

香港特別行政區政府
保安局



The Government of the
Hong Kong Special Administrative Region
Security Bureau

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6 November 2015

Miss Betty MA
Legislative Council Secretariat
Legislative Council Complex
1 Legislative Council Road
Central, Hong Kong

Dear Miss MA,

We refer to the meetings of Bills Committee on Interception of Communications and Surveillance (Amendment) Bill 2015 on 6, 12, 23 October and 2 November 2015, and the Hon James TO's letter of 4 November 2015 to the BC (the "Letter").

In relation to the issues raised by the Members and in the Letter, the Government's response is at Annex.

Yours sincerely,

(Mrs Millie Ng)
for Secretary for Security

Encl (21 pages)

c.c.

Department of Justice

(Attn: Mr Godfrey KAN, Senior Assistant Solicitor General
Ms Monica LAW, Senior Assistant Law Draftsman)

**Interception of Communications
and Surveillance (Amendment) Bill 2015
(the “Bill”)**

**Response to Issues Raised
at the Bills Committee’s Meetings held on
6, 12, 23 October and 2 November 2015, and
the Hon James TO’s Letter of 4 November 2015**

(a) Proposed CSAs to be moved by the Administration

To specify the day in addition to the month and year from which the unauthorized interception or covert surveillance began in notifying the relevant person

Under section 48 of the Interception of Communications and Surveillance Ordinance (the “ICSO”) (Cap. 589), if the Commissioner considers that there is any case in which any interception or covert surveillance has been carried out by an officer of a law enforcement agency (“LEA”) without the authority of a prescribed authorization, the Commissioner is required to give notice to the relevant person indicating, among others, the “duration” of the unauthorized interception or covert surveillance. A former Commissioner pointed out that the meaning of “duration” in section 48 was unclear. To enhance the clarity of the term “duration”, the Bill proposes that the Commissioner should notify the relevant person of “the month and year” from which the unauthorized interception or covert surveillance began, on top of the length of time involved. The notification arrangement seeks to strike a balance between the need to notify the relevant person of the unauthorized operation and the need to avoid the disclosure of operational details which may be prejudicial to the prevention or detection of crime or the protection of public security.

2. The above said, having regard to Members’ views, and to facilitate the making of written submissions by the relevant person upon receipt of the Commissioner’s notice of unauthorized interception or covert surveillance, we have no objection to introducing Committee Stage Amendments (“CSAs”) to the effect that the Commissioner should notify the relevant person of the exact date (i.e. the day, the month and the year) from which the unauthorized

interception or covert surveillance began, on top of the “duration” of the unauthorized operation.

To review the drafting of the Chinese headings of the proposed sections 38A and 58A and the proposed new Chinese heading of section 58

3. Members are concerned that the headings of the proposed sections 38A and 58A and the proposed new Chinese heading of the existing section 58 may be misleading because they give the impression that the device retrieval warrant or the prescribed authorization concerned would invariably be revoked following submission of report to the relevant authority as required. As we explained at the meeting of 2 November 2015, the revised headings are only meant to give a clearer picture of the contents of the sections. There is no intention to change the substance of the provisions and the LEAs would act in accordance with the requirements of those sections. That said, in view of Members’ concerns, we will move CSAs to revise both the Chinese and the English section headings as follows –

	<u>Original proposal</u>	<u>New proposal</u>
38A	“撤銷器材取出手令”	向小組法官提供報告：不能執行器材取出手令
	<i>Revocation of device retrieval warrant</i>	<i>Report to panel judge: device retrieval warrant cannot be executed</i>
58:	於逮捕截取或秘密監察的目標人物後，撤銷訂明授權	向有關當局提供報告：截取或秘密監察的目標人物被逮捕
	<i>Revocation of prescribed authorization following arrest of subject of interception or covert surveillance</i>	<i>Report to relevant authority: arrest of subject of interception or covert surveillance</i>
58A	遇上資料不準確或情況改變而撤銷訂明授權	向有關當局提供報告：資料不準確或情況有變化
	<i>Revocation of prescribed authorization in case of inaccurate information or change in circumstances</i>	<i>Report to relevant authority: inaccurate information or change in circumstances</i>

4. The relevant CSAs to reflect the above are at **Appendix**.

(b) Proposed Amendments to the Code of Practice (“CoP”)

To consider introducing a requirement to the effect that LEAs shall not use any protected products obtained during the “time gap”

5. The proposed section 65A aims to address the problem of “unauthorized operation” of technical nature which inevitably occurs during the time gap between the revocation of a prescribed authorization by the relevant authority and the actual discontinuance of the operation by the LEA. The section adds a statutory requirement that if a prescribed authorization has been revoked by the relevant authority in whole or in part, the LEA must make arrangements to ensure the discontinuance of the interception or covert surveillance in question as soon as reasonably practicable. Any protected products obtained during the time gap are to be regarded as having been obtained pursuant to a prescribed authorization for the purposes of the ICSO so that these products would have to be protected from unauthorized use or disclosure and be disposed of in accordance with the provisions of the ICSO.

