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

Purpose

This paper reports on the deliberations of the Bills Committee on Interception of Communications and Surveillance (Amendment) Bill 2015 ("the Bill").

Background

2. The Interception of Communications and Surveillance Ordinance (Cap. 589) ("ICSO"), which came into force on 9 August 2006, provides a statutory regime to regulate the conduct of interception of communications and covert surveillance by designated law enforcement agencies[1] ("LEAs").

3. Under the ICSO regime, prior to carrying out any covert operations covered by the Ordinance, an 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 may issue the authorization sought by the LEA.

4. ICSO provides for a Commissioner on Interception of Communications and Surveillance ("the Commissioner"), who is an independent oversight authority and has the power to review all relevant records of LEAs, to require

[1] Under ICSO, LEAs which may conduct covert surveillance are Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption. LEAs which may conduct interception are Customs and Excise Department, Hong Kong Police Force and Independent Commission Against Corruption.

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

5. In discharging his oversight function, the first Commissioner[2] made a number of recommendations to enhance the effectiveness of the ICSO regime. According to the Administration, these recommendations which improve on operational procedures and which do not require legislative amendments have already been implemented and CoP has been amended as appropriate. As to the recommendations that require legislative amendments, the Administration conducted two rounds of consultation in June and December 2011 with key stakeholders before drawing up the legislative proposals. Having taken into account the views received, the Administration proposes to implement the recommendations of the first Commissioner to provide an express power for the Commissioner to require the production of interception products and surveillance products obtained under ICSO for the Commissioner's inspection, as well as to enhance the effectiveness of the regulatory regime under ICSO and the clarity of a number of provisions in ICSO.

The Bill

6. The Bill was introduced into the Legislative Council on 11 February 2015. The Bill aims to amend ICSO -

(a) to provide for the revocation and partial revocation of device retrieval warrants;

(b) to provide for the partial revocation of prescribed authorizations;

(c) to provide for additional grounds for revoking prescribed authorizations;

(d) to provide for the variation of conditions in prescribed authorizations;

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

(e) to treat certain protected products obtained after the revocation of a prescribed authorization as properly obtained;

(f) to require a department head to report a failure to comply with a relevant requirement that is not due to the department's fault;

(g) to empower the Commissioner to require the provision of protected products and to delegate the power to examine them; and

(h) to make other textual amendments and to provide for related matters.

The Bills Committee

7. At the House Committee meeting on 27 February 2015, Members agreed to form a Bills Committee to study the Bill. Mr IP Kwok-him and Mr YIU Si-wing were elected as Chairman and Deputy Chairman of the Bills Committee respectively. The membership list of the Bills Committee is in **Appendix I**. The Bills Committee has held a total of 17 meetings to study the Bill. The Bills Committee has also received views from deputations at one of its meetings. A list of deputations that have submitted views to the Bills Committee is in **Appendix II**.

Deliberations of the Bills Committee

Checking of protected products by the Commissioner
(clauses 13 and 14)

Proposal to check protected products

8. Clause 13 of the Bill seeks to amend section 53 of ICSO 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[3] to the Commissioner. Under clause 14, a new section 53A is added to ICSO to allow the Commissioner to delegate the Commissioner's power to examine protected products to officers working in the Commissioner's office

[3] "Protected product" is defined in section 2(1) of ICSO as any interception product or surveillance product. In the same section, "interception product" is defined as any contents of a communication that have been obtained pursuant to a prescribed authorization for interception, including a copy of such contents. "Surveillance product" is defined as any material obtained pursuant to a prescribed authorization for covert surveillance, including a copy of the material.

who are responsible to him. Members note that the first Commissioner proposed in his Annual Report 2008 and Annual Report 2010 to amend ICSO to provide the Commissioner and his staff with express power to examine, inspect and listen to protected products, including those which concern cases of non-compliance or irregularity and cases involving information subject to legal professional privilege ("LPP") or journalistic material ("JM") (or a likelihood of obtaining such information or material) as well as other cases chosen by the Commissioner at random.

9. While acknowledging that the proposal to check protected products by the Commissioner will cause added intrusion into the rights of the subjects of covert operations, members recognize that the purpose is to ensure that the officers in LEAs have done nothing wrong in the conduct of interception or covert surveillance against the subjects. Some members have, however, expressed concern about the security risk of the checking proposal and whether it is lawful for the Commissioner or his designated staff to make written notes or summary of protected products.

10. The Administration has advised that the security risk of the checking proposal will be reduced to the minimum by having the interception and surveillance products kept and preserved in the LEA's premises. The products will be examined upon the request of the Commissioner at the LEAs' premises. When the review is completed the products will be destroyed by the LEA in accordance with ICSO.

11. Noting that the Commissioner may make written notes and summaries when he is checking protected products, Mr James TO has expressed concern about the legal basis for the arrangements. The Administration has explained that section 40(1) of the Interpretation and General Clauses Ordinance (Cap. 1) ("IGCO") 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 examine, inspect and listen to protected products, they can rely on the general incidental power under section 40(1) of IGCO to make such notes and summaries when performing these functions. Members note that Mr James TO has indicated his intention to propose a Committee stage amendment ("CSA") to section 53(5) to put it beyond doubt that the Commissioner is empowered to make written notes and summaries during his performance of duties to check protected products.

Protected product that contains information subject to LPP

12. Members note that the Law Society of Hong Kong has submitted its views to the Bills Committee that there must be appropriate and proper protection for LPP information, and the Administration should seriously consider introducing an express provision to the effect that nothing in ICSO could be construed as authorizing any arbitrary or intentional access to LPP information by LEAs.

13. The Administration has advised that the right to confidential legal advice is guaranteed by Article 35 of the Basic Law. LPP protects client-lawyer communications from disclosure to a client's prejudice. Whilst ICSO does not preclude the obtaining of LPP information nor require the termination of the operation as and when LPP information has been obtained, ICSO and CoP have put in place stringent measures to protect LPP information so that any LPP information inadvertently obtained by LEAs through authorized covert operations will not be passed to the investigators of LEAs and will not be used for investigations or in any legal proceedings. In addition, the proposed amendment to section 53(1)(a) seeks to empower the Commissioner to require, for the purpose of performing his functions, 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 to the Commissioner. This express power will further facilitate the performance of the Commissioner's function in overseeing the compliance by LEAs and their officers with the requirements of ICSO and CoP, including those for the protection of LPP information. The comprehensive safeguards for LPP information will thereby be further strengthened by the Bill.

Protected product that contains JM

14. Some deputations have submitted the views to the Bills Committee that an express provision similar to the one relating to LPP should be provided in ICSO for protected product that contains JM. They have also suggested that when exercising his power to check protected products involving JM, the Commissioner should ensure that the checking of such contents is solely for the purpose of examining whether the conduct of LEAs is proper, and that the contents concerned should not be disclosed to irrelevant parties. Sharing these deputations' views, some members have raised concern about the need to provide expressly that protected products should also include products containing JM and to introduce safeguards for obtaining information which may involve JM in the ICSO regime.

15. The Administration has explained that the nature of JM, which, under ICSO, means "any material acquired or created for the purposes of journalism", is different from that of information subject to LPP. However, in handling cases where JM is likely to be involved, the mechanism under the existing ICSO has provided sufficient safeguards on the premise of striking a balance between prevention and detection of serious crimes and protection of press freedom. As stipulated in Schedule 3 to ICSO, when applying for an authorization to conduct any covert operation, the LEA officer concerned has to set out in the affidavit or written statement supporting the application an assessment of the likelihood of obtaining information which may be the contents of JM. The panel judge concerned will consider whether or not a prescribed authorization should be issued, taking into account the applicant's assessment, and will impose additional conditions on all cases assessed to have a likelihood of obtaining JM for ensuring better protection of press freedom. It is also stated in CoP that the Commissioner should be notified of cases where information which may be the contents of any JM has been obtained or will likely be obtained by LEA officers through interception or covert surveillance operations. The LEA concerned has to preserve, in compliance with the Commissioner's request, the relevant interception products for his case review. With the passage of the Bill, the Commissioner shall have the right, under section 53(1)(a) of ICSO, to obtain and check any protected product which contains or may contain JM for the purpose of ascertaining whether LEAs have complied with the relevant requirements. The protection of press freedom will thereby be further enhanced by the Bill.

