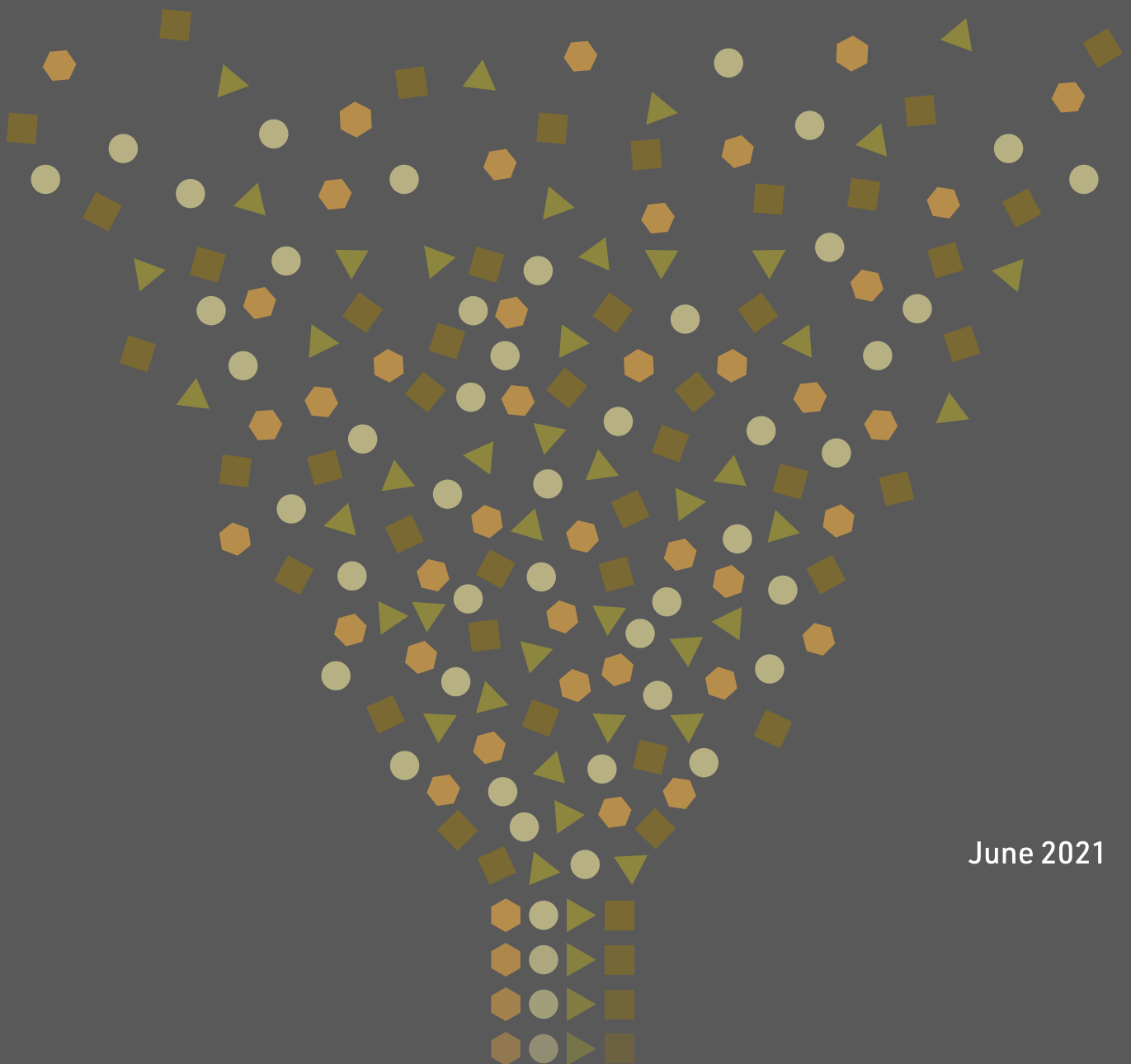


Annual Report 2020 to the Chief Executive

by
The Commissioner on
Interception of Communications
and Surveillance



June 2021

截取通訊及監察事務專員辦公室

Office of the Commissioner on Interception of Communications and Surveillance

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29 June 2021

The Honourable Mrs Carrie Lam Cheng Yuet-ngor, GBM, GBS
The Chief Executive
Hong Kong Special Administrative Region
People's Republic of China

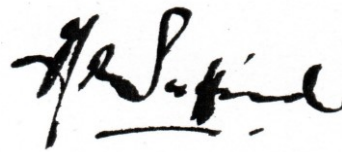
CONFIDENTIAL

Dear Madam,

Annual Report for the Year 2020

I have the pleasure, pursuant to section 49 of the Interception of Communications and Surveillance Ordinance, in submitting to you the annual report for the year 2020, together with its Chinese translation.

Yours sincerely,



(A. R. Suffiad)

Commissioner on Interception of
Communications and Surveillance

Encl: Annual Report for 2020

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Abbreviations

Unless the context otherwise requires:

affidavit/affirmation/ statement	affidavit or affirmation in support of an application to a panel judge for a prescribed authorization/statement in writing in support of an application to an authorizing officer for an executive authorization
ATR	audit trail report
Cap.	chapter in the Laws of Hong Kong
capable device	device capable of being used for covert surveillance
Code of Practice, COP	the Code of Practice issued by the Secretary for Security under section 63 of the Ordinance
Commissioner	Commissioner on Interception of Communications and Surveillance
discontinuance report	report on discontinuance of interception or covert surveillance submitted pursuant to section 57 of the Ordinance
DMS	device management system
fresh application	application for a prescribed authorization which is not a renewal
ICSO, Ordinance	Interception of Communications and Surveillance Ordinance (Cap. 589)
interception	interception of communications

JM	journalistic material
LEA	a law enforcement agency under the Ordinance, namely, Customs and Excise Department, Hong Kong Police Force, Immigration Department or Independent Commission Against Corruption
LPP	legal professional privilege
LPP information	information protected by legal professional privilege
non-ICSO purpose	purpose which is not related to ICSO
panel judge	a panel judge appointed under section 6 of the Ordinance
PJO	Panel Judges' Office
QR Code	Quick Response Code
renewal application	application for renewal of a prescribed authorization
RSM	removable storage media
REP-1 report	report on arrest of subject of interception or covert surveillance made on form REP-1
REP-11 report/ REP-13 report	report on material change in circumstances or initial material inaccuracies under a prescribed authorization made on form REP-11 or form REP-13

Reported LPP Call	a call with LPP likelihood, heightened LPP likelihood or LPP information and is reported to the panel judge by way of an REP-11 report on such
Secretariat	Secretariat, Commissioner on Interception of Communications and Surveillance
section	section of the Ordinance
statutory activity	interception of communications and/or covert surveillance activity referred to in the Ordinance
the report period	the period from 1 January to 31 December 2020
the Team	a dedicated team comprising officers from the LEAs that operates independently of their investigative arms
weekly report form	the form designed for the LEAs and the PJO to provide information to the Commissioner once every week

CHAPTER 1

INTRODUCTION

1.1 Pursuant to section 49 of the Interception of Communications and Surveillance Ordinance (Cap. 589) ('Ordinance' or 'ICSO'), the Commissioner on Interception of Communications and Surveillance ('Commissioner') is required to submit to the Chief Executive an annual report ending on 31 December in each year. This report covers the period 1 January to 31 December 2020.