6. In the CoP, we would require that when the officer in charge of the interception or covert surveillance concerned has notice of the revocation of the prescribed authorization by the relevant authority, the officer shall refrain from using or gaining access to the protected products obtained after the revocation of the prescribed authorization concerned. Since these details are operational in nature, we consider that they should be set out in the CoP rather than in the legislation.

7. We propose that the following three paragraphs be added to the CoP: -

[]. *Where a prescribed authorization has been revoked by the relevant authority under relevant provisions of the Ordinance, the officer-in-charge must take immediate action to cause the interception or covert surveillance operation to be discontinued as soon as reasonably practicable. However, due to the time required for the communication of the revocation decision to the officers responsible for discontinuing the operation, there is inevitably a time gap between the revocation of the prescribed authorization and the actual discontinuance of the operation.*

[]. *Under section 65A(1) of the Ordinance, if a prescribed authorization or a part of a prescribed authorization is revoked under section 24(3)(a)(i), 27(3)(a)(i), 58(2) or*

58A(4) of the Ordinance, the head of the department concerned must make arrangements to ensure that the interception or covert surveillance concerned or the relevant part of the interception or covert surveillance concerned is discontinued as soon as reasonably practicable. Any interception or surveillance products obtained after the revocation but before the actual discontinuance of the interception or covert surveillance are deemed to have been obtained pursuant to a prescribed authorization for the purposes of the Ordinance. In other words, these products will have to be dealt with in accordance with the provisions of the Ordinance, including section 59 which sets out the safeguards for protected products. As soon as an officer has notice of the revocation, the officer shall not use or gain access to any products obtained during the time gap.

- []. Whether the time taken to discontinue the operation is reasonable or not depends on the particular circumstances of the case. As a practical guidance for the departments to comply with the requirement that the interception or covert surveillance must be discontinued “as soon as reasonably practicable”, the benchmark timeframe within which discontinuance should normally be effected is 60 minutes counting from the time of revocation by the relevant authority. The time of discontinuance should be reported to the Commissioner. Any department which cannot discontinue the operation within the above benchmark timeframe should also explain the reasons when reporting the time of discontinuance to the Commissioner. The Commissioner will review whether the time taken is reasonable or not.

To give examples of “material inaccuracy” or “material change in circumstances”

8. At present, the LEAs submit reports on any material inaccuracy or material change in circumstances to the relevant authority as it is one of the standard conditions specified by the relevant authority in the prescribed authorizations. However, the ICSO does not contain any express provision

enabling the relevant authority to revoke a prescribed authorization upon receipt of such a report.

9. In the Bill, we propose to impose a statutory obligation on the LEAs to report any material inaccuracy and material change in circumstances to the relevant authority as soon as reasonably practicable for all types of prescribed authorizations during the validity of the authorizations. In view of Members' comments, we will provide some examples of "material inaccuracy" and "material change in circumstances" in the CoP, as follows: -

<i>material inaccuracy</i>	<ul style="list-style-type: none">● <i>Incorrect information in relation to the particulars of the subject</i>● <i>Incorrect information in relation to the background of application or case details</i>
<i>material change in circumstances</i>	<ul style="list-style-type: none">● <i>Heightened likelihood of obtaining information subject to legal professional privilege ("LPP") or journalistic materials ("JM")</i>● <i>New information on the identity of the subject uncovered during operation</i>● <i>New information relevant to the granting or otherwise of application in question</i>

(c) Others

(ci) About the Bill

To make it clear in the relevant proposed new sections the references of “further authorization or requirement” under a prescribed authorization or a device retrieval warrant (clauses 6(2), 8(2), 9, 16(10), 17(5) and 18 of the Bill)

10. The existing section 32 of the ICSO provides that a prescribed authorization (i.e. a judge’s authorization, an executive authorization or an emergency authorization) may be issued or renewed subject to any conditions specified in it that apply to the prescribed authorization itself *“or to any further authorization or requirement under it (whether granted or imposed under its terms or any provision of this Ordinance)”*. Thus, conditions may be imposed by the relevant authority when it issues or renews a prescribed authorization, and the expression *“any further authorization or requirement under it”* in section 32 refers to any authorization or requirement granted or imposed under the terms of the prescribed authorization in question such as those referred to in section 29(1) to (5) as well as any further authorization granted under section 29(6) or (7) or section 30 of the ICSO. Paragraph 129 of the CoP requires that where conditions are imposed, the officers must ensure that they are observed in executing the prescribed authorization.