Delegation of power to examine protected products

16. Members have enquired about the number and rank of officers to whom the power of the Commissioner may be delegated pursuant to the proposed new section 53A. The Administration has advised that the Commissioner's office is currently supported by 20 civil servants headed by a Principal Executive Officer ("PEO", at D1 level). Resources have been reserved to create a dedicated team of three new posts (one Senior Executive Officer and two 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 LEAs who are entrusted to handle sensitive information.

17. Having regard to the sensitivity and confidentiality of information being handled, Mr James TO has expressed concern about the need to spell out explicitly in the Bill the class of officers to be delegated with the Commissioner's power to examine protected products.

18. The Administration has pointed out that all staff in the Commissioner's 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 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. It is believed that these arrangements, in addition to those safeguards already provided for in ICSO, would offer sufficient protection of the protected products.

19. The Administration has further explained that the current drafting of the proposed new section 53A 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. Therefore, there is no need to restrict the class of officers to whom the Commissioner's power may be delegated.

Destruction of protected products
(clause 19)

The Commissioner's review function and the requirement to destroy protected products

20. The proposed amendment to section 59(1) under clause 19 provides that a protected product should be destroyed once its retention is no longer necessary for the relevant purpose of the prescribed authorization and for compliance with any requirements imposed by the Commissioner that the protected product should be provided to him for the purpose of performing his functions.

21. Some members have expressed concern that the longer and the more protected products are retained by LEAs, the greater the risk of unauthorized or accidental access, disclosure or other use of these products. Members have also enquired about the existing destruction policy of LEAs and suggested that the Administration should consider setting out the minimum period of time that an LEA is required to retain all or certain categories of protected products for the Commissioner's checking.

22. The Administration has explained that at present, the originals of interception products are normally destroyed by LEAs within one month from interception. Any summaries and extracts of the originals are destroyed as soon as possible and in any case not later than one month after the completion of the operation. Surveillance products are also destroyed as soon as their retention is not necessary for the relevant purpose of the prescribed authorization. Where a protected product contains any information that is subject to LPP, the head of an LEA shall ensure that the product is destroyed not later than one year after its retention ceases to be necessary for the purposes of any civil or criminal proceedings; or in the case of a prescribed authorization for a telecommunications interception, is destroyed as soon as reasonably practicable. For specific cases, the LEAs have been preserving, at the Commissioner's request, protected products for his inspection.

23. The Administration has pointed out that the Commissioner is fully aware that protected products contain highly sensitive personal information. The longer and the more protected products are retained by LEAs, the greater the risk of unauthorized or accidental access, disclosure or other use of these products. As such, unless there are very exceptional circumstances, it is unlikely that the Commissioner would require an LEA to retain all protected products indiscriminately for his inspection. At present, in support of the Commissioner's functions to review different categories of cases at present, the four LEAs have put in place arrangements whereby protected products of specific cases are preserved for the Commissioner's review. Under these arrangements which are operating smoothly, 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. According to the Administration, once the Bill is passed, 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. The Administration does not suggest setting a minimum or maximum period of retention of protected products in the legislation, 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.

Interactions between sections 53 and 59

24. Members have sought clarification on how the procedures devised by the Commissioner under section 53(5) for the checking of protected products, such as for LEAs to retain the protected products for a certain period to facilitate the checking, would interact with the destruction requirement to be imposed on

LEAs by the proposed amendment to section 59(1)(c).

25. The Administration has explained that 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. The Administration has further explained that section 53(3) makes it clear that notwithstanding any other provision of 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 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.

Sanctions on LEA officers for non-compliance with the Commissioner's request

26. Some members including Mr James TO and Ms Cyd HO consider that criminal sanctions should be imposed on an LEA officer should he or she fail to provide any protected product as per the Commissioner's request or fail to comply with any requirement of the Commissioner. To this end, Mr James TO has indicated his intention to propose CSAs to clause 13 to the effect that non-compliance with the Commissioner's requirement imposed under section 53(1)(a) to retain any protected product, whether or not it contains any information that is or may be subject to LPP, for his checking shall be an offence punishable with a maximum penalty of two years' imprisonment. Similarly, Mr TO also proposes to amend clause 19 to introduce criminal sanctions for destroying a protected product when it is required to be provided to the Commissioner under the proposed amendment to section 59(1)(c) of ICSO, i.e. it shall be an offence punishable with a maximum penalty of two years' imprisonment.

27. The Administration has explained that ICSO by its policy design does not provide for any criminal sanctions. It has been the Administration's position that the question on whether criminal sanctions should be introduced under ICSO has to be considered holistically alongside the relevant bureau's deliberation on the Law Reform Commission's recommendations regarding the interception or covert surveillance conducted by persons who are not public officers. Due to mixed responses and divergent views from different sectors of the community, the relevant bureau is still considering the way forward. Pending the outcome of the bureau's deliberation, the Administration has no plan to consider introducing criminal offences under ICSO.

28. Mr James TO does not consider it necessary to defer consideration of his proposal of introducing criminal offences under ICSO pending the outcome of the study on the interception or covert surveillance conducted by non-public officers. He is of the view that penalty provisions should be added for non-compliance with the provisions of ICSO. The Administration has explained that ICSO was enacted to regulate the interception of communications and covert surveillance operations conducted by LEAs with a stringent statutory regime. The Administration has pointed out that although no criminal sanctions are provided for under ICSO, LEAs are required to comply with relevant requirements under ICSO and CoP, and they are subject to stringent oversight by the Commissioner. Officers who fail to do so are subject to disciplinary actions. A public officer who wilfully conducted interception or covert surveillance without a prescribed authorization may have committed the common law offence of misconduct in public office and, if convicted, is punishable by seven years' imprisonment. According to the Administration, since the enactment of ICSO, disciplinary actions, including reprimand, written warning of dismissal, written admonishment, warning and advice, have been taken against more than 60 officers who were found in breach of ICSO, CoP and/or related internal guidelines. The ICSO regime has been operating smoothly and the past and present Commissioners are generally satisfied with the performance of the LEAs. When the first Commissioner made his recommendations to improve the ICSO regime, he knew full well about the absence of criminal sanction in ICSO; he has not questioned the sufficiency of the current disciplinary mechanism in non-compliance cases; and he has not supported to add criminal sanction in ICSO. Therefore, the Administration does not see the need to provide for criminal sanctions under ICSO.

Notifications to relevant persons
(clause 12)

29. Members note the first Commissioner's view that the meaning of "duration" in section 48 of ICSO[4] is 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. According to the Administration, 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

[4] Under section 48 of ICSO, 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 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.

security.

30. While raising no objection to the proposed amendments to section 48, some members have enquired whether consideration should be given to specifying the day in addition to the month and year from which the unauthorized interception or covert surveillance began in the notice to the relevant person. 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, the Administration has agreed to introduce 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.

Emergency authorizations and prescribed authorizations issued upon oral application
(clauses 5 to 8)

31. Section 23(3)(a) of ICSO provides that if an application for confirmation of an emergency authorization is not made within 48 hours beginning with the time when the emergency authorization is issued, the head of an LEA shall cause the immediate destruction of any information obtained by carrying out the interception or Type 1 surveillance[5] concerned. 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, or a renewal granted, upon an oral application. Where an LEA has made an application for confirmation in compliance with section 23(1) or 26(1) but the relevant authority refuses to confirm the authorization or renewal in question, the relevant authority has 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. Some members have expressed concern that if an LEA causes the immediate destruction of the information obtained when it fails to make an application in accordance with the requirements, this may undermine the Commissioner's power of checking protected products.