1.2 The ICSO came into operation in August 2006 and was amended with the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016 in June 2016. The ICSO provides a statutory regime to regulate the conduct of interception of communications, through the post or through the use of telecommunications facilities, and covert surveillance by the use of surveillance devices (collectively called 'statutory activities') by public officers of the four law enforcement agencies ('LEAs'), namely, Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption. The regulation is to ensure that these statutory activities cannot be lawfully and properly carried out unless the relevant requirements stipulated in the Ordinance are satisfied.

1.3 The first and foremost of the relevant requirements is that any statutory activity can only be lawfully and properly conducted by an officer of an LEA pursuant to a prescribed authorization granted by a relevant authority. The relevant authority includes a panel judge who is empowered to issue a prescribed authorization for interception or for Type 1 surveillance and an authorizing officer of the LEA concerned who can issue a prescribed authorization for Type 2 surveillance. After

obtaining a prescribed authorization, the LEA and its officers are required to comply with its terms in carrying out the statutory activity so authorized. They are also required to observe the provisions of the Code of Practice ('COP') issued by the Secretary for Security under section 63 of the ICSO and other relevant requirements.

1.4 Whether a prescribed authorization should be granted is expressly based on the necessity and proportionality principles, and the premise that the well-being of Hong Kong can be achieved by striking a fair and proper balance between the need for the prevention and detection of serious crime and the protection of public security on the one hand and safeguarding the privacy and other rights of persons in Hong Kong on the other.

1.5 An important function of the Commissioner is to oversee the compliance by the LEAs and their officers with the relevant requirements of the scheme of the ICSO. When this function is engaged, the objects and spirit of the Ordinance must be at the forefront of the oversight. Another function of the Commissioner is to make recommendations to the Secretary for Security on the COP and to the LEAs on their arrangements to better carry out the objects of the Ordinance and the provisions of the COP.

1.6 In 2020, various ways of checking the compliance of the LEAs with the relevant requirements, including the examination of the protected products, continued to operate smoothly. I have also rendered my views to the Security Bureau on the arrangements for better operation of the ICSO and made recommendations to the LEAs for tackling existing and anticipated problems in relation to the ICSO. A recommendation on the COP was put forth to the Security Bureau for necessary follow up action. This engagement is significant for the benefits of the society in respect of protection of privacy and other rights of individuals.

1.7 In the report period, I had meetings with the panel judges to exchange views on a number of issues, including recommendations to the LEAs in preparing applications for covert surveillance with a view to avoiding similar non-compliance relating to the operation of surveillance devices, and measures to be adopted by the panel judges in granting the authorizations to facilitate compliance by the LEAs. The results of the meetings were conveyed to the LEAs during my periodical visits. They all welcomed the recommendations and measures.

1.8 During the periodical visits to the LEAs on checking of files and documents and after the examination of protected products, I noticed that generally the LEAs had taken cautious approaches in conducting covert operation and handling protected products in order to guard against the obtainment of information subject to LPP and journalistic material ('JM') despite a few cases of non-compliance and irregularities as detailed in Chapter 6 of this report reflecting the negligence and misjudgement of some officers in ICSO-related duties, the lack of communication among some LEA officers as well as the inadequacy in drafting the ambit of surveillance operation sought to be authorized. I kept on reminding the LEAs to stay vigilant on the protection of LPP information or handling of JM. In the report period, there was a decrease in the number of reported new cases that were likely to involve LPP information as compared with last year. Details are given in Chapter 4 of this report.

1.9 In this annual report, I have continued the practice of providing the utmost transparency of my work as the Commissioner, while taking care not to divulge any information the disclosure of which may prejudice the prevention or detection of crime or the protection of public security. I must point out that it is crucial not to reveal information that might be useful to individuals who may be involved in criminal activities in Hong Kong. In this regard, I have included as much information as possible insofar as its publication does not amount to contravention of the non-prejudice principle.

CHAPTER 2

INTERCEPTION

Prescribed authorizations for interception

2.1 Under section 29(1) of the Ordinance, a prescribed authorization for interception may –

- (a) in the case of a postal interception, authorize one or both of the following –
 - (i) the interception of communications made to or from any premises or address specified in the prescribed authorization;
 - (ii) the interception of communications made to or by any person specified in the prescribed authorization (whether by name or by description); or
- (b) in the case of a telecommunications interception, authorize one or both of the following –
 - (i) the interception of communications made to or from any telecommunications service specified in the prescribed authorization;
 - (ii) the interception of communications made to or from any telecommunications service that any person specified in the prescribed authorization (whether by name or by description) is using, or is reasonably expected to use.

Written applications

2.2 Applications for the issue or renewal of a prescribed authorization should normally be made in writing to a panel judge unless it is not reasonably practicable to do so. During the report period, there were a total of 1,150 written applications for interception made by the LEAs. All of them were granted by the panel judges. Of which, 572 were for authorizations for the first time ('fresh applications') and 578 were for renewals of authorizations that had been granted earlier ('renewal applications').

Emergency authorizations

2.3 An officer of an LEA may apply to the head of his department for the issue of an emergency authorization for any interception if he considers that there is immediate need for the interception to be carried out due to an imminent risk of death or serious bodily harm of any person, substantial damage to property, serious threat to public security or loss of vital evidence, and having regard to all the circumstances of the case that it is not reasonably practicable to apply to a panel judge for the issue of a judge's authorization. An emergency authorization shall not last for more than 48 hours and may not be renewed. As soon as reasonably practicable and in any event within the period of 48 hours from the issue of the emergency authorization, the head of the department shall cause an officer of the department to apply to a panel judge for confirmation of the emergency authorization where any interception is carried out pursuant to the emergency authorization.

2.4 During the report period, no application for emergency authorization for interception was made by any of the LEAs.

Oral applications

2.5 An application for the issue or renewal of a prescribed authorization may be made orally if the applicant considers that, having regard to all the circumstances of the case, it is not reasonably practicable to make a written application in accordance with the relevant written application provisions under the Ordinance. The relevant authority may orally deliver his determination to issue the prescribed authorization or give the reasons for refusing the application. The COP issued by the Secretary for Security provides that the oral application procedures should only be resorted to in exceptional circumstances and in time-critical cases where the normal written application procedures cannot be followed. An oral application and the authorization granted as a result of such an application are regarded as having the same effect as a written application and authorization. Similar to emergency authorizations, the head of the department shall cause an officer of the department to apply in writing to the relevant authority for confirmation of the orally granted prescribed authorization as soon as reasonably practicable and in any event within 48 hours from the issue of the authorization, failing which the prescribed authorization is to be regarded as revoked upon the expiration of the 48 hours.

2.6 During the report period, no oral application for interception was made by any of the LEAs.

Duration of authorizations

2.7 For over 75% of the cases (fresh authorizations as well as renewals) granted by the panel judges during the report period, the duration of the prescribed authorizations was for a period of one month or less, short of the maximum of three months allowed by the Ordinance. While the longest approved duration was 36 days, the shortest one was for

several days only. Overall, the average duration of all the authorizations was about 31 days. This indicates that the panel judges handled the applications carefully and applied a stringent control over the duration of the authorizations.