11. On the recommendation of a former Commissioner, we propose that the relevant authority should have a similar power to impose new conditions in other scenarios. Section 24 deals with the determination of an application for confirmation of an emergency authorization while section 27 deals with the determination of an application for confirmation of a prescribed authorization or renewal issued or granted upon an oral application. In line with section 32, the proposed sections 24(3A) and 27(3A)(b) aim to make it clear that any new conditions imposed by the panel judge or the relevant authority may apply not only to the emergency or prescribed authorization itself but also to any further authorization or requirement under it.

12. Likewise, the new sections 57(5A)(b), 58(3A)(b) and 58A(6)(b) are proposed for a similar purpose. Whenever a prescribed authorization is only partially revoked following the discontinuance of the interception or covert surveillance, arrest of the subject, or in case of material inaccuracy or change in circumstances, the relevant authority may impose new conditions that apply not only to the prescribed authorization itself but also to any further authorization or requirement under it.

13. The existing section 38 of the ICSO provides that a device retrieval warrant may be issued subject to any conditions specified in it that apply to the warrant itself or to any further authorization under it (whether granted under its terms or any provision of the ICSO). In line with section 38, the proposed section 38A(4)(b) seeks to make it clear that in a situation where a device retrieval warrant is not revoked or is only partially revoked, the panel judge may impose new conditions which apply to the warrant itself or to any further authorization under it. Such “further authorization” refers to any authorization granted under section 36 or 37 of the ICSO.

14. Having regard to section 32 of the ICSO, which provides that a prescribed authorization (i.e. a judge’s authorization, an executive authorization or an emergency authorization) “may be issued or renewed subject to any conditions specified in it that apply to the prescribed authorization itself or to any *further authorization or requirement under it* (whether granted or imposed under its terms or any provision of this Ordinance)” (*emphasis added*), we consider it appropriate to retain the use of the phrase “further authorization or requirement under it” in the captioned proposed amendments to ensure consistency.

To consider how section 59(1)(c) as amended by the Bill would interact with sections 23(3)(a) and 26(3)(b)(i) which require immediate destruction of protected products, and sections 24(3)(b)(i) and 27(3)(b)(i) whereby a panel judge may order immediate destruction of protected products

15. Section 23(3)(a) provides that if an application for confirmation of an emergency authorization is not made within the period of 48 hours, the head of an LEA shall cause the immediate destruction of any information obtained by carrying out the interception or Type 1 surveillance concerned which includes any product so obtained. There is also a similar provision in section 26(3)(b)(i) in respect of a failure to apply for confirmation of a prescribed authorization issued upon an oral application. The purpose of the requirement to cause the immediate destruction of any information obtained in these circumstances is to deter the LEAs from not complying with the requirement to apply to the relevant authority for confirmation of the authorization within 48 hours of its issuance, to protect the privacy of the subject and affected persons and to prevent the LEAs from using the information whether as evidence or otherwise. Failure to make an application for confirmation pursuant to section 23(1) or 26(1) is a serious matter and the LEA must submit to the Commissioner a report with details of the case pursuant to section 23(3)(b) or 26(3)(b)(ii). As it is a clear case of very serious non-compliance, any information obtained by the

LEA should not be made available to its officers and must be destroyed immediately to safeguard the privacy of the subject and affected persons.

16. Where a department has made an application for confirmation in compliance with section 23(1) or 26(1) but the relevant authority refuses to confirm the authorization in question, the relevant authority has a discretionary power to make an order under section 24(3)(b) or 27(3)(b) (as the case may be) for the immediate destruction of any information obtained by carrying out the operation concerned. The relevant authority will take into account all the circumstances of the case in determining whether such an order should be made and to what extent information so obtained should be destroyed, including whether the conditions in section 3 have been met, whether the protected products should be kept by the LEA for possible examination by the Commissioner, and the conduct of the LEA concerned. Conferring a power on the relevant authority to order the immediate destruction of information enables the relevant authority to better protect the privacy of the subject and affected persons if the relevant authority considers that the authorization should be revoked or have effect subject to variations and the circumstances of the case warrant the making of such an order.