32. The Administration has explained that the purpose of the destruction requirements under sections 23(3)(a), 24(3)(b), 26(3)(b)(i) and 27(3)(b) is related to either serious non-compliance or a failure to meet the stringent

[5] There are two types of covert surveillance under ICSO. Section 2(3) of ICSO provides that any covert surveillance which is otherwise Type 2 surveillance is regarded as Type 1 surveillance if it is likely that any information which may be subject to LPP will be obtained by carrying out it. The relevant authority for authorizing prescribed authorizations to carry out interception and Type 1 surveillance is any panel judge, and the relevant authority for Type 2 surveillance applications is the authorizing officer designated by the respective head of the departments listed in Part 2 of Schedule 1 to ICSO.

threshold for the issue of a prescribed authorization and hence, immediate destruction of the information obtained is an appropriate remedy. As it is a clear case of very serious non-compliance, any information obtained by the LEA should be destroyed immediately to safeguard the privacy of the subject and affected persons. 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.

33. Having regard to members' concerns, privacy protection and the need to facilitate an effective oversight by the Commissioner of LEAs' compliance, the Administration has agreed to introduce CSAs to clause 19 of the Bill by adding new section 59(1B) such that the Commissioner will be able to gain access to all protected products, including those referred to in sections 23(3)(a), 24(3)(b), 26(3)(b)(i) and 27(3)(b) before they may be destroyed by LEAs. The Administration considers that the CSAs will strike a right balance among privacy protection, deterrence against LEAs' abuse of power and effective oversight by the Commissioner of LEAs' compliance with the relevant requirements. These CSAs will also give full effect to the recommendations of the first Commissioner that (a) the Commissioner should be given the express power and unfettered discretion to examine all protected products of his choice, which would pose as a useful and strong deterrent against LEAs doing anything unauthorized or concealing any unauthorized acts, and that (b) the requirement to destroy protected products should be made subject to the Commissioner's power to examine them. According to the Administration, the Administration's CSAs are also endorsed by the incumbent Commissioner.

34. While supporting the Administration's proposed CSAs, members share the concerns raised by the legal adviser to the Bills Committee about the need to make consequential amendments to sections 23(3)(a), 24(3)(b), 26(3)(b)(i) and 27(3)(b) of ICSO to spell out expressly that the immediate destruction arrangements under these sections are subject to the requirement under section 59 as amended by the Administration's CSAs. The Administration has advised that the purpose of its proposed CSAs is to give full effect to the recommendation of the first Commissioner with regard to section 59 of ICSO. The new section 59(1B) to be added by the proposed CSAs have clearly provided that the requirements of the section apply "despite section 23(3)(a) or 26(3)(b)(i) or any requirement in an order made under section 24(3)(b) or 27(3)(b)". To remind LEAs and panel judges of the new requirements, the Administration will amend CoP to clearly spell out the new provisions that need to be observed for the destruction of protected products relating to the scenarios governed by the relevant sections. Having regard to the relevance of the proposed CSAs to section 59, the fact that the law would be read and interpreted as a whole, and the clarity afforded by the provisions of the new section 59(1B),

the Administration does not consider it necessary to further amend its proposed CSAs.

Time gap between revocation of the prescribed authorization and the actual discontinuance of the operation
(clause 20)

35. Pursuant to the proposed new section 65A, if a prescribed authorization is revoked by the relevant authority in whole or in part, the head of the department concerned is required to 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.

36. Some members have enquired about the arrangements and safeguards in place to ensure that the officer will not use or gain access to the protected products obtained after the revocation of the prescribed authorization concerned. The Administration has pointed out that under the existing ICSO regime, any protected products obtained pursuant to a prescribed authorization for the purposes of ICSO would have to be protected from unauthorized disclosure and be disposed of in accordance with the provisions of ICSO. The proposed new section 65A aims to address the technical and unavoidable problem of "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 concerned.

37. Members note that the Administration also proposes to, among others, amend CoP to give practical guideline that the benchmark timeframe within which actual discontinuance should normally be effected is 60 minutes counting from the time of revocation by the relevant authority. Some members including Mr James TO and Mr Dennis KWOK are of the view that the benchmark timeframe should be spelt out in ICSO. They have also enquired about the rationale for proposing the 60-minute benchmark timeframe, which seems unduly long.

38. The Administration has explained that the benchmark timeframe of 60 minutes is determined on the basis of the operational experience gained by LEAs since the inception of the ICSO regime, and is operational in nature, hence the specification in CoP rather than in the legislation. The Administration has stressed that CoP, when revised, will require that the time of revocation for each case should be clearly documented, and the time of revocation and the time of actual discontinuance must be reported to the

Commissioner. Any LEA which fails to discontinue operation within the stipulated timeframe would be required to submit a report to the Commissioner to account for the delay in discontinuing the operation. The Commissioner will then review whether the time taken is reasonable or not. In addition, CoP will require LEAs not to gain access to any protected products (including its copy) obtained during the time gap for the purpose of investigation or any other purpose. The Administration has assured members that it would consider members' concern in future review of the benchmark in the light of operational experience gained.

39. Notwithstanding the Administration's explanation, Mr James TO takes the view that the above arrangements should be spelt out in ICSO, instead of CoP. He has provided the Bills Committee with two versions of CSAs to the proposed new section 65A, in which both versions seek to introduce the following requirements: (a) the head of the department concerned shall report to the Commissioner the respective time of revocation and discontinuance of the interception or covert surveillance concerned; and (b) when the officer-in-charge concerned has notice of the revocation of the prescribed authorization, he shall not use or gain access to any protected product obtained after the revocation. In his second version of CSAs, it is further proposed that contravention of the requirement referred to in (b) above shall be an offence punishable with a maximum penalty of two years' imprisonment.

40. The Administration maintains its position that Mr TO's proposals concern operational details and should be incorporated in CoP rather than in the legislation. According to the Administration, CoP is promulgated pursuant to section 63 of ICSO, and serves to provide practical guidance to LEAs on the principles and requirements set out in ICSO. Non-compliance with CoP has to be reported to the Commissioner, and the officers concerned would be subject to disciplinary actions or, depending on the circumstances of the case, may be prosecuted for the common law offence of misconduct in public office.

41. As regards Mr TO's proposed CSA to provide for criminal sanctions in cases of using or gaining access to any protected product obtained after the revocation of a prescribed authorization, the Administration has drawn members' attention to the statutory duty of LEA officers to comply with the relevant requirements under ICSO, and the fact that LEA officers who are in default will be subject to disciplinary actions, or may even be prosecuted for the common law offence of misconduct in public office. The Administration maintains the view that the proposal to introduce criminal sanctions into ICSO, which has not been so recommended by the first Commissioner, would represent a major departure from the existing regulatory regime.

Partial revocation of a prescribed authorization
(clauses 16 and 17)

Proposals to enable an LEA to discontinue part of an interception or covert surveillance and to empower the relevant authority to vary terms or conditions

42. The proposed amendments to section 57 in clause 16 seek to, among others, 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. The Administration has explained that 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. While section 57 of ICSO provides for the relevant authority to revoke a prescribed authorization in its entirety in the event of an arrest or discontinuation of operation by LEA, there is currently no express provision in ICSO providing for the partial revocation of a prescribed authorization.

43. Members also note that the Administration further proposes to amend section 57 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. Similarly, section 58 is amended to allow partial revocation of prescribed authorization upon arrest of the subject of interception or covert surveillance. If the prescribed authorization is not revoked or is only revoked in part, the relevant authority is empowered to vary the terms and conditions in the prescribed authorization and to specify new conditions.

Arrangements to discontinue the interception or covert surveillance concerned

44. Under section 57 of 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. Some members have expressed the view that as opposed to "cause" as currently used under section 57, the reviewing officer must "order and cause" the interception or covert surveillance concerned to be discontinued. Some members have sought further clarification on whether the reviewing officer is obliged to order in writing the discontinuance so as to mandate compliance by the officer-in-charge of the interception or covert surveillance.