Offences

2.8 Table 2(a) in Chapter 8 gives a list of the major categories of offences for the investigation of which prescribed authorizations for interception had been issued or renewed during the report period.

Revocation of authorizations

2.9 Under section 57(1) of the Ordinance, an officer of an LEA, who conducts any regular review pursuant to the arrangements made under section 56 by his head of department, has a responsibility to discontinue an interception or a part of an interception (and also covert surveillance or a part of covert surveillance) if he is of the opinion that a ground for discontinuance of the prescribed authorization or a part of the prescribed authorization exists. A similar obligation also attaches to the officer who is for the time being in charge of the operation after he becomes aware that such a ground exists. The officer concerned shall then report the discontinuance and the ground for discontinuance to the relevant authority who shall revoke the prescribed authorization concerned or the relevant part of the prescribed authorization concerned.

2.10 The number of authorizations for interception revoked fully under section 57 during the report period was 532. Another 19 cases involved the cessation of a part, but not all, of the interception approved under a prescribed authorization, so that while the prescribed authorization was partially revoked, the remaining part of the interception approved continued to be in force.

2.11 The grounds for discontinuance were that the interception operation was not or no longer productive, the subject had been arrested, the subject had stopped using the telecommunications facility concerned for his criminal activities, or the value to continue the interception operation was considered not proportional to the risk of obtaining LPP information, etc.

2.12 Revocation of authorizations is also expressly provided for in section 58 of the Ordinance. Where the relevant authority (a panel judge) receives a report from an LEA that the subject of an interception has been arrested, with an assessment of the effect of the arrest on the likelihood that any LPP information will be obtained by continuing the interception, he shall revoke the prescribed authorization if he considers that the conditions under the Ordinance for the continuance of the prescribed authorization are not met. The arrest of the subject may or may not relate to the offence(s) for which the interception is authorized to investigate, but all the same the officer of the LEA in charge of the interception who has become aware of the arrest is obliged by section 58 to make the report with the assessment to the panel judge. If the conditions for the continuance of the prescribed authorization are still met, the panel judge may decide not to revoke it. During the report period, the LEAs were aware of a total of 102 arrests but only 17 section 58 reports, which should be made through a prescribed form (i.e. REP-1 report), were made to the panel judge. The panel judge allowed the interception operations related to these section 58 reports to continue subject to additional conditions to guard against the risk of obtaining LPP information, except one case in which the panel judge allowed the interception operation to continue without additional conditions imposed because the subject was released unconditionally before submission of the relevant section 58 report to the panel judge. As regards the other arrest cases, decisions were made by the LEAs concerned to discontinue the interception operations pursuant to section 57 instead of resorting to the section 58 procedure. This reflects

the fact that the LEAs were appreciative of the risk of obtaining LPP information after an arrest.

2.13 Section 58A of the Ordinance provides that, where the relevant authority (a panel judge) receives a report from an LEA on material change in circumstances or material inaccuracies under a prescribed authorization, he shall revoke the prescribed authorization if he considers that the conditions under the Ordinance for the continuance of the prescribed authorization are not met. During the report period, no authorization for interception was revoked by the panel judge under this section of the Ordinance.

Authorizations with five or more previous renewals

2.14 There were 14 authorizations for interception with five or more previous renewals within the report period. All the cases with six renewals and some of their further renewals were checked and found in order during periodical visits to the LEAs.

Arrests attributable to interception

2.15 It is and continues to be the common view of the LEAs that interception is a very effective and valuable investigation tool in the prevention and detection of serious crime and the protection of public security. It has to be pointed out that under section 61 of the Ordinance, any telecommunications interception product shall not be admissible in evidence in any proceedings before any court other than to prove that a relevant offence has been committed. Therefore, whatever is obtained by way of interception can only be used by way of intelligence. The intelligence gathered from interception very often leads to a fruitful and successful conclusion of an investigation. During the report period, a total of 85 persons, who were subjects of prescribed authorizations, were

arrested as a result of or further to interception operations. In addition, 56 non-subjects were also arrested consequent upon the interception operations.

Procedure of oversight for interception

2.16 The LEAs' compliance with the requirements of the Ordinance in respect of the interception cases reported in 2020 was reviewed by the following ways:

- (a) checking of the weekly reports submitted by the LEAs and the Panel Judges' Office ('PJO');
- (b) examination of the contents of the LEAs' files and documents during periodical visits to the LEAs;
- (c) examination of interception products at the LEAs' offices; and
- (d) counter-checking the facilities intercepted with non-LEA parties and through other means.

The following paragraphs further explain how the above reviews were carried out.

Checking of weekly reports

2.17 The LEAs were required to submit weekly reports to the Secretariat on their respective applications, successful or otherwise, and other relevant reports made to the panel judges/departmental authorizing officers by way of completing forms designed for the purpose ('weekly report forms'). Such weekly reports deal with all statutory activities, i.e. interception and covert surveillance. At the same time, the PJO was

also requested to submit weekly report forms on the applications they received from all the LEAs, approved or refused, and the revocations of prescribed authorizations. A weekly report covers the statutory activities with related authorizations and refused applications in the entire week before the week of its submission to the Secretariat.

2.18 The weekly report forms only contain general information relating to cases of the related week such as whether the application was successful or rejected, the duration of the authorization, the offences involved, the assessment on the likelihood of obtaining LPP information and JM from the proposed operation, etc. Case background, progress of the investigation, identity and particulars of the subject and others as well as other sensitive information are not required and therefore obliterated or sanitised so that such information will always be kept confidential with minimal risk of leakage.

2.19 Upon receipt of the weekly report forms from the LEAs, the Secretariat would study the details of each weekly report form and, except those relating to Type 2 surveillance, counter-check against the PJO's returns. In case of discrepancies or doubts, clarification and explanation were sought from the LEAs and/or the PJO as and when necessary.

Examination of documents and information during periodical visits

2.20 Should the Commissioner perceive a need, clarification and explanation on the weekly report forms would also be sought in the periodical visits to the offices of the LEAs. In the visits, the Commissioner would also select, on a random basis, some other cases for examination apart from those requiring clarification. Documents to be scrutinised by the Commissioner would include the originals of the applications, reports on discontinuance, reports on material change in circumstances, reports on material inaccuracies, case files and internal review documents, etc.

Such visits were carried out so that secret or sensitive information contained in case files and documents that would otherwise be required to be sent to the Secretariat for checking would always remain in the safety of the LEAs' offices to avoid any possible leakage.

2.21 If questions or doubts still could not be resolved after the examination of such documents, the Commissioner would require the LEA to answer the queries or to explain the cases in greater detail.

2.22 In addition to matters relating to minor discrepancies in the weekly reports from the LEAs and the PJO, a total of 737 applications for interception and 623 related documents/matters had been checked during the Commissioner's periodical visits to the LEAs in the report period.

Examination of interception products

2.23 Having the express power to examine the protected products after the enactment of the Interception of Communications and Surveillance (Amendment) Ordinance 2016, the Commissioner and his delegated officers have carried out the relevant examinations since October 2016. Each such examination was conducted at the LEAs' offices and only those parts of the interception products to which LEA officers had accessed previously would be examined by the Commissioner and his delegated officers.

