

LEGISLATIVE COUNCIL BRIEF

Interception of Communications and Surveillance Ordinance (Chapter 589)

Interception of Communications and Surveillance (Amendment) Bill 2015

INTRODUCTION

At the meeting of the Executive Council on 3 February 2015, the Council **ADVISED** and the Chief Executive **ORDERED** that the Interception of Communications and Surveillance (Amendment) Bill 2015 (the Bill), at Annex, should be introduced into the Legislative Council (LegCo).

JUSTIFICATIONS

2. Interception of communications and covert surveillance operations are critical to the capability of our law enforcement agencies¹ (LEAs) in combating serious crime and protecting public security. The Interception of Communications and Surveillance Ordinance (Cap. 589) (ICSO), enacted in August 2006, provides a statutory regime to regulate the conduct of interception of communications and covert surveillance by the LEAs. In discharging his oversight function, the former Commissioner² on Interception of Communications and Surveillance made a number of recommendations to enhance the effectiveness of the ICSO regime. For the majority of the recommendations especially those which aim to 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. We propose to amend the ICSO to implement the recommendation of the former

¹ Under the ICSO, the law enforcement agencies which may conduct covert surveillance are Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption. The law enforcement agencies which may conduct interception are Customs and Excise Department, Hong Kong Police Force and Independent Commission Against Corruption.

² Mr Woo Kwok-hing, GBS, was the first Commissioner under the ICSO from 17 August 2006 to 16 August 2012.

Commissioner to provide an express power for the Commissioner on Interception of Communications and Surveillance (the Commissioner) to require the production of interception products and surveillance products (collectively “protected products”) obtained under the ICSO for the Commissioner’s inspection, as well as to implement a number of technical proposals recommended by the former Commissioner to enhance the effectiveness of the regulatory regime under the ICSO and the clarity of certain provisions in the ICSO. All the proposals have been endorsed by the incumbent Commissioner³.

Legislative Proposals

Key Proposal

Checking of Protected Products by the Commissioner

3. At present, for the purpose of performing the Commissioner’s functions under the ICSO, the Commissioner may require any public officer or any other person to provide any information, document or other matter in his or her possession or control to the Commissioner. In his Annual Report 2008 and Annual Report 2010, the former Commissioner proposed to amend the ICSO to require the preservation of protected products by the LEAs, and that the Commissioner and his or her staff should be given express power to examine, inspect and listen to such products, including those which concern cases of non-compliance or irregularity and cases involving information subject to legal professional privilege (LPP) or journalistic material (or a likelihood of obtaining such information or material). In his Annual Report 2011, the former Commissioner noted that while the checking of the products by the Commissioner and his or her staff would cause added intrusion to the subject’s rights, the purpose is to ensure that the LEA 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.

4. We propose to set out expressly in section 53(1)(a) that for the purpose of performing any of the Commissioner’s functions, the Commissioner may also require any public officer or any other person to provide “any protected products” (including any protected products that contain information that is or may be subject to LPP) in his or her possession

³ Mr Darryl Gordon Saw, a retired Judge of the Court of First Instance of the High Court, is the incumbent Commissioner under the ICSO with effect from 17 August 2012.

to the Commissioner. We also propose to add a new section 53A to provide an express power for the Commissioner to delegate the Commissioner's power to examine protected products to an officer working in his or her office who is responsible to him or her.

5. The ICSO contains the important principles that preservation of and access to protected products should be kept to the minimum that is necessary for the purpose that they are preserved; protected products should be destroyed as soon as their retention is no longer necessary; and all practical steps are taken to ensure that the protected products are protected against unauthorized or accidental access. Given the proposal in paragraph 4 above, we further propose to amend section 59 (1)(c) so that the head of an LEA must make arrangements to ensure that a protected product that is no longer required by the Commissioner after checking will be destroyed after its retention is no longer necessary for the relevant purpose of the prescribed authorization and for the purpose of enabling compliance with any further requirement of the Commissioner.

Other Technical Proposals

Time gap between the revocation of the prescribed authorization and the actual discontinuance of the operation

6. The former Commissioner raised concerns regarding the "unauthorized" operations resulting from the time gap between the revocation of a prescribed authorization by the relevant authority (i.e. a Panel Judge, an authorizing officer or a department head) and the actual discontinuance of the operation by the LEA, which is a technical problem in nature and is unavoidable.