45. The Administration has advised that pursuant to section 57, the reviewing officer should 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. Neither ICSO nor CoP provides that the reviewing officer has to convey his decision orally or in writing. In practice, as soon as the reviewing officer has formed the opinion and informed the officer-in-charge of the operation of his decision either orally or in writing, arrangements for discontinuing the operation will ensue. The reviewing officer's decision will be documented in writing in the report on the discontinuance to be submitted to the relevant authority under section 57. The officer-in-charge is obliged to comply with the instructions of the reviewing officer. In the view of the Administration, the term "cause", which carries a broader meaning than "order", reflects sufficiently and more holistically the obligations imposed on the reviewing officer. The Administration therefore does not consider it necessary to amend the current use of the term "cause" in section 57(1).

Applicability of section 58 to all arrests

46. The existing section 58 of 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.

47. Mr James TO has sought clarification about how section 58 is applicable to all arrests within or across LEAs and whether arrests for the purpose of section 58 refer to those within or outside the territory of Hong Kong. Mr TO, Ms Claudia MO and Mr Dennis KWOK have sought further clarification as to whether the safeguards for information subject to LPP are applicable to legal advice by a lawyer in another jurisdiction in the event that an arrest takes place outside Hong Kong.

48. The Administration has advised that during the conduct of an interception or covert surveillance operation, if an LEA becomes aware of the subject's arrest in any place via any source, it is required under section 58 of ICSO to submit a report to the relevant authority. ICSO does not provide for any requirement that the "arrest" for the purpose of section 58 is limited to that within the territory of Hong Kong.

49. Noting that section 58 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, Mr James TO has pointed out that the subject of the interception or covert surveillance may have sought legal advice prior to an arrest, such as after search operations carried out by LEAs at his office or home. Mr TO has proposed a CSA to clause 17 to the effect that when the officer-in-charge has reasonable grounds for believing that the subject is highly likely to be arrested or has been arrested (within or outside Hong Kong) or in the circumstances where the subject is highly likely to contact or has contacted a legal professional, he shall comply with the assessment requirement. Mr TO has further indicated that he will consider proposing CSAs to expand the scope of section 58(1) of ICSO to cover other compulsory measures such as search of premises.

50. The Administration has explained that the purpose of section 58 is to safeguard the subject's right to confidential legal advice following his arrest and to ensure that the operation may continue only if the conditions for the continuance of the prescribed authorization under section 3 of ICSO are still met after his arrest. Section 58 is not applicable if the subject of an operation is subject to an investigation or inquiry without being arrested. However, according to the Administration, whether the subject has been arrested or not, there are safeguards at different stages of an interception or covert surveillance operation to protect LPP information (irrespective of whether the case involves a local or foreign lawyer in or outside Hong Kong). 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. When it is assessed that there is 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 oblige the LEA to report back when the likelihood is heightened or when there is any material change of circumstances so that the panel judge will reconsider the matter in the new light. These conditions would be put on a statutory footing by the new section 58A proposed in the Bill.

Revocation of a prescribed authorization after the submission of a report on material inaccuracy or material change in circumstances
(clause 18)

Meaning of "material inaccuracy" and "material change in circumstances"

51. Members note that as one of the standard conditions specified by the relevant authority in the prescribed authorizations, when the officer-in-charge becomes aware that there is any material inaccuracy in the information provided for the purposes of the application for the prescribed authorization or material change in circumstances on the basis of which the prescribed authorization was issued/renewed/confirmed, the officer must as soon as reasonably practicable after becoming aware of any of the matters, cause a report on the matter to be provided to the relevant authority. ICSO, however, does not contain any express provision enabling the relevant authority to revoke a prescribed authorization upon receipt of such a report. The proposed new section 58A provides for, among others, 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 on the basis of which a prescribed authorization was issued/renewed/confirmed.

52. Some members have expressed concern that the differences between "material inaccuracy" and "material change in circumstances" are not clear. In light of members' concerns, the Administration will provide some examples of "material inaccuracy" and "material change in circumstances" in CoP, as follows -

(a) "material inaccuracy" bears the following meanings :

(i) incorrect information in relation to the particulars of the subject;

(ii) incorrect information in relation to the background of the application or case details; and

(b) "material change in circumstances" bears the following meanings :

(i) heightened likelihood of obtaining information subject to LPP or JM;

(ii) new information on the identity of the subject uncovered during operation;

(iii) new information relevant to the granting or otherwise of the application in question.

"Reasonable suspicion" threshold

53. Some members including Mr James TO and Ms Claudia MO have expressed the view that it is more appropriate to require the submission of a report under the proposed new section 58A when the officer of the department concerned "reasonably suspects" or "knows" (as opposed to "becomes aware" as currently drafted) that there is a material inaccuracy or a material change in circumstances. Similar amendments should also be made to the expression "becomes aware" in other relevant provisions in ICSO. Ms MO has pointed out that there is a difference between the meaning of "becomes aware" and its Chinese rendition "知悉".

54. The Administration has advised that 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 the "reasonable person" test will apply. "Reasonable suspicion" is a standard usually used in criminal procedure. Although this standard is adopted in section 3(1)(b) of 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 the proposed new 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 LEA to make a report to the relevant authority when the officer becomes aware of the material inaccuracy or material change in circumstances. According to the Administration, adopting the "reasonable suspicion" standard would give rise to uncertainty and LEAs may encounter difficulty in complying with such a requirement.

55. The Administration has further advised that the expression "becomes aware" has been used in the existing sections 57 and 58 of ICSO. "Become aware" and "know" are not defined in IGCO or ICSO. For the purpose of the existing sections 57 and 58 and the proposed new section 58A, it does not consider that there is any material difference between the two expressions in terms of achieving the policy intent. The use of "becomes aware" in the current context has the effect of emphasizing that the officer comes to know that the relevant circumstances or information exists from a certain point of time. Section 58 is about reporting to the relevant authority following the arrest of the subject. Operationally, when section 58 is invoked, the officer concerned would verify the information pertinent to the arrest using the established

internal checking system before he provides the relevant authority with a report under section 58(1).

56. Notwithstanding the Administration's explanation, Mr James TO maintains his view that the "reasonable suspicion" threshold will better safeguard the privacy of the subject and prevent abuse of power by LEAs. He has provided the Bills Committee with two versions of CSAs to the proposed new section 58A to introduce the "reasonable suspicion" threshold. In his first version of CSAs, the Administration's proposed section 58A(6)(b) is kept, whereas in his second version, any such further authorization shall be granted or imposed under its terms referred to in section 29(1) to (7) or section 30 of ICSO, where appropriate. The Administration has maintained its position and explanation as set out in paragraphs 54 and 55 above, and does not find these proposed CSAs agreeable.

Revocation of device retrieval warrant and retrieval of surveillance device (clause 9)

57. Members note that the existing ICSO has no provision for the revocation of a device retrieval warrant. The proposed new section 38A under clause 9 seeks to allow the revocation of the entire, or a part of, a device retrieval warrant. The panel judge is also empowered to vary the terms or conditions of a warrant or to specify any new conditions in the warrant. Some members have expressed concern about the circumstances under which surveillance device deployed in a covert surveillance operation will not be retrieved after its completion. These members have sought clarification about the requirements and arrangements for LEAs to retrieve such device and whether LEAs are required to retrieve a non-physical device, such as a programme deployed in a convert surveillance operation after its completion.

58. The Administration has explained that under section 2(1) of ICSO, the definition of "surveillance device" includes a "data surveillance device" which is in turn defined as "any device or programme used to monitor or record the input of information into, or the output of information from, any information system by electronic means". The Administration has further explained that 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. Except in some exceptional cases in which 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.

59. Some members have expressed concern about whether measures have been taken to minimize the impact of non-retrieval of device on the privacy of

the subject of covert surveillance in the event that a device cannot be retrieved after the covert surveillance operation concerned has been completed.

60. The Administration highlights that since the inception of the ICSO regime, all devices used in covert surveillance operations under ICSO have been retrieved or recovered before the expiration of the prescribed authorization. No devices have ever been lost or required retrieval after the expiration of the prescribed authorization. The Administration has drawn members' attention to the tight control of use of surveillance devices by public officers for the purposes of covert surveillance operations under ICSO. Under section 5 of 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. The Administration highlights that paragraph 136 of CoP sets out 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. Paragraph 136 of 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. The Administration has stressed that when the prescribed authorization ceases to be in effect, no covert surveillance (including the use of 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 by the LEA concerned, or else it will contravene section 5 of ICSO.