2.24 Apart from some specific cases such as LPP and JM cases reported by the LEAs, the Commissioner would also select from the weekly reports, on the basis of the information provided therein or at random, interception products of other cases for examination with a view to checking if those other interception products may contain any LPP information, JM or any information that indicates heightened LPP/JM likelihood not reported by the LEAs. Such examination would also enable

the Commissioner to identify whether there were any irregularities or concealment of unauthorized acts violating the ICSO, such as checking if the person using the telecommunications facilities as authorized by a prescribed authorization was actually the subject of the prescribed authorization and if any discontinuance of interception operation was to avoid exposure or detection of inadvertent mistakes or acts done without authority. If there were questions or doubts arising from the examination of the interception products, the Commissioner would require the LEA concerned to provide clarification or explanation.

2.25 During the report period, with the basis of selection as mentioned in paragraph 2.24 above, the interception products of 352 selected authorizations had been examined.

Counter-checking with non-LEA parties and through other means

2.26 Apart from checking the weekly returns from the LEAs against those from the PJO, and examining case files, documents and interception products at the LEAs' offices, other measures have also been adopted for further checking the interceptions conducted by the LEAs.

2.27 Wherever necessary, counter-checks were conducted with non-LEA parties who have played a part in the interception process but are independent from the LEAs. The interception of telecommunications facilities by an LEA is made through a dedicated team ('the Team') that, whilst being part of the LEAs, operates independently of their investigative arms. As required by the Commissioner, the Team has archived in a confidential electronic record the status of all interceptions whenever they are effected, cancelled or discontinued. Arrangements have also been made for the archiving of the status of all interceptions being conducted at particular intervals as designated by the Commissioner from time to time. All these records are available to the Secretariat but only the

Commissioner and his designated staff can access the confidentially archived information for the purpose of checking the intercepted facilities for their status of interception at various points of time and as at any reference point of time so designated by the Commissioner, ensuring that no unauthorized interception has taken place. Moreover, the Secretariat counter-checked the LEAs' returns with communications services providers' four-weekly returns to verify the intercepted facilities reported by the LEAs.

Results of various forms of checking

2.28 Various forms of checking, including examination of interception products in respect of the specific cases (such as LPP and JM cases) and 352 selected authorizations, 737 applications and 623 related documents/matters, were conducted in the report period as mentioned in paragraphs 2.17 to 2.27. No unauthorized interception was found but eight cases of non-compliance/irregularity/incident were revealed as detailed in Chapter 6.

CHAPTER 3

COVERT SURVEILLANCE

Covert surveillance

3.1 Pursuant to section 2 of the ICSO, covert surveillance means any surveillance carried out with the use of any surveillance device if the surveillance is carried out in circumstances where the subject of the surveillance is entitled to a reasonable expectation of privacy, that it is carried out in a manner calculated to ensure that the subject is unaware that the surveillance is or may be taking place, and that it is likely to result in the obtaining of any private information about the subject. Surveillance device means a data surveillance device, a listening device, an optical surveillance device or a tracking device or a device that is a combination of any two or more of such devices. Any surveillance which does not satisfy the above criteria is not covert surveillance under the Ordinance.

Two types of covert surveillance

3.2 There are two types of covert surveillance: Type 1 and Type 2. Type 1 surveillance has a higher degree of intrusiveness into the privacy of the subject and requires a panel judge's authorization whereas an authorization for Type 2 surveillance, termed an executive authorization, can be issued by an authorizing officer of the LEA to which the applicant belongs. An authorizing officer is an officer not below the rank equivalent to that of Senior Superintendent of Police designated by the head of department.

Written applications

3.3 During the report period, there were a total of:

- (a) five fresh written applications for Type 1 surveillance ; and
- (b) one fresh written application for Type 2 surveillance.

3.4 No application for Type 1 or Type 2 surveillance was refused.

Emergency authorizations

3.5 An officer of an LEA may apply in writing to the head of the department for the issue of an emergency authorization for any Type 1 surveillance, if he considers that there is immediate need for the Type 1 surveillance to be carried out due to an imminent risk of death or serious bodily harm of any person, substantial damage to property, serious threat to public security or loss of vital evidence, and having regard to all the circumstances of the case that it is not reasonably practicable to apply for the issue of a judge's authorization. An emergency authorization shall not last longer than 48 hours and may not be renewed. Where any Type 1 surveillance is carried out pursuant to an emergency authorization, the head of the department shall cause an officer of the department to apply to a panel judge for confirmation of the emergency authorization as soon as reasonably practicable after, and in any event within the period of 48 hours beginning with, the time when the emergency authorization is issued. During the report period, no application for emergency authorization for Type 1 surveillance was made by the LEAs.

3.6 On the other hand, there is no provision in the Ordinance for application for emergency authorization for Type 2 surveillance.

Oral applications

3.7 Applications for Type 1 and Type 2 surveillance, including those for emergency authorization, should be made in writing. Nonetheless, an application for the issue or renewal of a prescribed authorization may be made orally if the applicant considers that, having regard to all the circumstances of the case, it is not reasonably practicable to make a written application. The relevant authority may orally deliver his determination to issue the prescribed authorization or refuse the application.

3.8 The COP stipulates that the oral application procedure should only be resorted to in exceptional circumstances and in time-critical cases where the normal written application procedure cannot be followed. For a prescribed authorization orally granted for Type 1 surveillance, the head of the department shall cause an officer of the department to apply in writing to the panel judge, and for such an authorization for Type 2 surveillance, the applicant shall apply in writing to the authorizing officer, for confirmation of the orally granted prescribed authorization as soon as reasonably practicable and in any event within 48 hours from the issue of the authorization. Failing to do so will cause that orally granted prescribed authorization to be regarded as revoked upon the expiration of the 48 hours.

3.9 During the report period, no oral application for Type 1 or Type 2 surveillance was made by the LEAs.

Duration of authorizations

3.10 The maximum duration of prescribed authorizations (fresh authorizations as well as renewals) for Type 1 surveillance granted by the panel judge and Type 2 surveillance by the authorizing officers allowed

under the Ordinance is three months. In the report period, the longest approved duration of Type 1 surveillance granted was about 27 days whereas the shortest one was about four days. Overall, the average duration for such authorizations was about 18 days. The duration of the Type 2 surveillance granted was about four days.

Offences

3.11 The major categories of offences for the investigation of which prescribed authorizations were issued or renewed for surveillance during the report period are set out in Table 2(b) in Chapter 8.

Revocation of authorizations

3.12 During the report period, five Type 1 surveillance operations were discontinued under section 57 of the ICSO before the natural expiration of the prescribed authorizations. The grounds for discontinuance were mainly that the subject had been arrested or the surveillance had been carried out. Section 57(3) requires the LEA to report the discontinuance and the ground for discontinuance to the relevant authority who shall revoke the prescribed authorization concerned upon receipt of the report on discontinuance. Of these reported discontinuance cases, four prescribed authorizations were subsequently revoked fully by the panel judge under section 57. The remaining prescribed authorization had already expired by the time the panel judge received the discontinuance report. Thus, the panel judge could only note the discontinuance reported instead of revoking the prescribed authorization.