7. We propose to amend the ICSO to the effect 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 disclosure and be disposed of in accordance with the provisions of the ICSO. Separately, the COP would stipulate a timeframe within which discontinuation should normally be effected in these circumstances and would prescribe the authority responsible for approving any

extension of such timeframe. Any LEA which fails to discontinue the operation within the stipulated timeframe would be required to submit a report to the Commissioner to account for the delay in discontinuing the operation. In addition, the COP would require the LEAs not to gain access to any products obtained during the time gap once they have notice of the revocation.

Partial Revocation of Prescribed Authorizations, Additional Grounds for Revoking Prescribed Authorizations and Revocation of Device Retrieval Warrants

(A) Partial revocation of a prescribed authorization

8. At present, the ICSO enables the relevant authority 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 the relevant authority 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.

9. On the former Commissioner's recommendation, we propose to enable an LEA to discontinue part of an interception or covert surveillance and to require the LEA to report such partial discontinuance to the relevant authority who must revoke the relevant part of the prescribed authorization concerned. We also propose that upon receipt from an LEA of a report on the arrest of the subject, the relevant authority must revoke a part of a prescribed authorization for interception or covert surveillance if the conditions for the continuance of that part of the prescribed authorization under section 3 of the ICSO are not met. We further propose to provide express power for the relevant authority to vary any terms or conditions in the prescribed authorization and specify new conditions upon receipt of a report on discontinuance or arrest.

(B) Revocation of a prescribed authorization after the submission of a report on material inaccuracy or material change in circumstances

10. 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, there is no such express requirement in the ICSO,

and the ICSO does not contain any express provision enabling the relevant authority to revoke a prescribed authorization upon receipt of such a report.

11. 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. We further propose to require the relevant authority to revoke an authorization in whole or in part if the relevant authority considers that the conditions in section 3 of the ICSO are no longer met; to empower the relevant authority to vary any terms or conditions in the prescribed authorization and to specify new conditions subject to which the prescribed authorization is to continue to have effect, upon receipt of a report on any material inaccuracy or material change in circumstances.

(C) Revocation of device retrieval warrant

12. The ICSO provides for the power of a Panel Judge to issue a device retrieval warrant. The warrant authorizes the retrieval of any of the devices authorized for use by an LEA under a prescribed authorization after the prescribed authorization has ceased to have effect under the ICSO. However, there is no express provision with regard to the revocation of a device retrieval warrant.

13. We propose to impose a statutory obligation on the LEAs to report to a Panel Judge when they become aware that section 33(1)(a) or (b) does not apply to the devices or any of the devices specified in the warrant, or when they are of the opinion that the warrant or any part of the warrant cannot for any reason be executed. We further propose to empower the Panel Judge to revoke the device retrieval warrant or the relevant part of the warrant, as well as to vary any terms or conditions in the device retrieval warrant and specify new conditions subject to which the device retrieval warrant is to continue to have effect, upon consideration of the report.

(D) Specifying new conditions when refusing to confirm an emergency authorization or refusing to confirm a prescribed authorization or renewal issued or granted upon oral application

14. When a Panel Judge refuses to confirm an emergency authorization under the ICSO, the Panel Judge may order that the authorization is to have

effect subject to variations from the time of the determination. There is no express provision in the ICSO enabling the Panel Judge to specify new conditions in such circumstances. Similarly, the relevant authority does not have power under the ICSO to specify new conditions when refusing to confirm a prescribed authorization or renewal issued or granted upon oral application. We propose to amend the ICSO to give the relevant authority such power.

Clarification of the Meaning of the Terms “Relevant Person” and “Duration”

15. Under the ICSO, if the Commissioner, in the performance of the Commissioner’s 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 is required to give notice to the relevant person indicating, among others, the duration of the unauthorized interception or covert surveillance. The former Commissioner pointed out that the meanings of “relevant person” and “duration” under the ICSO were unclear.

16. We propose to amend section 48 to enhance the clarity of the meanings of the two terms. On “duration”, we propose that the Commissioner must notify the relevant person the month and year from which the unauthorized interception or covert surveillance concerned began, on top of the length of time involved. On the meaning of “relevant person”, we propose to amend it to cover the subjects in the scenarios where (i) the interception or covert surveillance is continued after the prescribed authorization has ceased to have effect; (ii) a person who is not the intended subject of the interception or covert surveillance under the prescribed authorization is treated as such; and (iii) the interception or covert surveillance is carried out in the absence of any prescribed authorization.