61. The Administration has advised that non-compliance with any of the above requirements under ICSO and/or CoP amounts to non-compliance with a "relevant requirement", and has to be reported to the Commissioner under section 54 of 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.

62. Members also note that pursuant to paragraph 137 of 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. In addition, 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.

63. Mr James TO has expressed concern whether it is consistent with Article 30 of the Basic Law in relation to protection of privacy of communication if the requirements and arrangements to retrieve devices deployed in a covert surveillance operation upon completion is set out in CoP but not in the legislation. The Administration has affirmed that the regulatory framework for retrieval of surveillance devices as set out in the relevant provisions in ICSO and CoP is consistent with Article 30 of the Basic Law. CoP is issued and revised by the Secretary for Security pursuant to section 63 of ICSO, and section 63(4) of ICSO provides that any officer of an LEA must comply with the provisions of CoP. The Administration considers it unnecessary to incorporate the requirements of paragraphs 136 and 137 of CoP into ICSO.

64. Noting that panel judges are the authorities to issue a device retrieval warrant, some members have sought clarification whether the Commissioner is also empowered to order the retrieval of a surveillance device after expiry of the prescribed authorization concerned. Besides, Mr James TO considers that the non-retrieval of a surveillance device after expiry of the prescribed authorization concerned should be approved by a panel judge instead of being endorsed by an officer at the directorate rank as stipulated in CoP. Mr TO has indicated his intention to propose CSAs to the proposed new section 38A in clause 9 to this effect. Members note that apart from this, Mr TO has prepared another version of his proposed CSAs which further specifies that the panel judge may do so under the warrant or section 29(6) or (7) or section 30.

65. The Administration has explained that the panel judges and the Commissioner play different roles. The panel judges are the authorities to consider applications for prescribed authorization to conduct interception and covert surveillance and are the authorities to issue a device retrieval warrant authorizing the retrieval of any of the devices used under such a prescribed authorization after such authorization has expired. The Commissioner has an oversight function under ICSO. If the Commissioner is not satisfied with an LEA's reasons in its report on the decision of not applying for a device retrieval warrant and considers that the device should have been retrieved before or after expiry of the authorization, he may notify the LEA concerned of his findings and recommend the LEA to take appropriate actions, including applying to a panel judge for a device retrieval warrant. The LEA concerned shall then

submit to the Commissioner a report with details of any measures taken to implement the recommendations as soon as reasonably practicable or within the time specified by the Commissioner.

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)

66. Under the proposed sections 24(3A) and 27(3A)(b), 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. Some members have expressed concern that the use of the expression "any provision of this Ordinance" in the proposed sections 24(3A) and 27(3A)(b) is not clear about the specific provisions in ICSO to which the references of "any further authorization or requirement" under a prescribed authorization in these proposed sections are referred to.

67. The Administration has explained that pursuant to section 32 of ICSO, 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 ICSO. On the recommendation of the first Commissioner, the Administration proposes 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. The Administration has further advised that the phrase "further authorization or requirement under it" is also used in the proposed sections 57(5A)(b) and 58(3A)(b), and new section 58A(6)(b) for a similar purpose as well as used in the existing section 38.

68. Members note that Mr James TO has indicated that he will propose CSAs to the Bill to put it beyond doubt the corresponding sections of ICSO to which the references of "further authorization or requirement" are referred to.

69. The Administration considers that having regard to the requirement in section 32, it is appropriate to maintain the use of the phrase "further authorization or requirement under it" in the relevant clauses to ensure consistency. In addition, in the past nine years since the enactment of ICSO, neither the panel judges nor any authorizing officers have experienced any difficulties in understanding or exercising their powers under section 32. Furthermore, the first Commissioner has not made any recommendation that section 32 should be amended.

Power of the Chief Executive ("CE") to order the interception of telecommunications messages

70. Section 33(1) of the Telecommunications Ordinance ("TO") (Cap. 106) provides that for the purpose of providing or making available facilities reasonably required for (a) the detection or discovery of any telecommunications service provided in contravention of any provision of TO or any regulation made under TO, or (b) the execution of prescribed authorizations for telecommunications interception that may from time to time be issued or renewed under ICSO, CE may order that any class of messages shall be intercepted. Some members have asked whether CE has ever invoked section 33(1)(b) of TO since inception of the ICSO regime.

71. The Administration has advised that as the CE's exercise of such power relates to sensitive operational arrangement in connection with provision of facilities required for authorized covert operations under ICSO, the relevant statistics relating to the exercise of such power cannot be disclosed, as disclosure of such information may be prejudicial to the prevention or detection of crime or protection of public security. Some members including Mr James TO, Ms Cyd HO, Mr WONG Yuk-man and Ms Claudia MO find the Administration's explanation unacceptable. These members consider that the requested information should not contain any sensitive information. Instead, the Administration's refusal to disclose such information will give rise to suspicion about whether the Administration is trying to conceal any abuse by CE of his power under the section.

72. The Administration has further explained that section 33 of TO has been amended by ICSO and that part of the provision which had been ruled unconstitutional by the court in 2006 has been repealed. The Administration has stressed that since the inception of ICSO, CE has exercised the power under section 33(1) of TO in strict accordance with the law and, pursuant to section 33(2) of TO, such order does not of itself authorize the obtaining of the contents of any individual message. Hence, there is no question of interference with the privacy of communications.

Record keeping of intelligence by specified LEAs

73. Members have sought clarification as to whether all communications intercepted are audio recorded and transcribed by LEAs into text. The Administration has advised that in accordance with section 2(1) of ICSO, "intercepting act", in relation to any communication, means the inspection of some or all of the contents of the communication, in the course of its transmission by a postal service or by a telecommunications system, by a person other than its sender or intended recipient, and "inspect" includes listen to, monitor and record. Also, "interception product" means any contents of a communication that have been obtained pursuant to a prescribed authorization for interception, and includes a copy of such contents. The word "copy", in relation to any contents of a communication that have been obtained pursuant to a prescribed authorization for interception, means any of the following (whether or not in documentary form): (a) any copy, extract or summary of such contents; or (b) any record referring to the interception which is a record showing, directly or indirectly, the identity of any person who is the sender or intended recipient of the communication.

74. Some members have expressed concern whether information obtained from interception or covert surveillance operations, in particular information obtained from such operations of which the prescribed authorization has been revoked, will be regarded as intelligence and kept for future crime detection purposes. These members have sought clarification about the mechanism for destruction of such intelligence.

75. The Administration has advised that information obtained from covert operations, together with information obtained by an LEA from other sources such as crime reports from the public, case investigation and open source materials, may be aggregated into intelligence after being screened, evaluated and analysed. Such intelligence will be used by the LEA for the purpose of crime prevention or detection as appropriate. The intelligence management system of an LEA is subject to tight control, and LEAs have put in place stringent internal guidelines requiring that intelligence must be gathered lawfully. Data in an intelligence management system are subject to regular review and those which are no longer intelligence-worthy would be removed. In the context of a covert operation, as soon as an officer has notice of the revocation of the prescribed authorization, the officer must not use or gain access to any protected products (including their copies) obtained between the revocation of the prescribed authorization and the discontinuance of the operation for the purpose of investigation or any other purpose. The Administration has undertaken to spell out the arrangement clearly in CoP that

"any other purpose" includes intelligence gathering.

76. Mr James TO is of the view that intelligence derived from covert operation of which the prescribed authorization has been revoked on the ground of material inaccuracy in the information provided in the application concerned should be destroyed immediately after revocation. He has indicated that he may consider proposing CSAs to this effect.

Listening to intercepted communications

77. Having regard to the practical need to seek assistance from translators to listen to communications intercepted which are of a foreign language in which law enforcement officers are not proficient, some members have expressed concern whether a third party who is neither a law enforcement officer nor an officer designated by the Commissioner can be authorized to provide translation services.