17. The destruction arrangements set out in paragraphs 15 and 16 above are related to the handling of information obtained by carrying out operations the authorization of which is no longer available or is not confirmed. The situations involve either serious non-compliance or a failure to meet the stringent threshold for the issue of a prescribed authorization. Immediate destruction of the information obtained is an appropriate remedy for the LEA not complying with the requirement to apply for confirmation within 48 hours, and may be necessary if the operation does not meet the requirements for the issue of the prescribed authorization. This measure is without prejudice to the power of the Commissioner to report the non-compliance or matter in his annual report and to make recommendations under sections 49 to 52. The considerations underlying the above arrangements are different from those underlying the destruction of protected products obtained pursuant to valid prescribed authorizations (other than emergency authorizations) issued upon written applications.

To confirm whether any consequential amendments to the ICSO are required as a result of the proposed new section 54(2)

18. Under section 54 of the ICSO, where the head of any of the LEAs considers that there may have been any case of failure by an LEA or any of its officers to comply with any “relevant requirement”, he or she is required to

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 fault of the LEA or any of its officers, the LEA, at present as a matter of practice, would submit an incident report to the Commissioner.

19. The new section 54(2) is proposed in response to the recommendation of a former Commissioner and seeks to amend the ICSO to the effect that the LEAs must also report to the Commissioner any case of non-compliance with a “relevant requirement” which come to their attention even if the LEAs consider that such non-compliance is not due to their fault, so that the Commissioner could, if the Commissioner wishes, verify any claims made by the LEAs that the non-compliance in a particular case is not due to their fault. No other consequential amendment is required as a result of the new section 54(2).

To review the proposed new section 53A(1) of ICSO to consider restricting the class of officers to whom the power of the Commissioner could be delegated

20. A new section 53A is proposed to be added to empower the Commissioner to delegate his power to examine protected products to “an officer working in the Commissioner’s office who is responsible to the Commissioner”.

21. The Commissioner’s office is currently supported by 20 civil servants headed by a Principal Executive Officer (“PEO”, at D1 level). For the checking proposal to work effectively, the Commissioner will need more staff to support him. Resources have been reserved to create a dedicated team of three new posts (1 Senior Executive Officer and 2 Executive Officers I) to strengthen the support to the Commissioner in implementing the checking proposal after the passage of the Bill. The ranks of the three posts to be created are largely equivalent to that of inspectors in the LEAs who are entrusted to handle sensitive information.

22. All staff in the office who have access to sensitive information are subject to extended checking which is the highest level of integrity checking within the Administration. They are also bound by the Official Secrets Ordinance (Cap. 521) and various internal guidelines against unauthorized disclosure, the breach of which would lead to disciplinary action or even legal sanction. The Commissioner will delegate the power to examine protected products to the PEO and the dedicated team in writing, and specify any terms and conditions subject to which the delegation is to have effect. A person delegated by the Commissioner with the power to examine protected products is

not empowered to further delegate the power to other persons. It is tentatively intended that only the Commissioner and the PEO would access protected products containing LPP and JM. Upon the passage of the Bill, the Commissioner will draw up internal guidelines on further safeguards in detail, such as staff delegation, supervision and security measures to be followed by the designated staff and disciplinary arrangements in case of non-compliance. We believe these arrangements, in addition to those safeguards already provided for in the legislation, would offer sufficient protection of the protected products. In addition, the current drafting has the benefit of allowing flexibility for the Commissioner to decide on the rank of the delegated officer as appropriate in the circumstances of each case, including the sensitivity of the information to which the officer may have access. We do not see the need to restrict the class of officers to whom the Commissioner's power may be delegated.

To review section 58A such that a report thereunder is required when the officer of the department concerned “reasonably suspects” (as opposed to “becomes aware” as currently drafted) that there is a material inaccuracy or a material change in the circumstances; and to consider similar amendment to the existing section 58

23. The existence of a material inaccuracy or a material change in circumstances is a matter of fact that can be ascertained by reference to objective evidence, whereas reasonable suspicion is a belief based on objective facts (and inferences drawn from those facts) and is evaluated using the reasonable person test. “Reasonable suspicion” is a standard usually used in criminal procedure. Although this standard is adopted in section 3(1)(b) of the ICSO in determining whether the conditions for the issue, renewal or continuance of a prescribed authorization are met, it is not appropriate in the context of section 58A which reflects the existing practice of panel judges in issuing or renewing a prescribed authorization after finding that the conditions in section 3 are met. It is only practicable to impose a requirement on the LEA to make a report to the relevant authority when the officer ***becomes aware*** of the material inaccuracy or material change in circumstances. Adopting the “reasonable suspicion” standard would give rise to uncertainty and the LEAs may encounter difficulty in complying with such a requirement.