3.13 As regards Type 2 surveillance, during the report period, one Type 2 surveillance operation was discontinued under section 57 before its natural expiration. The ground for discontinuance was that the

surveillance had been carried out. The prescribed authorization concerned was subsequently revoked by the authorizing officer.

3.14 Revocation of authorizations is expressly provided for in section 58 of the ICSO for covert surveillance when the subject(s) of the covert surveillance has been arrested. During the report period, there were two Type 1 surveillance operations involving an LEA being aware of the arrest of subjects. The LEA was aware that five subjects of the surveillance operations had been arrested but it did not seek continuation of prescribed authorizations by way of section 58 report to the panel judge. The covert surveillance operations concerned were discontinued pursuant to section 57. As regards Type 2 surveillance, during the report period, the LEA concerned was not aware of any arrest of the subjects of covert surveillance and hence no report was made to the authorizing officer under section 58 seeking continuation of executive authorization.

3.15 The LEAs' voluntary selection of the section 57 procedure to discontinue the covert surveillance operation as soon as reasonably practicable instead of resorting to the section 58 process of reporting an arrest with a wish to continue with the operation, similar to the situation for interception, demonstrates that the LEAs were appreciative of the risk of obtaining LPP information after an arrest.

Authorizations with five or more previous renewals

3.16 During the report period, no authorization for Type 1 or Type 2 surveillance had been renewed for more than five times.

Application for device retrieval warrant

3.17 During the report period, there was no application for any device retrieval warrant for retrieving the devices used for Type 1 or

Type 2 surveillance, the reported reason being that the devices were removed at the time of the completion of the surveillance operation, successful or otherwise.

Arrests attributable to covert surveillance

3.18 As a result of or further to surveillance operations, a total of seven persons who were subjects of the prescribed authorizations were arrested.

Procedure of oversight for covert surveillance

3.19 The LEAs' compliance with the requirements of the Ordinance in respect of covert surveillance cases reported in 2020 was reviewed by the following ways:

- (a) checking of the weekly reports submitted by the LEAs and the PJO;
- (b) examination of the contents of the LEAs' files and documents during periodical visits to the LEAs;
- (c) examination of surveillance products at the LEAs' offices; and
- (d) checking of the records kept by the surveillance device recording system of the LEAs.

Details of the above reviews are set out in the ensuing paragraphs.

Checking of weekly reports

3.20 Weekly reports submitted by the LEAs and the PJO cover all statutory activities, including both types of covert surveillance. The way

of checking that has been described in Chapter 2 for interception equally applies to covert surveillance.

Examination of documents and information during periodical visits

3.21 The mechanism of checking cases during periodical visits to the LEAs is described in Chapter 2.

3.22 During the year, ten applications for Type 1 surveillance (including five applications reported in 2019 and five in 2020) and 14 related documents/matters had been checked.

3.23 Pursuant to the Ordinance, an application for Type 2 surveillance is submitted to and determined by a designated authorizing officer of the department concerned. Special attention has all along been paid to examine each and every application for Type 2 surveillance to ensure that all such applications correctly fall within the category of Type 2 surveillance and all executive authorizations are granted properly. During the periodical visits to the LEAs in the report period, apart from the clarification of matters relating to minor discrepancies in the weekly reports, two applications for Type 2 surveillance (including one application reported in 2019 and the other in 2020) and two related documents/matters had been checked.

3.24 For cases where surveillance devices have been withdrawn under a prescribed authorization but no surveillance operation is carried out, the Commissioner would examine the following matters:

- (a) whether the prescribed authorization should have been sought in the first place;

- (b) the reason for not carrying out any surveillance operation pursuant to the prescribed authorization;
- (c) whether the devices drawn were used during the period concerned for any purposes other than those specified in the prescribed authorization; and
- (d) the way in which the devices drawn were kept by officers before they were returned to the device store/registry.

Such cases are included for examination in the periodical visits, at which the relevant case documents are checked and the LEAs concerned are requested to answer queries where necessary.

Examination of surveillance products

3.25 In accordance with section 53(1)(a) of the Ordinance, the Commissioner and his delegated officers have the express power to check the protected products obtained by the LEAs through covert surveillance. The examination of surveillance products was conducted at the LEAs' offices.

3.26 Apart from some specific cases such as LPP and JM cases, the Commissioner would also select from the weekly reports, on the basis of the information provided therein or at random, other cases for examination with a view to checking if the surveillance products of these cases may contain any LPP information, JM or any information that indicates heightened LPP/JM likelihood not reported by the LEAs. Such examination would also enable the Commissioner to identify whether there were any irregularities or concealment of unauthorized acts violating the ICSO, such as checking if the person under covert surveillance as authorized by a prescribed authorization was actually the subject of the prescribed authorization, if any information subject to LPP in the

surveillance products had been screened out by the dedicated units before the products were passed to the investigators, and if any discontinuance of surveillance operation was to avoid exposure or detection of inadvertent mistakes or acts done without authority. If there were questions or doubts arising from the examination of the surveillance products, the Commissioner would require the LEA concerned to provide clarification or explanation.

3.27 During the report period, the surveillance products of six selected authorizations were examined.

Checking of surveillance devices

3.28 Having regard to the fact that covert surveillance, as defined by the Ordinance, is surveillance carried out with the use of one or more surveillance devices, the LEAs had been required to develop a comprehensive recording system of surveillance devices, so as to keep a close watch and control over the devices with a view to restricting their use only for authorized and lawful purposes. Not only is it necessary to keep track of surveillance devices used for ICSO purposes, but it is also necessary to keep track of devices capable of being used for covert surveillance ('capable devices') albeit they may allegedly only be used for non-ICSO purposes. Capable devices should be kept under close scrutiny and control because of the possibility that they might be used without authorization or unlawfully. The LEAs have to maintain a register of devices withdrawn based on loan requests supported by a prescribed authorization and a separate register of devices withdrawn for administrative or other purposes based on loan requests for surveillance devices in respect of which no prescribed authorization is required. Both types of register will also record the return of the devices so withdrawn. An inventory list of surveillance devices for each device registry is also maintained with a unique serial number assigned to each single surveillance device item for identification as well as for checking purposes.

3.29 The LEAs have established a control mechanism for issuing and collecting surveillance devices. All records of issue and return of surveillance devices should be properly documented in the device register. Copies of both the updated inventory lists and device registers are submitted to the Commissioner regularly. Where necessary, the LEAs are also required to provide copies of the device request forms for examination. In case of discrepancies or doubts identified as a result of checking the contents of these copies and comparing them with the information provided in the weekly report forms and other relevant documents, the LEA concerned will be asked to provide clarification and explanation.