78. According to the Administration, all designated listeners are officers of the LEA concerned. LEAs have put in place mechanism to make special arrangements for handling different operational scenarios, including the encounter of a language that they are not proficient in, which are subject to the oversight of the Commissioner. The Administration has advised that under sections 4[6] and 30[7] of ICSO, a law enforcement officer may listen to or monitor the contents of an intercepted communication himself or with the assistance of a translator who is not an officer of the LEA provided that it is done in accordance with the terms and conditions of the prescribed authorization.

79. Some members have also examined the need to introduce an express provision in ICSO to 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.

80. The Administration has advised that under the proposed amendments to section 53 of ICSO, 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

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[6] Under section 4 of ICSO, no public officer shall, directly or indirectly (whether through any other person or otherwise), carry out any interception unless the interception is carried out pursuant to a prescribed authorization.

[7] Section 30 of ICSO provides that a prescribed authorization also authorizes the undertaking of conduct that is necessary for and incidental to the carrying out of what is authorized to be carried out under the authorization, including the provision of assistance for the execution of the prescribed authorization (paragraph (g)).

information that is or may be subject to LPP) 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 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.

81. The Administration has further explained that under section 40(1) of 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 ICSO. In the light of the above, the Administration does 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.

Whether social media and instant messaging applications fall within the scope of ICSO regime

82. Members have enquired whether social media and instant messaging applications, which are different from a telephone call in that the transmitted messages are stored in the internet service provider ("ISP")'s server after transmission, fall within the meaning of "communication" in the definition of "interception" in section 2(1) of ICSO and whether intercepting messages transmitted through online means of communication by LEAs will be regarded as an "intercepting act" under ICSO.

83. The Administration has advised that whether the interception of a message is within the scope of ICSO depends on whether the message falls within the definition of "communication" and whether it is transmitted by a system falling within the definition of "telecommunications system"[8] under TO. Under ICSO, if a communication is transmitted by a telecommunications system, and an LEA intercepts the communication in the course of its transmission, then the interception will be regarded as an "intercepting act". The LEA must obtain an authorization from a panel judge before it may conduct such interception, and such interception operations are subject to the oversight of the Commissioner.

[8] Under section 2(1) of the Telecommunications Ordinance, "telecommunications system" means "any telecommunications installation, or series of installations, for the carrying of communication by means of guided or unguided electromagnetic energy or both".

84. Some members including Mr James TO and Mr SIN Chung-kai have enquired whether there is a need to review the definition of "interception" or "telecommunications system" under ICSO having regard to the proliferation of use of social media and instant message applications among members of the public. The Administration is of the view that the current definitions under ICSO have been effective and there is no need to amend them. The views of members on the scope of ICSO, however, would be taken into consideration if there is a need to review the definition of "interception" or "telecommunications system" under ICSO in the future.

85. Mr James TO has indicated his intention to propose a CSA to section 2(5)(b) of ICSO to the effect that "a communication transmitted by a telecommunications system is regarded as being in the course of the transmission if it has been received by the intended recipient of the communication or by an information system or facility under his control or to which he may have access, whether or not he has actually read or listened to the contents of the communication". In the view of the Administration, Mr TO's proposed amendment would reverse the definition of a communication transmitted by a telecommunications system "in the course of its transmission" by making it cover any communication which has been received by the intended recipient of the communication or by an information system or facility under his control or to which he may have access, whether or not he has actually read or listened to the contents of the communication. According to the Administration, the proposed amendment will fundamentally change the scope of ICSO and is out of line with the policy intent as articulated in ICSO. Moreover, Mr TO's proposed amendment is not amongst the first Commissioner's recommendations and does not appear to relate to the substance or subject matter of the Bill.

Obtaining information from ISPs

86. Members have also sought clarification on whether LEAs' requests for metadata and subscribers' information from ISPs for investigation of cyber crime would be subject to regulation under ICSO. The Administration has advised that LEAs will, for the purpose of combating technology crime and offences committed through the Internet, request information relating to the case under investigation from ISPs when necessary. Such enquiries do not involve any request for records of the content of any non-public communications. LEAs are required to abide by the provisions of the Personal Data (Privacy) Ordinance (Cap. 486) when requesting personal data for the purpose of crime prevention and detection.

87. Mr Charles MOK has drawn the attention of the Bills Committee and the Administration to the inconsistencies in LEAs' practice of obtaining information from ISPs for investigation of cyber crime. In the view of Mr MOK, LEAs should obtain an authorization under ICSO prior to requesting subscribers' information from ISPs. The Administration has stressed that requesting subscribers' information from ISPs is part of LEAs' routine law enforcement efforts made on a need basis, and falls outside the scope of ICSO. LEAs may apply to the court in accordance with the relevant laws for a court warrant authorizing the search of any premises or place. The arrangements for LEAs applying for court warrants to obtain documents or information from ISPs are substantially the same as those for applying for court warrants to obtain documents or information from other organizations and individuals.

88. Some members including Mr James TO, Mr SIN Chung-kai and Mr Charles MOK consider that as the criteria for the issue of an authorization under ICSO are more stringent than the criteria for the issue of a search warrant, LEAs would therefore use search warrants to obtain messages transmitted by instant messaging programmes. These members take the view that the scope of ICSO should be expanded to cover the obtaining from ISPs by LEAs of information which has been transmitted by an instant messaging programme.

89. The Administration has advised that LEAs never use court warrants to circumvent ICSO, and court warrants obtained from court and prescribed authorizations under ICSO have very different purposes in a judicial investigation process. Since the commencement of ICSO, over 2 400 persons have been arrested as a result of or further to operations under ICSO. On the other hand, LEAs also use court warrants as necessary especially for obtaining evidence for presentation to Court. LEAs have to observe stringent requirements when applying for search warrants from magistrates. Once a search warrant is issued, LEAs must act in accordance with the search warrant, including any conditions imposed by the magistrate.

90. Mr Dennis KWOK has provided for the consideration of the Bills Committee his proposed CSAs to clause 4 which seek to add a new section 3(3) to ICSO to put it beyond doubt that a prescribed authorization must not be for the purpose of (a) an act to obtain the contents of communication stored in or by the telecommunications system (not in the course of its transmission), or (b) an act to obtain data (other than that already in the public domain) held or obtained by a telecommunications service operator; and to require a public officer intending to conduct such an act to apply for an order pursuant to section 103 of the Criminal Procedure Ordinance ("CPO") (Cap. 221).

91. The Administration has advised that Mr Dennis KWOK's proposed CSAs relate to applications for a court order under section 103 of CPO to obtain information or data held by a telecommunications service provider or any other person. The order referred to in Mr KWOK's proposed CSAs authorizes an operation which will become overt upon granting of the order by a magistrate or the Court of First Instance, and is by nature different from the covert operations regulated by ICSO. In addition, the proposed CSAs are not amongst the first Commissioner's recommendations which the Bill seeks to implement. The Administration considers the concerns expressed by members outside the scope of the Bill. Mr Dennis KWOK has then suggested the Administration incorporating his CSAs in CoP. The Administration has explained that CoP is issued for the purpose of providing practical guidance to LEA officers in respect of matters provided for in ICSO. The proposal in Mr KWOK's CSAs, however, falls outside the regulatory scope of ICSO. It is therefore not appropriate to amend ICSO or CoP in this context.

92. Some members have, however, noted with concern that respective LEAs have not maintained statistics relating to applications for search warrants to obtain information from ISPs. These members, including Mr James TO, Mr SIN Chung-kai, Mr WONG Yuk-man and Ms Claudia MO have strongly requested LEAs to provide statistics on the respective numbers of approved and rejected applications for such search warrants to facilitate members' relevant monitory work. Some other members consider it inappropriate for the Administration to devote manpower and resources for compilation of statistics relating to search warrants. They have suggested that issues relating to search warrants could be dealt with by the relevant Panel.