To review the drafting of section 58A, including the possibility to simplify the language in clauses such as “知悉在為以下申請而提供的資料中”, “具關鍵性的不準確之處”, and “關鍵性變化”; and to review the Chinese drafting of section 58A(4): “如該當局認為第3條所指的、讓有關訂明授權或其某部分持續有效的先決條件未獲符合”

24. We have carefully reviewed the Chinese text of section 58A and do not consider it necessary to make any amendments.

25. As for section 58A(4), we note that where a provision is lengthy and an expression is limited by more than one qualifier, the practice has been to separate the qualifiers with “、”. The punctuation mark breaks up the sentence into smaller blocks to aid comprehension. The expression “如該當局認為第3條所指的、讓有關訂明授權或其某部分持續有效的先決條件未獲符合” contains a total of 37 words which, if not broken up, would be rather difficult to read. Precedents can be found in the ICSO itself. One example is in paragraph (a) of the definition of “秘密監察”. It reads “秘密監察...指為任何特定調查或行動的目的而使用任何監察器材進行的、符合以下說明的任何監察...”.

To consider imposing criminal sanction on an LEA officer should he/she fail to provide any protected product as per the Commissioner’s request under section 53(1)(a) or fail to comply with any other requirement of the Commissioner

26. On whether criminal sanctions should be imposed in the event of unauthorized interception or covert surveillance conducted by public officers, we consider that public officers and non-public officers should be subject to the same treatment. In addition, the ICSO was enacted to regulate the interception of communications and covert surveillance operations conducted by the LEAs with a stringent statutory regime.

27. Although no criminal sanctions are provided for under the ICSO, the LEAs are required to comply with relevant requirements under the ICSO, and subject to stringent oversight by the Commissioner. Officers who fail to do so are subject to disciplinary actions, or may even be prosecuted for committing a criminal offence, depending on the circumstances of the case. The regime has been operating smoothly and the Commissioner is generally satisfied with the performance of the LEAs. We do not see the need to provide for criminal sanctions under the ICSO.

To explain whether it is legal for the Commissioner or his delegated staff to make written notes or summary of protected products when checking protected products at the premises of LEAs; and whether there will be any safeguards for such protected products

28. Section 40(1) of the Interpretation and General Clauses Ordinance (“IGCO”) (Cap. 1) provides that where any Ordinance confers upon any person power to do or enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing. Insofar as the making of written notes and summaries of protected products is reasonably necessary to enable the Commissioner and his delegated staff to conduct reviews, carry out examinations and examine protected products, they have the power to make written notes and summaries when performing these functions.

29. The Commissioner is fully aware that protected products contain highly sensitive personal information. The longer and the more protected products are retained by the LEAs, the greater the risk of unauthorized or accidental access, disclosure or other use of these products. To protect the privacy of the subjects and affected persons and the confidentiality of the operations, the disclosure or use of protected products that are no longer necessary for the relevant purpose of the prescribed authorization should be kept to the minimum that is necessary for facilitating the performance of the Commissioner’s functions. The Commissioner would only use the protected products for verifying or checking the contents of the reports prepared by the LEAs, conducting reviews, dealing with applications for examinations, or for other legitimate purposes such as random checking. The Commissioner would not use the protected products for the investigation of crimes or matters outside the scope of his oversight and review functions.

To advise whether the procedures devised by the Commissioner under section 53(5) for implementing the checking proposal, such as for LEAs to keep the protected products for a certain period to facilitate the checking, would have overriding effect over the destruction requirement imposed on the LEAs by section 59(1)(c) as currently drafted

30. Under the existing section 59(1)(c) of the ICSO, the head of a specified LEA shall ensure that protected products are destroyed as soon as their retention is not necessary for the relevant purpose of the prescribed authorization. Under the Bill, any requirement that any protected product should be provided to the Commissioner would **override** the requirement to destroy the protected product when it is no longer necessary for the relevant

purpose of the prescribed authorization. Once the Bill is passed, the LEAs will liaise with the Commissioner on any necessary adjustments required to the current destruction arrangements so as to facilitate the exercise of the Commissioner's power to check protected products.

31. In addition, section 53(5) of the ICSO provides that the Commissioner may determine the procedure to be adopted in performing any of his functions under the ICSO. In performing his functions to review different categories of cases at present, the Commissioner has put in place arrangements whereby the four LEAs preserve protected products of specific cases for his review. Under these arrangements, the Commissioner is able to require an LEA to preserve the protected products of a particular case before they may be destroyed pursuant to the destruction requirement. We understand that the arrangements are operating smoothly. The LEAs comply with the Commissioner's requirements and the Commissioner has not encountered any difficulties in this regard. When the express power to check protected products is introduced upon the passage of the Bill, the Commissioner would determine the appropriate procedure to be adopted to enable the checking of protected products. Individual privacy is better protected in this way as the Commissioner may not necessarily review each and every case investigated by the LEAs and may not necessarily require access to each and every protected product obtained pursuant to a prescribed authorization in a case reviewed by him. Therefore the current proposal strikes a fair balance between the right to privacy of the subjects and affected persons on the one hand and the need to facilitate the performance of the Commissioner's oversight function on the other. We do not suggest setting a minimum or maximum period of retention of protected products in the law, as this would inevitably restrict the flexibility of the Commissioner in determining the most appropriate procedure to be adopted for checking different types of cases under varying scenarios.