Reporting of non-compliance to the Commissioner

17. 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 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 would submit an incident report to the Commissioner as a matter of practice.

18. On the recommendation of the former Commissioner, we propose 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.

Discrepancy in the English and Chinese texts in the ICSO

19. We propose to amend sections 23 and 26 of the ICSO to make minor amendments to the Chinese texts of those sections.

THE BILL

20. The main provisions of the Bill are summarised below –

- (a) **Clause 6** empowers the panel judge to specify new conditions when refusing to confirm an emergency authorization;
- (b) **Clause 8** empowers the relevant authority to specify new conditions when refusing to confirm a prescribed authorization or renewal that is issued or granted upon oral application;
- (c) **Clause 9** provides for the revocation of device retrieval warrants;
- (d) **Clause 13** empowers the Commissioner to, for the purpose of performing the Commissioner's functions under the ICSO, require any public officer or any other person to provide protected products to the Commissioner;
- (e) **Clause 14** empowers the Commissioner to delegate the Commissioner's power to examine protected products to officers working in the his or her office who are responsible to him or her;
- (f) **Clause 15** requires the head of an LEA to report to the Commissioner a failure to comply with any relevant requirement even though the failure is not due to the fault of the department or its officer;
- (g) **Clause 16** provides for the revocation of a part of a prescribed authorization if the LEA considers that the conditions for the

continuance of that part are not met and has discontinued the relevant part of the interception or covert surveillance;

- (h) **Clause 17** provides for the partial revocation of a prescribed authorization after the subject of the interception or covert surveillance has been arrested;
- (i) **Clause 18** provides for the revocation of a prescribed authorization in the case of a material inaccuracy in the information contained in an application submitted or a material change in circumstances;
- (j) **Clause 19** provides for the destruction of protected products that have been provided to the Commissioner;
- (k) **Clause 20** provides that any protected product obtained after the prescribed authorization is revoked and before the interception or covert surveillance is discontinued in accordance with the arrangements made by the department head is to be regarded as having been obtained pursuant to a prescribed authorization.

LEGISLATIVE TIMETABLE

21. The legislative timetable will be –

Publication in the Gazette	6 February 2015
First and Commencement of Second Reading Debate	11 February 2015
Resumption of Second Reading Debate, Committee Stage and Third Reading	to be notified

IMPLICATIONS OF THE PROPOSAL

22. The proposal has no economic, productivity, environmental, sustainability and family implications. The proposal is in conformity with the Basic Law, including the provisions concerning human rights. It does not affect the current binding effect of the ICSO. As for financial or civil service implications of additional resources requirements that may arise from the implementation of the proposals, the Administration will make arrangements in accordance with the prevailing mechanism.

PUBLIC CONSULTATION

23. We have taken into account views of key stakeholders before drawing up the legislative proposals, including the Commissioner and the Panel Judges, the legal professional bodies, journalists' associations and the Privacy Commissioner for Personal Data. The stakeholders generally welcomed the proposal to strengthen the Commissioner's oversight functions and empower the Commissioner to check the protected products, and 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. We briefed the Panel on Security of the LegCo on the legislative proposals on 2 July 2013. Members generally supported the proposals and considered that they should be implemented as soon as practicable.

PUBLICITY

24. We will publish the Bill in the Gazette. A spokesperson will be available to answer media and public enquiries.

BACKGROUND

25. The ICSO, enacted in August 2006, provides for a statutory regime for the conduct of interception of communications and covert surveillance by the LEAs. It aims to strike a balance between the need for prevention and detection of serious crimes and the protection of public security on the one hand and the need for safeguarding the privacy and other rights of individuals on the other. Under the ICSO regime, there is stringent control and monitoring at all stages of the covert operations – from the initial application to the execution of the authorization, and throughout the oversight process. Prior to any covert operations, the LEA must obtain a prescribed authorization from the relevant authority. All applications for prescribed authorizations must be for the purpose of preventing or detecting serious crime or protecting public security, and that the necessity and proportionality tests must be met before the relevant authority issues the respective authorization. The Commissioner is an independent oversight authority under the ICSO. His main function is to oversee the compliance by the LEAs with the relevant requirements of the ICSO.