93. The Administration has pointed out that applications to the court for search warrants are made under different Ordinances and relate to the investigation of a wide variety of crimes. The court is the authority for approving applications for search warrants. Compilation of such statistics is resource intensive. LEAs do not have any plan to compile such statistics given the large volume of workload they currently shoulder in respect of statistical compilation and that such statistics have no apparent value for formulating crime-fighting strategies or throwing light on crime trends. In response to the Bills Committee's enquiry, the Judiciary Administration has also advised that under existing arrangement, magistrates do from time to time process search warrant applications submitted from LEAs. However, it is not the practice of the Judiciary to keep statistics of such applications, whether they are related to ISPs or otherwise. The Judiciary does not see compelling reasons for it to keep track of the results of such applications.

Committee stage amendments

CSAs proposed by the Administration

94. Apart from the CSAs mentioned in paragraphs 30 and 33 above, the Administration has agreed to move amendments to the headings of the proposed amendments to section 58 (clause 17), and proposed new sections 38A (clause 9) and 58A (clause 18) for the purpose of enhancing the clarity of these headings. The CSAs to be moved by the Administration are in **Appendix III**.

CSAs proposed by individual Members

95. The Bills Committee takes note that Mr James TO has indicated his intention to move CSAs to the Bill as detailed in paragraphs 11, 26, 39, 49, 56, 64, 68 and 85 above. Mr Dennis KWOK has also indicated his intention to move CSAs to the Bill as detailed in paragraph 90 above. The CSAs proposed by Mr James TO and Mr Dennis KWOK are in **Appendices IV(a) to (h) and V** respectively.

96. At the request of members, the Administration has undertaken to advise, before the resumption of the Second Reading debate on the Bill, on whether the Administration would withdraw the Bill if any of the CSAs proposed by Members is passed.

Resumption of Second Reading debate

97. The Bills Committee raises no objection to the resumption of the Second Reading debate on the Bill at the Council meeting of 16 March 2016.

Advice sought

98. Members are invited to note the deliberations of the Bills Committee.

Council Business Division 2
Legislative Council Secretariat
25 February 2016

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

Membership list

Chairman	Hon IP Kwok-him, GBS, JP
Deputy Chairman	Hon YIU Si-wing, BBS
Members	Hon James TO Kun-sun Hon CHAN Kam-lam, SBS, JP Hon Emily LAU Wai-hing, JP Hon Cyd HO Sau-lan, JP Hon CHAN Kin-por, BBS, JP Hon WONG Kwok-kin, SBS Hon Paul TSE Wai-chun, JP Hon WONG Yuk-man Hon Claudia MO Hon NG Leung-sing, SBS, JP Hon Frankie YICK Chi-ming, JP Hon MA Fung-kwok, SBS, JP Hon Charles Peter MOK, JP Hon LEUNG Che-cheung, BBS, MH, JP Hon KWOK Wai-keung Hon Dennis KWOK Hon SIN Chung-kai, SBS, JP Dr Hon Elizabeth QUAT, JP Dr Hon CHIANG Lai-wan, JP Hon CHUNG Kwok-pan Hon Christopher CHUNG Shu-kun, BBS, MH, JP Hon Tony TSE Wai-chuen, BBS (Total : 24 members)
Clerk	Miss Betty MA
Legal adviser	Mr Timothy TSO
Date	6 July 2015

Appendix II

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

List of organisations which have given oral representation to the Bills Committee

1. Labour Party
2. Mr NG Chung-tat
3. Hong Kong Human Rights Monitor
4. Hong Kong Civil Rights Observer
5. Hong Kong Journalists Association
6. Miss Kanley TSANG King-lai
7. Miss WONG Yuk-ting
8. Hong Kong In-media

List of organisations which have provided written views to the Bills Committee

1. Hong Kong Internet Service Providers Association
2. The Law Society of Hong Kong

Interception of Communications and Surveillance (Amendment) Bill 2015

Committee Stage

Amendments to be moved by the Secretary for Security

Clause	Amendment Proposed
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 deleting "month and year from" and substituting "date on".
12(1)	By deleting "month and year from" and substituting "date on".
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:**".
19	By renumbering the clause as clause 19(1).
19(1)	In the proposed section 59(1)(c), by deleting "that the protected product" and substituting "that, except as otherwise provided in subsection (1A), the protected product".

19 By adding—

"(2) After section 59(1)—

Add

"(1A) Subsection (1B) applies if the protected product consists of information described in section 23(3)(a), 24(3)(b)(i) or (ii), 26(3)(b)(i) or 27(3)(b)(i) or (ii).

(1B) Despite section 23(3)(a) or 26(3)(b)(i) or any requirement in an order made under section 24(3)(b) or 27(3)(b), the head of the department concerned—

(a) must immediately notify the Commissioner of the case;

(b) must make arrangements to ensure that the information is retained; and

(c) must—

(i) if the Commissioner notifies the head of the department that the Commissioner will not require the provision of the information under section 53(1)(a), cause the immediate destruction of the information; or

(ii) if the Commissioner requires the provision of the information under section 53(1)(a)—

(A) provide the information as required; and

(B) cause the immediate destruction of the information when it is no longer required by the Commissioner.".".

Interception of Communications and Surveillance (Amendment) Bill 2015

Committee Stage

Amendments to be moved by the Hon. James To Kun-sun

Clause	Amendment Proposed
13	By deleting the clause and substituting —

"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(3), after "the requirement" —

Add

", not complying the requirement imposed by the Commissioner under subsection (1)(a) shall be an offence punishable with a maximum penalty of 2 years imprisonment.".

(3) 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)".

(4) Section 53(5), after "the procedure" —

Add

"(including making notes and summaries of protected products)".".

Interception of Communications and Surveillance (Amendment) Bill 2015

Committee Stage

Amendments to be moved by the Hon. James To Kun-sun

Clause	Amendment Proposed
19	By deleting the clause and substituting —

"19. Section 59 amended (Safeguards for protected products)

(1) Section 59(1)—

Repeal paragraph (c)

Substitute

"(c) that, except as otherwise provided in subsection (1A), 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;

Provided that whereas the retention of the protected product is necessary for the purpose of enabling compliance with a requirement or further requirements imposed under section 53(1)(a), its destruction shall be an offence punishable with a maximum penalty of 2 years imprisonment.".

(2) After section 59(1)—

Add

"(1A) Subsection (1B) applies if the protected product consists of information described in section 23(3)(a), 24(3)(b)(i) or (ii), 26(3)(b)(i) or 27(3)(b)(i) or (ii).

(1B) Despite section 23(3)(a) or 26(3)(b)(i) or any requirement in an order made under section 24(3)(b) or 27(3)(b), the head of the department concerned—

(a) must immediately notify the Commissioner of the case;

(b) must make arrangements to ensure that the information is retained; and

(c) must—

(i) if the Commissioner notifies the head of the department that the Commissioner will not require the provision of the information under section 53(1)(a), cause the immediate destruction of the information; or

(ii) if the Commissioner requires the provision of the information under section 53(1)(a)—

(A) provide the information as required; and

(B) cause the immediate destruction of the information when it is no

longer required by the Commissioner;

Provided that the destruction of the information before it is no longer required by the Commissioner shall be an offence punishable with a maximum penalty of 2 years imprisonment.".".

版本 A (沒有刑事罰則)

Interception of Communications and Surveillance (Amendment) Bill 2015

Committee Stage

Amendments to be moved by the Hon. James To Kun-sun

Clause	Amendment Proposed
20	By deleting the clause and substituting —

"**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 practicable, and to ensure the time of revocation of the prescribed authorization concerned or the relevant part of the prescribed authorization concerned and the time of discontinuance of the interception or covert surveillance concerned or the relevant part of the interception or covert surveillance concerned must be reported to the Commissioner.

(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.

(3) An officer when has notice of the revocation of the prescribed authorization concerned or the relevant part of the prescribed authorization concerned shall not use or gain access to any protected products (including its copy) obtained during the time gap (between the revocation of the prescribed authorization concerned or the relevant part of the prescribed authorization concerned and the actual discontinuance of the interception or covert surveillance concerned or the relevant part of the interception or covert surveillance concerned) for the purpose of investigation or any other purpose.".".

