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**Bills Committee on Interception of Communications and Surveillance  
(Amendment) Bill 2015**

**Background brief prepared by the Legislative Council Secretariat**

**Purpose**

This paper sets out background information on the Administration's proposal to amend the Interception of Communications and Surveillance Ordinance (Cap. 589) ("ICSO") and summarizes relevant discussions of the Panel on Security ("the Panel") on the review of ICSO.

**Background**

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 four designated law enforcement agencies ("LEAs"), namely Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption, observe the privacy and other rights of the public while they combat crimes and protect public security.

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. The conditions for authorization are defined under section 3 of ICSO. The purpose of 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, have to be met.

4. 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.

## **Deliberations of the Panel**

### Appointment of senior judges as panel judges

5. 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.

6. According to the Administration, checks and balances were built into the ICSO regime to ensure that a balance was struck 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 a prescribed authorization as set out in ICSO were met.

### Review of panel judge's determination

7. 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. 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

8. Some members were supportive of the former Commissioner's recommendation 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.

9. 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.

10. 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.

11. Some members considered that the proposed power of the Commissioner to check and listen to intercept products should be exercised prudently to protect privacy. Concern was raised about the number and ranking of staff who would assist the Commissioner to perform such tasks. According to the Administration, it was aware of the need for such power to be exercised prudently. The Administration would discuss with the Commissioner about the number and ranking of such staff.

#### Differences in the interpretation of provisions in the legislation

12. 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.

13. 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.

#### Protection of information subject to legal professional privilege and journalistic material

14. Members noted that the Administration 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. 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.

15. According to the Administration, it recognized the need to strike a balance between combating serious crimes and protecting the privacy of individuals. Regarding the review of ICSO, as a number of the issues involved panel judges, the Working Group would consult panel judges.

16. Members also noted that in considering legislative amendments to ICSO, the Administration 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.

17. Members were informed 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.

### Penalty for unauthorized interception of communications by law enforcement officers

18. There was a view that ICSO should be amended to impose penalty for unauthorized interception of communications by law enforcement officers and criminalize such acts.

19. According to the Administration, all law enforcement officers were aware of the requirements in ICSO and the consequences of contravention of the provisions in ICSO. LEAs would consult the Commissioner on the disciplinary actions before actions were taken against the officers whenever the LEA concerned identified a need to do so. The scope of misconduct in public office had been clarified in a case by CFA and the penalty for such an offence was adequate.

### Contents of the Commissioner's annual report

20. 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. 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.

21. Some members were concerned that if there was no breakdown in the statistics provided in the Annual Report between cases involving serious crime and those involving public security and a low threshold was adopted for the interpretation of "public security" in ICSO, interception might be carried out for political monitoring. According to the Administration, there was no question of interception for political monitoring. Under ICSO, a prescribed authorization had to be granted by a panel judge.

### Interception of communications and surveillance by the non-government sector

22. Some members expressed concern that while Article 30 of the Basic Law provided that "the freedom and privacy of communication of Hong Kong residents shall be protected by law", ICSO only regulated the interception of communications and surveillance conducted by designated LEAs. Sections 24 and 27 of the Telecommunications Ordinance (Cap. 106) were far from adequate for the protection of members of the public from interception of communications by the non-government sector. There was a view that ICSO

should be extended to cover interception of communications by non-government sector and such acts should be criminalized.

23. Some members had expressed concern that the SNOWDEN incident revealed that the Hong Kong Internet Exchange of the Chinese University of Hong Kong was even not aware of the interception or hacking that had occurred. There was a suggestion that the Administration should take steps to prevent intrusion into the privacy of communication of Hong Kong residents by persons not regulated by ICSO, especially those from other jurisdictions.

24. According to the Administration, it had always sought to enhance information security. Regarding the interception of communications and surveillance by the non-government sector, the Law Reform Commission ("LRC") had published five reports related to privacy between 1996 and 2006, including reports on regulating the interception of communications and the regulation of covert surveillance. The Administration noted that when the reports were published, the media sector and journalists expressed grave concern that the recommendations might compromise press freedom. Given the complexity and sensitivity of the issues involved, the Constitutional and Mainland Affairs Bureau ("CMAB") was handling the relevant reports by stages and would consider very carefully the views of all parties concerned. The issues raised in the LRC report on stalking were comparatively less controversial and CMAB would first deal with it. At its meeting on 16 June 2014, the Panel on Constitutional Affairs was informed by the Administration that in the light of the public concerns over the impact of anti-stalking legislation on press freedom and freedom of expression, the Administration was of the view that there were no favourable conditions for the Administration to pursue the matter further.

### **Relevant papers**

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

**Relevant papers on  
Legislative amendments to the Interception of Communications and  
Surveillance Ordinance (Cap. 589)**

<b>Committee</b>	<b>Date of meeting</b>	<b>Paper</b>
Panel on Security	5.7.2011 (Item III)	<u>Agenda</u> <u>Minutes</u>
Panel on Security	2.7.2013 (Item III)	<u>Agenda</u> <u>Minutes</u>

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