert surveillance operations. Concern was raised about the implications of the appointment arrangements, including the role and independence of panel judges.

9. According to the Administration, checks and balances were built into the ICSO regime to ensure that a balance was maintained between protecting the

privacy of individuals and allowing LEAs to conduct interception and covert surveillance operations for the purpose of prevention and detection of serious crimes and protection of public security in warranted circumstances. Whenever an application was made to the relevant authority (panel judge or authorizing officer) for a prescribed authorization, the relevant authority would assess whether the conditions for the issuance of the prescribed authorization as set out in ICSO were met.

Protection of information subject to legal professional privilege and proactive monitoring of interception products and related records

10. Some members were concerned whether the Administration would, in considering the Commissioner's recommendations to amend ICSO, solicit views from LEAs and the Department of Justice. According to the Administration, it had formed an interdepartmental working group ("the Working Group") to conduct a comprehensive review of ICSO. In undertaking the review, the Administration would take into account the recommendations of the Commissioner, the views of panel judges and the operational experience of LEAs.

11. Members considered it necessary to strike a balance between protecting privacy and legal professional privilege ("LPP"), while allowing LEAs to carry out interception of communications and covert surveillance operations for the prevention or detection of serious crimes and the protection of public security.

12. According to the Administration, it recognized the need to strike a balance between combating serious crimes and protecting the privacy of individuals. Stringent safeguards were provided under ICSO at all stages of the covert operations, from the initial application to the execution of the authorization, and throughout the entire oversight process. Regarding the review of ICSO, as a number of the issues involved the panel judges, the Working Group would consult the panel judges. In conducting the review, the Administration would strive to improve the operation of the ICSO regime without compromising the privacy of individuals and the effectiveness of LEAs in combating serious crimes.

13. There was a view that during the process of reviewing and considering legislative amendments to ICSO, the Administration should consult the public widely on the proposed amendments. According to the Administration, in considering legislative amendments to ICSO, it would take into account the views of relevant parties, including the Commissioner, the panel judges, members and LEAs, as well as the views of the two legal professional bodies where appropriate.

Contents of the Commissioner's annual report

14. There was a view 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.

15. 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.

Review of panel judge's determination

16. Noting that the Administration proposed to establish a mechanism for the review of a panel judge's determination of an application for the issue of a judge's authorization, members sought information on the rationale and the implementation details for the proposal. According to the Administration, ICSO did not provide for any mechanism for an LEA to apply to a panel judge for a review of the latter's determination. The Administration planned to explore the option of establishing a statutory review mechanism under which a panel judge might, upon application by an LEA, review his own determination. It considered that this arrangement would enable LEAs to have an opportunity to explain to the panel judges their grounds for making the applications in person and to provide further information about their applications where necessary.

Power of the Commissioner and his designated staff to listen to interception product

17. Some members took the view that ICSO should be amended to provide the Commissioner and his designated staff with the power to listen to or examine products of interception or covert surveillance. Some other members considered that if the Commissioner and his designated staff were to be provided with such a power, proper checks and balances should be put in place to prevent abuse.

18. According to the Administration, it had no objection in principle to the suggestion, and would endeavour to strike a balance among relevant considerations when formulating the mechanism. The Administration considered it necessary to strike a balance among facilitating the performance of the oversight function by the Commissioner, minimizing the disclosure of products of interception and covert surveillance as required in ICSO, and the destruction of products of interception or covert surveillance as soon as their

retention was not necessary for the relevant purpose of the prescribed authorization.

19. Members noted that the Administration had conducted consultation on the suggestion with key stakeholders, some of whom considered that in facilitating the performance of the oversight function by the Commissioner and his designated staff, there should be proper checks and balances in place to prevent leakage and minimize disclosure of such products. The Administration had also communicated with the new Commissioner, who had assumed the position since August 2012, on the issue and the detailed arrangements. In response to the request of the new Commissioner, the Administration was gathering further information on the practice of similar overseas oversight agencies.

Differences in the interpretation of provisions in the legislation

20. Members were concerned that LEAs and panel judges held different interpretations on a number of provisions in ICSO, such as the power of a 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. Some members took the 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.

21. According to the Administration, LEAs had adopted pragmatic measures to address the Commissioner's concerns and resolve the differences in views regarding the power of panel judge to revoke an authorization. SB had also amended CoP where appropriate to address the issues identified in the annual reports. As some of the Commissioner's recommendations arose from different interpretations of certain provisions in ICSO, the Administration would consider those recommendations in detail when it conducted the comprehensive review of ICSO.

Cases where journalistic material had been obtained or would likely be obtained through interception or covert surveillance

22. Members noted that CoP had been amended to formalize the requirement that the Commissioner should be notified of cases where journalistic material had been obtained or would likely be obtained through interception or covert surveillance. There was a view that ICSO should also be amended to set out such requirement.

Criminal sanction on law enforcement officers in breach of ICSO

23. Concerns were raised over a lack of criminal sanction on law enforcement officers in breach of ICSO. According to the Administration, any public officer who had committed an act in contravention of the provisions in ICSO or CoP would be subject to disciplinary action under the disciplinary mechanism of the department concerned. Any public officer who had intentionally conducted interception of communications or covert surveillance without lawful authority was liable to be prosecuted for the common law offence of misconduct in public office.

Scope of ICSO

24. Some members were concerned about the reasons for not legislating against interception of communications and covert surveillance activities carried out by organizations such as the agencies of the Central People's Government in the Hong Kong Special Administrative Region.

25. According to the Administration, existing legislation afforded some protection from interference with private communications by non-public officers. For example, section 24 of the Telecommunications Ordinance (Cap. 106) provided that it was an offence for any person who had official duties in connection with a telecommunications service to willfully destroy, alter, intercept or detain any message intended for delivery, or to disclose any message to any person other than the person to whom the message was addressed; and section 27 stipulated that a person who damaged, removed or interfered with any telecommunications installation with intent to intercept or discover the contents of a message was guilty of an offence. There were also provisions in the Post Office Ordinance (Cap. 98) and the Personal Data (Privacy) Ordinance (Cap. 486) safeguarding the privacy of individuals in relation to postal packets and personal data.

Relevant papers

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

**Relevant papers on
Review of the Interception of Communications and Surveillance Ordinance**

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	3.1.2012 (Item VI)	<u>Agenda</u> <u>Minutes</u>
Legislative Council	18.1.2012	<u>Motion on "Annual Report 2010 to the Chief Executive by the Commissioner on Interception of Communications and Surveillance"</u>
Panel on Security	4.12.2012 (Item IV)	<u>Agenda</u> <u>Minutes</u>