版本 B (有刑事罰則)

Interception of Communications and Surveillance (Amendment) Bill 2015

Committee Stage

Amendments to be moved by the Hon. James To Kun-sun

Clause	Amendment Proposed
20	By deleting the clause and substituting —

"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 practicable, and to ensure the time of revocation of the prescribed authorization concerned or the relevant part of the prescribed authorization concerned and the time of discontinuance of the interception or covert surveillance concerned or the relevant part of the interception or covert surveillance concerned must be reported to the Commissioner.

(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.

(3) An officer when has notice of the revocation of the prescribed authorization concerned or the relevant part of the prescribed authorization concerned shall not use or gain access to any protected products (including its copy) obtained during the time gap (between the revocation of the prescribed authorization concerned or the relevant part of the prescribed authorization concerned and the actual discontinuance of the interception or covert surveillance concerned or the relevant part of the interception or covert surveillance concerned) for the purpose of investigation or any other purpose.

(4) Contravention of subsection (3) shall be an offence punishable with a maximum penalty of 2 years imprisonment. ".".

Interception of Communications and Surveillance (Amendment) Bill 2015

Committee Stage

Amendments to be moved by the Hon. James To Kun-sun

Clause	Amendment Proposed
17 (1)	(1) By deleting "**Revocation of prescribed authorization following arrest of subject of interception or covert surveillance**" and substituting "**Report to relevant authority: information subject to legal professional privilege may be obtained**".
	(2) Section 58(1)— **Repeal subsection (1)** **Substitute** "(1) Where, further to the issue or renewal of a prescribed authorization under this Ordinance, the officer of the department concerned who is for the time being in charge of the interception or covert surveillance concerned has reasonable grounds for believing that the subject of the interception or covert surveillance is highly likely to be arrested or has been arrested (within or outside Hong Kong) or in the circumstances where the subject is highly likely to contact or has contacted a legal professional, the officer shall, as soon as practicable after forming the opinion, cause to be provided to the relevant authority by whom the prescribed authorization has been issued or renewed a report assessing the effect of the possible arrest or arrest or the circumstances on the likelihood that any information which may be subject to legal professional privilege will be obtained by continuing the interception or covert surveillance.".

版本 A (進一步的授權是根據本條例的任何條文)

Interception of Communications and Surveillance (Amendment) Bill 2015

Committee Stage

Amendments to be moved by the Hon. James To Kun-sun

Clause	Amendment Proposed
18	By deleting the clause and substituting —

"18. Section 58A added

After section 58—

Add

"58A. Report to relevant authority: 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) has reason to suspect 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) has reason to suspect 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 having reasonable suspicion 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 having reasonable suspicion 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 having reasonable suspicion 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 having reasonable suspicion 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).".".

版本 B (進一步的授權是根據本條例第 29(1)至(7)或第 30 條)

Interception of Communications and Surveillance (Amendment) Bill 2015

Committee Stage

Amendments to be moved by the Hon. James To Kun-sun

Clause	Amendment Proposed
18	By deleting the clause and substituting —

"18. Section 58A added

After section 58—

Add

"58A. Report to relevant authority: 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) has reason to suspect 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) has reason to suspect 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 having reasonable suspicion 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 having reasonable suspicion 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 having reasonable suspicion 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 having reasonable suspicion 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 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 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).".".

版本 A (進一步的授權是根據本條例的任何條文)

Interception of Communications and Surveillance (Amendment) Bill 2015

Committee Stage

Amendments to be moved by the Hon. James To Kun-sun

Clause	Amendment Proposed
9	By deleting the clause and substituting —

"9. Section 38A added

Part 3, Division 6, after section 38—

Add

"38A. Report to panel judge: device retrieval cannot be executed

(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 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).

(5) If any decision of not applying for a device retrieval warrant is made, the officer of the department concerned who has made the decision must, as soon as practicable after making such a decision, cause a report on the decision to be provided to a panel judge.

(6) If a panel judge receives a report under subsection (5), the panel judge may revoke the device retrieval authorization in the prescribed authorization concerned

or the relevant part of the device retrieval authorization concerned.

(7) If the device retrieval authorization is not revoked or only part of the device retrieval authorization is revoked, the panel judge may do one or both of the following—

(a) cause an application of device retrieval warrant be made;

(b) cause a report on the decision be made to the Commissioner.".".

版本 B (進一步的授權是根據本條例第 29(6)或(7)或第 30 條)

Interception of Communications and Surveillance (Amendment) Bill 2015

Committee Stage

Amendments to be moved by the Hon. James To Kun-sun

Clause	Amendment Proposed
9	By deleting the clause and substituting —

"9. Section 38A added

Part 3, Division 6, after section 38—

Add

"38A. Report to panel judge: device retrieval cannot be executed

(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 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 section 29(6) or (7) or section 30 of this Ordinance).

(5) If any decision of not applying for a device retrieval warrant is made, the officer of the department concerned who has made the decision must, as soon as practicable after making such a decision, cause a report on the decision to be provided to a panel judge.

(6) If a panel judge receives a report under subsection (5), the panel judge may revoke the device retrieval authorization in the prescribed authorization concerned

or the relevant part of the device retrieval authorization concerned.

(7) If the device retrieval authorization is not revoked or only part of the device retrieval authorization is revoked, the panel judge may do one or both of the following—

(a) cause an application of device retrieval warrant be made;

(b) cause a report on the decision be made to the Commissioner.".".

Interception of Communications and Surveillance (Amendment) Bill 2015

Committee Stage

Amendments to be moved by the Hon. James To Kun-sun

Clause	Amendment Proposed
6(2)	By deleting "any provision of this Ordinance" and substituting "under those terms 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 this Ordinance".
8(2)	By deleting "any provision of this Ordinance" and substituting "under those terms 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 this Ordinance".
9	By deleting "any provision of this Ordinance" and substituting "section 29(6) or (7) or section 30 of this Ordinance".
16(10)	By deleting "any provision of this Ordinance" and substituting "under those terms 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 this Ordinance".
17(5)	By deleting "any provision of this Ordinance" and substituting "under those terms 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 this Ordinance".
18	By deleting "any provision of this Ordinance" and substituting "under those terms 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 this Ordinance".

21 By adding the clause—

"**21. Section 32 amended (Prescribed authorization may be issued or renewed subject to conditions)**

Section 32—

Repeal

"any provision of this Ordinance"

Substitute

"under those terms 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 this Ordinance".".

22 By adding the clause—

"**22. Section 38 amended (Device retrieval warrant may be issued subject to conditions)**

Section 38—

Repeal

"any provision of this Ordinance"

Substitute

"section 29(6) or (7) or section 30 of this Ordinance".".

Interception of Communications and Surveillance (Amendment) Bill 2015

Committee Stage

Amendments to be moved by the Hon. James To Kun-sun

Clause	Amendment Proposed
3	By adding — "(5) Section 2 amended (Interpretation) Section 2(5)(b)— Repeal "is not regarded" Substitute "is regarded".".

Appendix V
(English version only)

Interception of Communications and Surveillance (Amendment) Bill 2015

Committee Stage

Amendments to be moved by the Honourable Dennis KWOK

Clause	Amendment Proposed
4	(a) By renumbering the clause as clause 4(1).
	(b) By adding –
	"(2) After section 3(2) –
	Add
	"(3) For the avoidance of doubt, a prescribed authorization in subsection (1) must not be for the purpose of –
	(a) an act of which the effect is to make some or all of the contents of the communication available to a person who is not the sender or the intended recipient of the communication when the communication is stored in or by the telecommunications system (whether before or after its transmission but not in the course of its transmission); or
	(b) an act of which the effect is to make available any data (other than that already in the public domain) which is (or is to be or is capable of being) held or obtained by, or on behalf of, an operator in the provision of telecommunications service.
	(4) An officer or any other person of a department who intends to conduct any of the acts mentioned in subsection (3) must apply for an order pursuant to section 103 of the Criminal Procedure Ordinance (Cap. 221).".".