32. Section 53(3) makes it clear that notwithstanding any other provision of the ICSO or any other law, any officer on whom a requirement to provide information, document or other matter is imposed by the Commissioner under section 53(1) must comply with the requirement. Paragraph 144 of the CoP further reminds LEAs of the importance of cooperating with the Commissioner fully. Any failure to comply with the requests of the Commissioner would be viewed most seriously and the officer concerned will be liable to disciplinary actions.

(cii) About the operation of the existing ICSO and drafting of existing provisions

To explain how a non-physical device (such as a programme) deployed in a covert surveillance operation was retrieved by LEA officers after completion of the operation concerned; whether LEA officers could retrieve, from a remote location and without physical contact, a surveillance device in the form of a program; and in relation to cases where a device could not be retrieved after the covert surveillance operation concerned was completed, whether measures were taken to minimize the impact of non-retrieval of device on the privacy of the subject of covert surveillance

33. The use of surveillance devices by public officers for the purposes of covert surveillance operations under the ICSO are tightly controlled. Under section 5 of the ICSO, no public officer shall, directly or indirectly (whether through any other person or otherwise), carry out any covert surveillance unless pursuant to a prescribed authorization. Section 30 provides that a prescribed authorization also authorizes, among others, the retrieval of any of the devices authorized to be used under the prescribed authorization.

34. Paragraph 136 of the CoP stipulates that as a matter of policy, surveillance devices should not be left in the target premises after the completion or discontinuance of the covert surveillance operation, in order to protect the privacy of the individuals affected and the covert nature of the operation. A prescribed authorization already authorizes the retrieval of a surveillance device within the period of authorization, and surveillance devices should be retrieved during the period of authorization. Where in some cases it may not be reasonably practicable to retrieve the device before the expiry of the authorization, an application must be made for a device retrieval warrant. Pursuant to paragraph 137 of the CoP, any decision of not applying for a device retrieval warrant where the device has not been retrieved after the expiry of an authorization should be endorsed by an officer at the directorate rank **and** a report on the decision, together with the reasons and steps taken to minimize possible intrusion into privacy by the device, should be submitted to the Commissioner. The Commissioner may then carry out a review based on the information provided and reasons advanced. The use of surveillance devices for ICSO operations are subject to stringent review by the Commissioner, and all devices used for such operations have to be returned to the ICSO device store after each operation and the movements of such devices are properly documented in the device registers, which are required to be submitted to the Commissioner regularly.

35. Paragraph 136 of the CoP further requires that in all cases, at the expiration of the authorization, the officer-in-charge of a covert surveillance

operation should take all reasonably practicable steps as soon as possible to deactivate the device or to withdraw any equipment that is capable of receiving signals or data that may still be transmitted by a device if it cannot be deactivated. When the prescribed authorization ceases to be in effect, no covert surveillance (i.e. any surveillance carried out with the use of any surveillance device defined in the ICSO, including a data surveillance device involving the use of “programme” to monitor or record the input of information into, or the output of information from, any information system by electronic means) shall be carried out, or else it will contravene section 5 of the ICSO. Non-compliance with any of the above-quoted requirements under the ICSO and/or the CoP amounts to non-compliance with a “relevant requirement”, and has to be reported to the Commissioner under section 54 of the ICSO. Any LEA officer in default would be subject to disciplinary action or, depending on the circumstances of the case, may be prosecuted for the common law offence of misconduct in public office.

36. LEAs are under an obligation to observe the above requirements in relation to the conduct of covert surveillance (including the retrieval of surveillance devices), regardless of the types of surveillance devices deployed. It is inappropriate to disclose detailed operational arrangements since doing so may reveal LEAs’ enforcement capabilities to criminals, who may be able to elude justice, thus undermining LEAs’ ability in crime investigation and protection of public safety.

37. According to the Commissioner’s Annual Reports published since the enactment of the ICSO, there had not been any case in which a device used in a covert surveillance operation under ICSO was lost or could not be retrieved or recovered at the expiration of a prescribed authorization.