Visits to device stores

3.30 Apart from the checking of inventory lists and device registers of surveillance devices managed by the LEAs, the Commissioner would also make visits to the device stores of the LEAs for the following purposes:

- (a) to check the entries in the original registers against the entries in the copy of registers submitted to the Commissioner, with the aim to ensure that their contents are identical;
- (b) to check the procedures for the issue and return of surveillance devices for purposes under the Ordinance and for non ICSO-related usage;
- (c) to check whether any issue of device was appropriately supported by a request form;
- (d) to check the physical existence of items on the copy inventory entries provided to the Commissioner periodically;

- (e) to check the items of device shown in the copy registers to have been recently returned to ensure that they are being kept in the stores;
- (f) to make stock-check of items evidenced by the copy registers to be in the stores;
- (g) for the above purposes, to compare the unique number on each item as shown on the copy registers against the number assigned to the item as marked on it or attached to it; and
- (h) to view the items physically and be briefed, if need be, as to how they may be used for conducting covert surveillance operations.

3.31 During the report period, a total of four visits were made to the device stores of LEAs.

Removable storage media

3.32 To better control the issue and return of surveillance devices, all the LEAs have adopted computerised device management system ('DMS') in their device stores. In addition, the LEAs have adopted the use of tamper-proof labels to seal the removable storage media ('RSM') (e.g. memory cards, discs and tapes) inside the surveillance devices at the time of issue to avoid any possibility of these RSM being substituted, or in any way tampered with. The LEAs have also adopted the use of QR Code to facilitate the issue and return of the RSM through DMS. Information showing whether RSM is issued or returned with a surveillance device and whether the tamper-proof label sealing the RSM inside the device is intact upon return of the device were clearly documented in the device register.

Devices for non-ICSO purposes

3.33 As a matter of practice, an authorized covert surveillance should always be supported by a prescribed authorization issued by a relevant authority but a non-ICSO operation requiring issue of devices will not have that support. Hence, in keeping track of issue of surveillance devices for non-ICSO purposes, the LEAs have accepted the requirements that a two-level approval by way of an endorsement of an officer and an approval of a senior officer is required. Both officers will sign with date on a device request memo to signify their endorsement and approval respectively. Each device request memo should have a unique memo reference. The withdrawing officer will bring along the device request memo to the device registry where the storekeeper on duty will issue the surveillance devices requested.

3.34 During the year, one report relating to capable devices was received from an LEA. Details of this case are described below.

Issue of Capable Devices without Proper Documentation and Record

3.35 An LEA reported to me an incident in which five capable devices were issued for non-ICSO purposes on a continuous basis without proper documentation.

3.36 In that LEA, individual units were responsible for procurement of capable devices required by them. Once a newly procured device was tested as fit for use, the device should be transferred to a capable device store ('the CDS') for safe keeping and registration in the inventory record. If there was an operational need to keep a capable device in the unit rather than in the CDS for non-ICSO purposes, the unit concerned should file application documents with the CDS, which would register such continuous issue in the inventory record. The updated

inventory record would then be provided to the concerned unit for verification. The need to retain a capable device was subject to review by the unit concerned at a regular interval.

3.37 In late 2018, a capable device was purchased by a unit ('User Unit'). With the intention of keeping the device for continuous use, the User Unit has not transferred the device to the CDS. An administrative staff of the User Unit ('Subject Officer') caused the preparation of relevant documents for device registration and retention of the device. During the preparation process which took several months, the Subject Officer maintained close liaison with the CDS and so the device storekeeper ('Device Storekeeper') and his deputy ('Deputy') were aware that the device was intended for continuous use by the User Unit. When the device registration document was eventually submitted to the CDS, the Device Storekeeper inspected the device, registered the device in the inventory and then instructed the Deputy to handle the remaining registration procedures. Upon completion of the registration process, the Deputy allowed the User Unit to keep the device as he had a wrong impression that the application documents for retention of the device prepared by the User Unit had already been received and processed. Though the device was kept by the User Unit, the updated inventory record showed that the device was maintained in the CDS. Different officers of the User Unit, including the Subject Officer, did not notice the discrepancy in the inventory record when they received it and just filed it away. On the other hand, in a computer file that was maintained by the CDS separately, the device was registered as having been issued to the User Unit on a continuous basis.

3.38 As time went by, the CDS conducted capable device inventory checking twice using the information available in the computer file. Two rounds of review on the retention of device were also conducted by the User Unit and the relevant review documents were submitted to the CDS

for record purpose. During all these checking and review exercises, neither the Device Storekeeper, the Deputy nor the Subject Officer noticed that it was wrongly stated in the inventory record that the device was being kept in the device store.

3.39 In March 2020, the User Unit intended to register four more capable devices in the inventory for continuous use. Similarly, the devices were then properly registered but they were not transferred to the CDS. The Deputy was aware that the CDS had not yet received the application documents from the User Unit for retention of these four devices but he considered that it might be more convenient for the User Unit to keep the devices for the time being. Another inventory checking took place afterwards and again the discrepancy of continuous issue went unnoticed. The discrepancy only came to light in July 2020 when, upon the Subject Officer's enquiry with the CDS on the particulars of some devices, the Device Storekeeper asked the Deputy to make reference to the relevant application documents which could not be located in the CDS.

3.40 The LEA concluded that the issue of the five capable devices to the User Unit deviated from the laid down procedures as the devices were issued in the absence of proper documentation and records. However, the LEA was of the view that there was no indication of deliberate neglect or any sinister motive on the part of the officers concerned. The LEA stated that the devices involved were all along in the safe custody of the User Unit and none of the devices had been misused. The LEA concluded that the Device Storekeeper and the Deputy should be held primarily responsible and proposed that an advice (non-disciplinary) be issued to each of them. For the failure to furnish the application documents for retaining the devices, the LEA proposed that the Subject Officer should be reminded by her supervisor. The LEA also made enhancements to the device issue procedures.

3.41 Having reviewed the case, I asked the LEA to revisit the responsibilities of the Device Storekeeper and the Subject Officer in the incident. Being the Device Storekeeper, the officer left the capable devices with the Deputy without ensuring that the latter would handle the devices in accordance with the laid down procedures. For the Subject Officer, had she duly submitted the required application documents, this incident would not have arisen. For the proposed enhancements to the device issue procedures, I also tendered my views.

3.42 After review, the LEA agreed that the performance of the Device Storekeeper was neither satisfactory nor professional and the Subject Officer had the responsibility to ensure the submission of the required documents. The LEA thus proposed that the Device Storekeeper be given a verbal warning (disciplinary) for his obliviousness to the continuous issue of capable devices in the absence of the required documents and his lack of adequate supervision on the Deputy. For the Subject Officer, the LEA proposed that a verbal advice (non-disciplinary) should be given. The LEA also adopted my advice and made further refinement to the device issue procedures.

3.43 I consider the actions taken against the officers involved in the incident and the enhancements to the device issue procedures appropriate.

Results of various forms of checking

3.44 Various forms of checking, including examination of surveillance products in respect of the specific cases (such as LPP and JM cases) and six selected authorizations, 12 applications and 16 related documents/matters, were conducted in the report period as mentioned in paragraphs 3.20 to 3.31. Two cases of unauthorized surveillance and one case of non-compliance were revealed as detailed in Chapter 6.

CHAPTER 4

LEGAL PROFESSIONAL PRIVILEGE AND JOURNALISTIC MATERIAL

Obligations of LEAs regarding LPP cases

4.1 The Ordinance requires that when making an application for a prescribed authorization, the applicant should state in the affidavit or statement in writing the likelihood that any information which may be subject to LPP will be obtained by carrying out the interception or covert surveillance.