ENQUIRIES

26. Enquiries relating to the brief can be directed to Mrs. Millie Ng, Principal Assistant Secretary for Security (E) at 2810 2632.

Security Bureau
4 February 2015

**Interception of Communications and Surveillance
(Amendment) Bill 2015**

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A BILL

To

Amend the Interception of Communications and Surveillance Ordinance to provide for the revocation of device retrieval warrants, partial revocation of prescribed authorizations and additional grounds for revoking prescribed authorizations; to allow conditions in prescribed authorizations to be varied; to clarify the meanings of certain expressions; to treat certain protected products obtained after the prescribed authorizations concerned are revoked to be properly obtained; to require a department head to report a failure to comply with a relevant requirement that is not due to the department's fault; to enable the Commissioner to require the provision of protected products and to delegate the power to examine them; to make minor textual amendments; and to provide for related matters.

Enacted by the Legislative Council.

1. Short title

This Ordinance may be cited as the Interception of Communications and Surveillance (Amendment) Ordinance 2015.

2. Interception of Communications and Surveillance Ordinance amended

The Interception of Communications and Surveillance Ordinance (Cap. 589) is amended as set out in sections 3 to 20.

3. Section 2 amended (interpretation)

(1) Section 2(1), definition of *device retrieval warrant*—

Repeal

everything after “section 34”

Substitute

“and, where the context requires, includes—

- (a) a device retrieval warrant to be issued under that section; and
- (b) a device retrieval warrant that has been partially revoked under section 38A;”.

(2) Section 2(1), definition of *emergency authorization*—

Repeal

everything after “Part 3”

Substitute

“and, where the context requires, includes—

- (a) an emergency authorization to be issued under that Division; and
- (b) an emergency authorization that has been partially revoked under Part 5;”.

(3) Section 2(1), definition of *executive authorization*—

Repeal

everything after “Part 3”

Substitute

“and, where the context requires, includes—

- (a) an executive authorization to be issued or renewed under that Division; and
- (b) an executive authorization that has been partially revoked under Part 5;”.

(4) Section 2(1), definition of *judge's authorization*—

Repeal

everything after “Part 3”

Substitute

“and, where the context requires, includes—

- (a) a judge’s authorization to be issued or renewed under that Division; and
- (b) a judge’s authorization that has been partially revoked under Part 5;”.

4. Section 3 amended (conditions for issue, renewal or continuance of prescribed authorization)

Section 3(1)—

Repeal

“, or the continuance,”

Substitute

“of a prescribed authorization, or the continuance of a prescribed authorization or a part”.

5. Section 23 amended (application for confirmation of emergency authorization)

Section 23(1), Chinese text—

Repeal

“生效”

Substitute

“發出”.

6. Section 24 amended (determination of application for confirmation of emergency authorization)

- (1) Section 24(3)(a)(ii), after “the variations”—

Add

“, and any new conditions,”.

- (2) After section 24(3)—

Add

“(3A) The new conditions specified by the panel judge under subsection (3)(a)(ii) may apply to the emergency authorization itself or to any further authorization or requirement under it (whether granted or imposed under its terms or any provision of this Ordinance).”.

7. Section 26 amended (application for confirmation of prescribed authorization or renewal issued or granted upon oral application)

Section 26(1), Chinese text—

Repeal

“或續期生效”

Substitute

“發出或該續期批予”.

8. Section 27 amended (determination of application for confirmation of prescribed authorization or renewal issued or granted upon oral application)

- (1) Section 27(3)(a)(ii), after “the variations”—

Add

“, and any new conditions,”.

- (2) After section 27(3)—

Add

“(3A) The new conditions specified by the relevant authority under subsection (3)(a)(ii) may apply—

- (a) to the prescribed authorization or renewed prescribed authorization itself; or
- (b) to any further authorization or requirement under the prescribed authorization or renewed prescribed authorization (whether granted or imposed under the terms of the prescribed authorization or renewed prescribed authorization or any provision of this Ordinance).”.