To explain whether it is consistent with Article 30 of the Basic Law in relation to protection of privacy if the requirements and arrangements to retrieve devices deployed in a covert surveillance operation upon completion is set out in CoP but not the law; and consider setting out in the ICSO such requirements and arrangements

38. Under Article 30 of the Basic Law, “[t]he freedom and privacy of communication of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences”.

39. The retrieval of surveillance devices is regulated by sections 33 to 38 of the ICSO and paragraphs 136 and 137 of the CoP. The CoP is issued and revised by the Secretary for Security pursuant to section 63 of the ICSO. Section 63(4) of the ICSO provides that any officer of an LEA must, in performing any function under or for the purposes of any provision of the ICSO, comply with the provisions of the CoP. Compliance by the LEAs and their officers with the applicable requirements under the provisions of the ICSO and the CoP is monitored by the Commissioner in accordance with Part 4 of the ICSO. The regulatory framework for the retrieval of surveillance devices as set out in the relevant provisions of the ICSO and the CoP is consistent with Article 30 of the Basic Law. It is unnecessary to incorporate the requirements of paragraphs 136 and 137 of the CoP into the ICSO.

To consider introducing a provision similar to section 30(g) of ICSO to expressly empower the Commissioner to require any public officer or any other person to provide translation service to assist him in the performance of his functions

40. Under the proposed revised section 53 of the ICSO, for the purpose of performing any of his functions thereunder, the Commissioner may require any public officer or any other person to answer any question, and to provide any information, document or other matter (including any protected product, whether or not it contains any information that is or may be subject to legal professional privilege) in his possession or control to the Commissioner, within the time and in the manner specified by the Commissioner when making the requirement. Paragraph 144 of the CoP also requires LEAs to provide as much assistance to the Commissioner as possible. As such, where so required by the Commissioner, LEAs could arrange for translation services as are necessary for the performance of his functions.

41. Further, under section 40 of the IGCO, where any Ordinance confers upon any person power to do or enforce the doing of any act or thing, all such powers shall be deemed to be also conferred as are reasonably necessary to enable the person to do or enforce the doing of the act or thing. The Commissioner may arrange for his own translation services as are reasonably necessary for the performance of his functions under the ICSO. Given the above, we do not consider it necessary to confer an express power on the Commissioner to require any public officer or any other person to provide translation service to assist him in the performance of his functions.

To provide information on intelligence management by LEAs

42. At present, information obtained as a result of a covert operation, together with the information obtained by an LEA from other sources such as crime reports from the public, case investigation and open source materials, can be aggregated into intelligence after being screened, evaluated and analysed. The intelligence will be used by the LEA for the purpose of crime prevention or detection. The intelligence management system of an LEA is subject to tight control. An LEA must strictly comply with its internal guidelines to ensure that all steps including the input, storage, access, use, updating, disposal or destruction of intelligence are under stringent internal control and audit. Audit trail record is kept for all access to and processing of intelligence, thereby ensuring system security and accuracy and reliability of intelligence.

To consider amending “cause the interception or covert surveillance concerned to be discontinued” in section 57(1) of ICSO along the line of “order and cause the interception or covert surveillance concerned to be discontinued”

43. Under section 57 of the ICSO, if an officer conducting reviews under section 56(1) or section 56(2) is of the opinion that the ground for discontinuance of a prescribed authorization exists, he shall as soon as reasonably practicable after forming the opinion, cause the interception or covert surveillance concerned to be discontinued. In practice, this would mean that the reviewing officer should inform the officer of the department concerned who is for the time being in charge of the interception or covert surveillance of his decision, and the latter should so comply. Paragraph 157 of the CoP requires that the reviewing officer should be at least one rank higher than the officer for approving the making of applications for judge’s authorization and the authorizing officer. Besides, where any interception or covert surveillance operation has been discontinued, the officer who has caused the discontinuance shall, as soon as reasonably practicable after the discontinuance, cause a report on the discontinuance and the ground for the discontinuance to be forwarded to the same relevant authority to whom an application under the ICSO for the issue or renewal of the prescribed authorization concerned has last been made, for revocation of the prescribed authorization concerned.

44. Whilst not defined in the IGCO or the ICSO, “cause” and “order” (as a verb) generally means “to precipitate or contribute to, whether directly or indirectly” and “to instruct” respectively. The officer conducting reviews under section 56(1) or section 56(2) of the ICSO shall make every necessary arrangement to ensure that the interception or the covert surveillance in question

has been discontinued and that a report on the discontinuance and the ground of the discontinuance has been provided to the same relevant authority. The officer-in-charge is obliged to comply with the instructions of the reviewing officer. Seen in this light, the term “cause”, which carries a much broader meaning than “order”, reflects sufficiently and more holistically the obligations imposed on the reviewing officer. We therefore do not consider it necessary to amend the current construction of the relevant clause in section 57(1).