4.2 The COP provides that the LEA should notify the Commissioner of interception/covert surveillance operations that are likely to involve LPP information as well as other cases where LPP information has been obtained inadvertently. On the basis of the LEA's notification, the Commissioner may review the information passed on to the investigators to check that it does not contain any information subject to LPP that should have been screened out.

4.3 For each of these cases, there are procedures to be followed at different stages of the operation. 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, which is considered as a material change in circumstances, the officer concerned has to promptly report to the relevant authority the altered LPP assessment. The reporting requirement regarding material change in circumstances is stipulated under section 58A of the ICSO. The report to the panel judge is made by way of an REP-11 report; or, in the case of a Type 2 surveillance operation, by way of an REP-13 report to the

authorizing officer. If the subject of the interception or covert surveillance has been arrested and the officer concerned considers that the operation should continue, the officer should submit a section 58 report to the relevant authority assessing the effect of the arrest on the likelihood that any LPP information will be obtained by continuing the interception or covert surveillance. In the report made under section 58A or section 58, the officer has to provide the details of all relevant circumstances, including why the assessment has altered, how it has come about to consider that LPP information has been obtained or may likely be obtained, the details of the likely LPP information that has been obtained, and what steps have been taken or are proposed to take to prevent infringement of the right to communications that are protected by LPP. In order to apprise the Commissioner promptly with updated information on this important matter, the concerned LEA is required to give the Commissioner a similar notification of each of such occurrences in accordance with the COP.

4.4 Regarding cases with assessment that there was likelihood of involving LPP information, the panel judge would impose additional conditions if he granted the authorization or allowed it to continue. These additional conditions were stringent and effective in safeguarding the important right of individuals to confidential legal advice.

4.5 There is a set of reporting and preservation requirements for cases involving LPP information. In particular, for interception operations involving telephone calls, when an LEA encounters a call with heightened LPP likelihood or LPP information, the LEA is required to submit an REP-11 report to the panel judge in respect of this call. This is named 'Reported LPP Call' irrespective of whether LPP information has indeed been obtained. The reporting officer has to disclose in the report the number of times the Reported LPP Call has been listened or re-listened to, the respective date and time and duration of each such listening or

re-listening and the identity of each of the listeners. In addition, in the report to the Commissioner, the reporting officer should also state whether there are any other calls between the telephone number involved in the Reported LPP Call and the subject's telephone number under interception, irrespective of whether such calls are intercepted before or after the Reported LPP Call. If there are such 'other calls', the reporting officer is also required to provide information on whether they have been listened to and if so, for how long and the identity of the listeners. In order to provide such information, the reporting officer should consult the relevant audit trail report ('ATR') that records accesses to the intercepted calls together with the corresponding call data when preparing the REP- 11 report and the notification to the Commissioner. For LPP cases involving interception, the LEA should preserve all the interception products which are still available at the time of discovery of LPP likelihood, heightened LPP likelihood or LPP information, the transcripts, summaries, notes, ATRs, etc. The preserved records should not be destroyed without the prior consent of the Commissioner as stated under section 59(1)(c) of the Ordinance. LEAs are required to make similar reporting and preservation arrangements also for cases where JM is involved or likely to be involved.

4.6 In the event that LPP information has been inadvertently obtained in covert surveillance operations, the COP also provides that investigators monitoring the operations will be required to hand over the recording to a dedicated unit who will screen out any information subject to LPP before passing it to the investigators for their retention. The Commissioner should be notified. On the basis of the LEA's notification, the Commissioner may review the information passed on by the dedicated unit to the investigators to check that it does not contain any information subject to LPP that should have been screened out. Similarly, the dedicated unit is required to screen out any JM that has been inadvertently obtained and withhold such materials from the investigators.

Outstanding LPP cases in 2019

4.7 It was reported in paragraph 4.19 of the Annual Report 2019 that there were 15 cases of heightened/assessed LPP likelihood which were still on-going beyond 2019. The authorized operations of these 15 cases were discontinued in 2020 and I had completed the review of these cases in the report period. Other than one case which involved two incidents referred to in Case 6.7 and Case 6.8 of Chapter 6, nothing untoward was revealed by various forms of checking of the other 14 LPP cases.

LPP reports received in 2020

4.8 In the report period, LEAs submitted notifications, in accordance with the COP, on 139 new cases that were likely to involve LPP information (LPP cases).

4.9 Amongst these 139 new LPP cases, 29 cases were assessed at the time of application that the operations sought to be authorized would likely obtain information subject to LPP and the panel judge imposed additional conditions in the prescribed authorizations in all these cases. There was no subsequent change in circumstances one way or another relating to LPP likelihood for these 29 cases.

4.10 For the remaining 110 cases ^{Note 1}, the LEAs submitted REP-11 or section 58 reports to the panel judge on the subsequent change in circumstances relating to LPP involvement or likelihood. These 110 cases included:

^{Note 1} Some of these cases were assessed at the time of application that the operations sought to be authorized would likely obtain information subject to LPP and some were not.

- (a) one case of obtaining information suspected to be subject to LPP; and
- (b) 109 cases of heightened likelihood of obtaining LPP information:
 - (i) in 87 cases the panel judge allowed the continuation of the prescribed authorization subject to additional conditions imposed to guard against the risk of obtaining LPP information; and
 - (ii) in 22 cases the concerned LEA discontinued the operations of its own accord.

4.11 Of the 139 new LPP cases, the authorized operations for 129 cases were discontinued by end of the report period. I had completed the review of these 129 cases. In the review of these LPP cases, all the relevant documents and records including the prescribed authorization, the REP-11 report, section 58 report, the determination by the panel judge, the notes, the summaries, the communication data, the ATRs, etc. were checked by me and my staff. For cases where the panel judge allowed the prescribed authorizations to continue subject to additional conditions, we checked whether the LEAs had complied with the additional conditions imposed by the panel judge, and whether the LPP information or likely LPP information had been screened out from the summaries passed on to investigators. In respect of interception of telephone calls, we also checked whether there were calls between the same telephone numbers preceding the Reported LPP Call that should have been but had not been reported, and whether there was any listening or re-listening to the interception products after the discontinuance or revocation of the prescribed authorizations.

4.12 The protected products of the 129 LPP cases were also examined by me and my delegated officers. When examining these products (and also those for JM cases), we particularly checked the following:

- (a) whether the contents of the communications or information reported in the relevant REP-11 report and notification to the Commissioner tallied with what was listened to or viewed by the LEA officers; and
- (b) whether there was any other communication or information that was subject to LPP or indicated heightened LPP likelihood (or contained JM or indicated heightened JM likelihood) but had not been reported to the relevant authority.

One case of obtaining information suspected to be subject to LPP

4.13 The case where information suspected to be subject to LPP was obtained involved an interception operation. At the grant of the relevant prescribed authorization, the interception operation was not assessed to have a likelihood of obtaining LPP information. As the interception progressed, one day, the LEA concerned encountered a call which contained information suspected to be subject to LPP. The LEA submitted an REP-11 report to the panel judge with the contents of the suspected LPP information detailed separately in an annex to the REP-11 report, and sought approval to continue with the prescribed authorization. After considering the REP-11 report, the panel judge allowed the prescribed authorization to continue with additional conditions imposed. The interception operation was later discontinued by the LEA because it was not productive.