9. Section 38A added

Part 3, Division 6, after section 38—

Add

“38A. Revocation of device retrieval warrant

- (1) If, while a device retrieval warrant is in force but not yet completely executed, the officer of the department concerned who is for the time being in charge of the execution of the warrant—
 - (a) becomes aware that section 33(1)(a) or (b) does not apply to the devices or any of the devices specified in the warrant; or
 - (b) is of the opinion that the warrant or a part of the warrant cannot for whatever reason be executed,
 the officer must, as soon as reasonably practicable after becoming aware of the matter or forming the opinion, cause a report on the matter or opinion to be provided to a panel judge.
- (2) If a panel judge receives a report under subsection (1), the panel judge may revoke the device retrieval warrant concerned or the relevant part of the device retrieval warrant concerned.

- (3) If the device retrieval warrant or a part of the device retrieval warrant is revoked under subsection (2), the warrant or that part of the warrant, despite section 35(b), ceases to have effect from the time of the revocation.
- (4) If the device retrieval warrant is not revoked or only part of the device retrieval warrant is revoked, the panel judge may do one or both of the following—
 - (a) vary any terms or conditions in the warrant;
 - (b) specify any new conditions in the warrant that apply to the warrant itself or to any further authorization under it (whether granted under its terms or any provision of this Ordinance).”.

10. Section 44 amended (examination by Commissioner)

Section 44(2)(a), after “one of interception or covert surveillance”—

Add

“, the month and year from which the interception or covert surveillance began”.

11. Section 46 amended (further provisions relating to examinations)

Section 46(3), after “other matter”—

Add

“(including any protected product, whether or not it contains any information that is or may be subject to legal professional privilege)”.

12. Section 48 amended (notifications to relevant persons)

- (1) Section 48(1)(a), after “one of interception or covert surveillance”—

Add

“, the month and year from which the interception or covert surveillance began”.

(2) Section 48—

Repeal subsection (7)**Substitute**

“(7) In this section—

relevant person (有關人士) means—

- (a) if the interception or covert surveillance concerned is one that is continued after the prescribed authorization concerned or the relevant part of the prescribed authorization concerned has ceased to have effect, the subject of the interception or covert surveillance;
- (b) if the interception or covert surveillance concerned is carried out by an officer of the department concerned purportedly pursuant to a prescribed authorization but the subject of the interception or covert surveillance is not the intended subject under the prescribed authorization, the subject of the interception or covert surveillance; or
- (c) if the interception or covert surveillance concerned is carried out without the authority of a prescribed authorization, otherwise than in a situation specified in paragraph (a) or (b), the subject of the interception or covert surveillance.”.

13. Section 53 amended (further powers of Commissioner)

(1) Section 53(1)(a), after “other matter”—

Add

“(including any protected product, whether or not it contains any information that is or may be subject to legal professional privilege)”.

(2) Section 53(4), after “other matter”—

Add

“(including any protected product, whether or not it contains any information that is or may be subject to legal professional privilege)”.

14. Section 53A added

After section 53—

Add**“53A. Delegation of power to examine protected products**

- (1) The Commissioner may delegate, in writing, the Commissioner’s power specified in subsection (2) to an officer working in the Commissioner’s office who is responsible to the Commissioner.
- (2) The power is the power to examine protected products provided to the Commissioner in compliance with a requirement imposed under section 53(1)(a).
- (3) The Commissioner may specify in any instrument of delegation any terms or conditions subject to which the delegation is to have effect.
- (4) A delegation under this section does not preclude the Commissioner from exercising at any time the power so delegated.”.

15. Section 54 amended (general obligations of departments to report on non-compliance)

(1) Section 54—

Renumber the section as section 54(1).

(2) After section 54(1)—

Add

“(2) Without affecting other provisions of this Part, if the head of any department considers that—

(a) there may have been a failure to comply with a relevant requirement in a case handled by the department; but

(b) the failure is not due to the fault of the department or any of its officers,

the head must also submit to the Commissioner a report with details of the failure.”.

16. Section 57 amended (discontinuance of interception or covert surveillance)

(1) Section 57, heading—

Repeal

“Discontinuance”

Substitute

“Revocation of prescribed authorization following discontinuance”.

(2) Section 57(1), after “prescribed authorization”—

Add

“or a part of a prescribed authorization”.

(3) Section 57(1), after “surveillance concerned”—

Add

“or the relevant part of the interception or covert surveillance concerned”.