To explain whether and how section 58 is applicable to all arrests within or across the LEAs as well as those within or outside the territory of Hong Kong

45. Section 58 of the ICSO requires an assessment of the effect of an arrest on the likelihood that any information which may be subject to LPP will be obtained by continuing the interception or covert surveillance. The assessment should be submitted to the relevant approving authority as soon as reasonably practicable after the arrest. The authority shall revoke the authorization if he is satisfied that the conditions for the continuance of the operation are not met. Besides, paragraph 123 of the CoP provides that where, further to the issue or renewal of a prescribed authorization, if the officer who is in charge of the interception / covert surveillance concerned becomes aware that the subject of the interception / covert surveillance has been arrested, and he forms an opinion that it is no longer necessary for the interception / covert surveillance to be continued after the arrest, he shall cause the interception / covert surveillance to be discontinued and shall, as soon as reasonably practicable after the discontinuance, cause a report to be provided to the relevant authority for revocation of the authorization in accordance with section 57(3). If, on the other hand, he forms an opinion that the interception / covert surveillance should continue, he should assess the effect of the arrest on the likelihood that any information which may be subject to LPP will be obtained by continuing the interception / covert surveillance and cause a report to be provided to the relevant authority under section 58 of the ICSO.

46. The ICSO does not provide for any requirement that the “arrest” for the purpose of section 58 of the ICSO is limited to that within the territory of Hong Kong. During the investigation process, if an LEA becomes aware of an arrest via any sources, it is required under section 58 of the ICSO to submit a report to the relevant authority.

To explain whether similar assessments to that under section 58 are required in scenarios other than arrest

47. The ICSO does not require that similar assessments have to be made when the subjects are being investigated but not arrested. However, there are procedures to be followed at different stages of an operation that provides safeguards for LPP information. When making an application for a prescribed authorization, the LEA applicant is obligated to state his assessment of the likelihood of obtaining LPP information. If subsequently there is anything that transpires which may affect the assessment, or which is considered as a material change of circumstances, the officer concerned has to promptly notify the panel judge of the altered LPP assessment by way of an REP-11 report; or, in the case of a Type 2 surveillance operation, to notify the authorizing officer by way of an REP-13 report. The panel judges have been very cautious in dealing with cases that might possibly involve LPP information being obtained by an LEA. According to the Commissioner's Annual Report 2013, when it was assessed that there was a likelihood of LPP information being obtained by an LEA and if the authorization was granted or allowed to continue, the panel judges would impose additional conditions. These additional conditions obliged the LEA to report back when the likelihood was heightened or when there was any material change of circumstances so that the panel judge would reconsider the matter in the new light. The Commissioner considered that these additional conditions were stringent and effective in safeguarding the important right of individuals to confidential legal advice. These conditions would be put on a statutory footing by the new section 58A proposed in the Bill.

**Security Bureau
November 2015**

Interception of Communications and Surveillance (Amendment) Bill 2015

Committee Stage

Amendments to be moved by the Secretary for Security

<u>Clause</u>	<u>Amendment Proposed</u>
9	In the proposed section 38A, in the heading, by deleting “Revocation of device retrieval warrant” and substituting “Report to panel judge: device retrieval warrant cannot be executed” .
10	By renumbering the clause as clause 10(1).
10(1)	By deleting “month and year” and substituting “date”.
12(1)	By deleting “month and year” and substituting “date”.
17(1)	By deleting “Revocation of prescribed authorization following” and substituting “Report to relevant authority:” .
18	In the proposed section 58A, in the heading, by deleting “Revocation of prescribed authorization in case of” and substituting “Report to relevant authority:” .

《2015年截取通訊及監察(修訂)條例草案》

委員會審議階段

由保安局局長動議的修正案

<u>條次</u>	<u>建議修正案</u>
9	在建議的第38A條中，在標題中，刪去“ 撤銷器材取出手令 ”而代以“ 向小組法官提供報告：不能執行器材取出手令 ”。
10	將該條重編為草案第10(1)條。
10(1)	刪去“始於何年何月”而代以“開始的日期”。
12(1)	刪去“始於何年何月”而代以“開始的日期”。
17(1)	刪去“於逮捕截取或秘密監察的目標人物後，撤銷訂明授權”而代以“向有關當局提供報告： 截取或秘密監察的目標人物被逮捕 ”。
18	在建議的第58A條中，在標題中，刪去“遇上資料不準確或情況改變而撤銷訂明授權”而代以“向有關當局提供報告： 資料不準確或情況有變化 ”。