(4) Section 57(2)(a), after “prescribed authorization”—

Add

“or a part of the prescribed authorization”.

(5) Section 57(2)(a), after “covert surveillance”—

Add

“or the relevant part of the interception or covert surveillance”.

(6) Section 57(2)(b), after “covert surveillance”—

Add

“or a part of the interception or covert surveillance”.

(7) Section 57(4), after “authorization concerned”—

Add

“or the relevant part of the prescribed authorization concerned”.

(8) Section 57(5)—

Repeal

“any”

Substitute

“the prescribed authorization or a part of the”.

(9) Section 57(5), after “, the prescribed authorization”—

Add

“or that part of the prescribed authorization”.

(10) After section 57(5)—

Add

“(5A) If only part of the prescribed authorization is revoked, the relevant authority may do one or both of the following—

- (a) vary any terms or conditions in the prescribed authorization;
- (b) specify any new conditions in the prescribed authorization 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).”.

(11) Section 57(7), after “a prescribed authorization”—

Add

“or a part of a prescribed authorization”.

(12) Section 57(7), after “the prescribed authorization”—

Add

“or that part of the prescribed authorization”.

17. Section 58 amended (reports to relevant authorities following arrests)

(1) Section 58, heading—

Repeal

“Reports to relevant authorities following arrests”

Substitute

“Revocation of prescribed authorization following arrest of subject of interception or covert surveillance”.

(2) Section 58(2)—

Repeal

everything after “subsection (1),”

Substitute

“if the relevant authority considers that the conditions for the continuance of the prescribed authorization concerned or a part of the prescribed authorization concerned under section 3 are not met, the relevant authority must revoke the prescribed authorization or that part of the prescribed authorization.”.

(3) Section 58(3), after “Where the prescribed authorization”—

Add

“or a part of the prescribed authorization”.

(4) Section 58(3), after “, the prescribed authorization”—

Add

“or that part of the prescribed authorization”.

(5) After section 58(3)—

Add

“(3A) If the prescribed authorization is not revoked or only part of the prescribed authorization is revoked, the relevant authority may do one or both of the following—

- (a) vary any terms or conditions in the prescribed authorization;
- (b) specify any new conditions in the prescribed authorization 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).”.

18. Section 58A added

After section 58—

Add

“58A. Revocation of prescribed authorization in case of inaccurate information or change in circumstances

- (1) This section applies if, while a prescribed authorization is in force, the officer of the department concerned who is for the time being in charge of the interception or covert surveillance concerned—
- (a) becomes aware that there is a material inaccuracy in the information provided for the purposes of—
 - (i) the application for the issue of the prescribed authorization made under section 8, 14 or 20, including such an application made orally under section 25;
 - (ii) the application for the renewal of the prescribed authorization made under section 11 or 17, including such an application made orally under section 25;
 - (iii) the application for confirmation of the prescribed authorization as provided for in section 23(1) or 26(1); or
 - (iv) the application for confirmation of the renewal of the prescribed authorization as provided for in section 26(1); or
 - (b) becomes aware that there has been a material change in the circumstances on the basis of which—
 - (i) the prescribed authorization was issued under section 9(1)(a), 15(1)(a), 21(1)(a) or 25(4)(a);
 - (ii) the prescribed authorization was renewed under section 12(1)(a), 18(1)(a) or 25(4)(a);
 - (iii) the prescribed authorization was confirmed under section 24(1)(a) or 27(1)(a) or ordered

- to have effect under section 24(3)(a)(ii) or 27(3)(a)(ii); or
 - (iv) the renewal of the prescribed authorization was confirmed under section 27(1)(a).
- (2) Subject to subsection (3), the officer must—
- (a) as soon as reasonably practicable after becoming aware of the matter described in subsection (1)(a)(i) or (b)(i), cause a report on the matter to be provided to the relevant authority by whom the prescribed authorization has been issued;
 - (b) as soon as reasonably practicable after becoming aware of the matter described in subsection (1)(a)(ii) or (b)(ii), cause a report on the matter to be provided to the relevant authority by whom the prescribed authorization has been renewed;
 - (c) as soon as reasonably practicable after becoming aware of the matter described in subsection (1)(a)(iii) or (b)(iii), cause a report on the matter to be provided to the relevant authority by whom the prescribed authorization has been confirmed or ordered to have effect; or
 - (d) as soon as reasonably practicable after becoming aware of the matter described in subsection (1)(a)(iv) or (b)(iv), cause a report on the matter to be provided to the relevant authority by whom the renewal of the prescribed authorization has been confirmed.
- (3) The officer is not required to cause a report on a material change in circumstances to be provided to the relevant authority under subsection (2) if—

- (a) the change arises from a discontinuance of the interception or covert surveillance concerned or a part of the interception or covert surveillance concerned under section 57(1) or (2) and a report has been provided to the relevant authority under section 57(3); or
 - (b) the change arises from the arrest of the subject of the interception or covert surveillance concerned as referred to in section 58(1) and a report has been provided to the relevant authority under that section.
- (4) Where the relevant authority receives a report under subsection (2), if the relevant authority considers that the conditions for the continuance of the prescribed authorization concerned or a part of the prescribed authorization concerned under section 3 are not met, the relevant authority must revoke the prescribed authorization or that part of the prescribed authorization.
- (5) If the prescribed authorization or a part of the prescribed authorization is revoked under subsection (4), the prescribed authorization or that part of the prescribed authorization, despite the relevant duration provision, ceases to have effect from the time of the revocation.
- (6) If the prescribed authorization is not revoked or only part of the prescribed authorization is revoked, the relevant authority may do one or both of the following—
- (a) vary any terms or conditions in the prescribed authorization;
 - (b) specify any new conditions in the prescribed authorization 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).

- (7) If, at the time of the provision of a report to the relevant authority under subsection (2), the relevant authority is no longer holding his or her office or performing the relevant functions of that office—
- (a) without affecting section 54 of the Interpretation and General Clauses Ordinance (Cap. 1), the reference to relevant authority in that subsection includes the person for the time being appointed as a panel judge or authorizing officer (as appropriate) and lawfully performing the relevant functions of the office of that relevant authority; and
 - (b) the provisions of this section are to apply accordingly.
- (8) In this section—
- relevant duration provision* (有關時限條文) means section 10(b), 13(b), 16(b), 19(b) or 22(1)(b) (as may be applicable).”.

19. Section 59 amended (safeguards for protected products)

Section 59(1)—

Repeal paragraph (c)

Substitute

- “(c) that the protected product—
- (i) is destroyed as soon as its retention is not necessary for the relevant purpose of the prescribed authorization, unless it is to be or has been provided to the Commissioner in compliance with a requirement imposed under section 53(1)(a) before it is so destroyed; or

- (ii) if it has been provided to the Commissioner in compliance with a requirement imposed under section 53(1)(a), is, after it is no longer required by the Commissioner, destroyed as soon as its retention is not necessary—
 - (A) for the relevant purpose of the prescribed authorization; and
 - (B) if further requirements are imposed by the Commissioner under section 53(1)(a), for the purpose of enabling compliance with the requirements.”.

20. Section 65A added

After section 65—

Add

“65A. Protected products obtained after revocation of prescribed authorization

- (1) 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), 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.
- (2) Any protected product that is obtained after the prescribed authorization concerned or the relevant part of the prescribed authorization concerned is revoked and before the interception or covert surveillance concerned or the relevant part of the interception or covert surveillance concerned is discontinued in accordance

with the arrangements made by the head of the department concerned under subsection (1) is, for the purposes of this Ordinance, to be regarded as having been obtained pursuant to a prescribed authorization.”.

Explanatory Memorandum

The former Commissioner on Interception of Communications and Surveillance has made a number of recommendations to enhance the effectiveness of the regulatory regime under the Interception of Communications and Surveillance Ordinance (Cap. 589) (*Ordinance*), including the recommendation that the Commissioner on Interception of Communications and Surveillance (*Commissioner*) be given express power to require public officers to provide to the Commissioner protected products, that is, interception products and surveillance products. The object of this Bill is to amend the Ordinance to implement the former Commissioner's recommendations that have been endorsed by the incumbent Commissioner and agreed by the Administration.

2. Clause 1 sets out the short title.
3. Clause 3 amends the definitions of *device retrieval warrant*, *emergency authorization*, *executive authorization* and *judge's authorization* in section 2(1) of the Ordinance. After the amendment, a device retrieval warrant, emergency authorization, executive authorization or judge's authorization that has been partially revoked will still be regarded as a device retrieval warrant, emergency authorization, executive authorization or judge's authorization (as the case may be) under the Ordinance.
4. Clause 4 amends section 3(1) of the Ordinance so that the conditions for the continuance of a prescribed authorization set out in that section also apply to any part of a prescribed authorization.
5. Clauses 5 and 7 amend sections 23(1) and 26(1) of the Ordinance respectively to make minor amendments to the Chinese texts of those sections.

6. Clause 6 amends section 24 of the Ordinance to empower the panel judge to specify new conditions when refusing to confirm an emergency authorization.
7. Clause 8 amends section 27 of the Ordinance to empower the relevant authority to specify new conditions when refusing to confirm a prescribed authorization or renewal that is issued or granted upon oral application.
8. Clause 9 adds a new section 38A to the Ordinance to provide for the revocation of a device retrieval warrant if section 33(1)(a) or (b) of the Ordinance does not apply to the devices specified in the warrant or the warrant cannot for whatever reason be executed. The panel judge is empowered to revoke the warrant in whole or in part, to vary existing terms and conditions in the warrant and to specify new conditions.
9. Clause 10 amends section 44(2)(a) of the Ordinance to require the Commissioner to notify a person who makes an application for an examination under section 43 of the Ordinance the month and year from which the unauthorized interception or covert surveillance began.
10. Section 46 of the Ordinance provides that a person who makes an application for an examination under section 43 of the Ordinance is not entitled to have access to any information made available to the Commissioner in connection with the examination. Clause 11 amends section 46(3) of the Ordinance to clarify that protected products are also inaccessible to such an applicant.
11. Clause 12 amends section 48 of the Ordinance to clarify the meaning of *relevant person* and requires the Commissioner to notify the relevant person the month and year from which the unauthorized interception or covert surveillance began.
12. Clause 13 amends section 53 of the Ordinance to provide that the Commissioner may, for the purpose of performing the

- Commissioner's functions, require any public officer or any other person to provide protected products to the Commissioner.
13. Clause 14 adds a new section 53A to the Ordinance to empower the Commissioner to delegate the Commissioner's power to examine protected products to officers working in the Commissioner's office who are responsible to the Commissioner.
 14. Section 54 of the Ordinance requires the heads of the Customs and Excise Department, the Hong Kong Police Force, the Immigration Department and the Independent Commission Against Corruption to report to the Commissioner a failure by the department or any of its officers to comply with any relevant requirement. Clause 15 amends that section so that a report is also required to be made even though the failure is not due to the fault of the department or its officers.
 15. Clause 16 amends section 57 of the Ordinance to enable an officer of a department to discontinue a part of an interception or covert surveillance. It also requires the relevant authority to partially revoke the prescribed authorization after receiving a report on the matter, and empowers the relevant authority to vary existing terms and conditions in the prescribed authorization and to specify new conditions.
 16. Clause 17 amends section 58 of the Ordinance to require the relevant authority to revoke a part of a prescribed authorization after the subject of the interception or covert surveillance has been arrested if the relevant authority considers that the conditions for the continuance of that part of the prescribed authorization under section 3 of the Ordinance are not met. It also empowers the relevant authority to vary existing terms and conditions in the prescribed authorization and to specify new conditions.
 17. Clause 18 adds a new section 58A to the Ordinance to provide for the revocation of a prescribed authorization in the case of any material inaccuracy in the information contained in a relevant

- application or any material change in circumstances. The relevant authority is required to revoke the prescribed authorization or a part of the prescribed authorization if the relevant authority considers that the conditions for the continuance of the prescribed authorization or that part of the prescribed authorization under section 3 of the Ordinance are not met. The relevant authority is also empowered to vary existing terms and conditions in the prescribed authorization and to specify new conditions.
18. Clause 19 amends section 59(1)(c) of the Ordinance to provide for the destruction of protected products that have been provided to the Commissioner in compliance with a requirement imposed by the Commissioner under section 53(1)(a) of the Ordinance.
 19. Clause 20 adds a new section 65A to the Ordinance to provide that any protected product that is obtained after the prescribed authorization concerned is revoked and before the interception or covert surveillance concerned is discontinued in accordance with the arrangements made by the department head concerned under the new section is to be regarded as having been obtained pursuant to a prescribed authorization.