4.14 I have reviewed the case and did not find any irregularity. As regards the call which involved suspected LPP information, I, having listened to the call, considered that the information concerned was LPP information, which was obtained by the LEA inadvertently.

101 cases of heightened LPP likelihood and 27 cases of assessed LPP likelihood

4.15 The review of the 128 heightened/assessed LPP likelihood cases had been conducted in accordance with the mechanism as stated in paragraphs 4.11 and 4.12 above. Of these 128 cases, five^{Note 2} cases were related to the incidents referred to in Cases 6.3, 6.4, 6.6, 6.7^{Note 3}, 6.8^{Note 4} and 6.9 of Chapter 6. Nothing untoward was found for the remaining 123 cases.

Ten on-going cases of heightened/assessed LPP likelihood

4.16 As the authorized operations for ten cases of heightened/assessed LPP likelihood reported in 2020 are still on-going beyond the report period, details about my review of these cases will be reported in the next annual report.

Obligations of LEAs regarding JM cases

4.17 The Ordinance requires the LEA applicant to set out, at the time of applying for a prescribed authorization, the likelihood that any information which may be the contents of any JM will be obtained by carrying out the interception or covert surveillance sought to be authorized. The COP provides that the LEAs should notify

Note 2 One of the five cases involved three incidents referred to in Cases 6.4, 6.7 and 6.8 of Chapter 6.

Note 3 This incident involved one LPP case in 2019 and one LPP case in 2020.

Note 4 This incident involved one LPP case in 2019 and two LPP cases in 2020.

the Commissioner of cases where information which may be the contents of any JM has been obtained or will likely be obtained through interception or covert surveillance operations. The reporting, preservation and screening requirements for cases involving JM are the same as those set out in paragraphs 4.5 and 4.6 above.

JM reports received in 2020

4.18 In 2020, I received notifications on four new cases with heightened likelihood of obtaining JM submitted in accordance with the COP, for which REP-11 reports were submitted to the panel judge.

Four cases of heightened JM likelihood

4.19 The four cases of heightened likelihood of obtaining JM included:

- (a) two cases which the panel judge imposed additional conditions on the prescribed authorizations after receipt of the REP-11 reports; and
- (b) two cases which the LEA concerned discontinued the operation of its own accord.

4.20 I conducted a review of all the four JM cases in accordance with a mechanism which was similar to that of checking LPP cases as detailed at paragraphs 4.11 and 4.12 above.

4.21 One of these four heightened JM likelihood cases involved an incident referred to in Case 6.3 of Chapter 6. Apart from that, checking of the relevant documents and records of these four cases did not reveal any other irregularity. The protected products were also checked and

nothing untoward was found. In these four cases and during the report period, no JM was actually obtained.

CHAPTER 5

APPLICATION FOR EXAMINATION AND NOTIFICATION TO RELEVANT PERSON

Application for examination

5.1 Pursuant to section 43 of the Ordinance, a person may apply in writing to the Commissioner for an examination if he suspects that he is the subject of any interception or covert surveillance activity carried out by officers of the LEAs. Upon receiving an application, the Commissioner shall carry out an examination to determine:

- (a) whether or not the suspected interception or covert surveillance has taken place; and
- (b) if so, whether or not such interception or covert surveillance has been carried out by an officer of an LEA without the authority of a prescribed authorization,

unless the Commissioner refuses to carry out an examination by reason of section 45(1) of the Ordinance. After the examination, if the Commissioner finds the case in the applicant's favour, he shall notify the applicant and initiate the procedure for awarding payment of compensation to him by the Government.

5.2 The circumstances provided in section 45(1) that justify the Commissioner not carrying out an examination are that, in the opinion of the Commissioner, the application is received by him more than one year after the last occasion on which the suspected interception or covert surveillance is alleged to have taken place, that the application is made anonymously, that the applicant cannot be identified or traced after the use of reasonable efforts, and that the application is frivolous or vexatious or

is not made in good faith. Section 45(2) of the Ordinance mandates the Commissioner not to carry out an examination or proceed with the examination where, before or in the course of the examination, he is satisfied that any relevant criminal proceedings are pending or are likely to be instituted, until the criminal proceedings have been finally determined or finally disposed of or until they are no longer likely to be instituted. Section 45(3) of the Ordinance defines relevant criminal proceedings as those where the interception or covert surveillance alleged in the application for examination is or may be relevant to the determination of any question concerning any evidence which has been or may be adduced in those proceedings.

The procedure

5.3 The procedure involved in an examination can be briefly described below. Enquiries will be made with the particular LEA which, the applicant alleges, has carried out either interception or covert surveillance or a combination of both against him as to whether any such statutory activity has taken place, and if so the reason why. Enquiries will also be made with the PJO as to whether any authorization had been granted by any panel judge for the particular LEA to carry out any such activity, and if so the grounds for so doing. Enquiries with other parties will be pursued if that may help obtain evidence regarding the existence or otherwise of any such alleged statutory activity. The results obtained from the various channels will be compared and counter-checked to ensure correctness. Apart from the information given above, it is considered undesirable to disclose more details about the methods used for the examination of applications or about the examinations undertaken, because that would possibly divulge information that may prejudice the prevention or detection of crime or the protection of public security.

5.4 The applications for examination will have to satisfy the following requirements, namely:

- (a) there is suspicion of interception of communications or covert surveillance that has been carried out against the applicant; and
- (b) the suspected interception or covert surveillance is suspected to have been carried out by one or more of the officers of the LEAs under the Ordinance, namely, Customs and Excise Department, Hong Kong Police Force, Immigration Department and Independent Commission Against Corruption.

5.5 A number of applicants did not understand the basis of an application for examination under the Ordinance. Some applicants alleged that they had been surreptitiously or openly followed or stalked by officers of an LEA. This normally would not satisfy the proper basis for an application for examination because there was no suspicion of any surveillance device being used. There have been cases previously where the applicants said devices suspected to be used included those which could directly read or control their minds. These again did not form a proper basis for an application to initiate an examination, the reason being that the devices suspected to be used do not fall within the kind or type of devices under the Ordinance the use of which would constitute a covert surveillance.

5.6 Some applicants described how a particular person, as opposed to an LEA officer, carried out the suspected interception or covert surveillance. This would also fail to satisfy the second requirement to entertain an application or to engage in an examination.

5.7 The above information concerning the relevant provisions of the Ordinance, application requirements and procedure as well as the consent form on the use of personal data have been provided on the website of the Secretariat. In addition, guidelines containing the necessary information for making an application are available in the Secretariat office for prospective applicants.

Applications received in 2020

5.8 During the report period, there were five applications for examination. All these applications alleged a combination of interception and covert surveillance. Since none of them came within the ambit of the exceptions covered by section 45(1) or section 45(2), I carried out an examination provided for in section 44 of the Ordinance in respect of each case.

5.9 After making all necessary enquiries, I found all the five cases not in the applicants' favour and accordingly notified each of the applicants in writing of the findings, with four of such notices issued during the report period and one thereafter. By virtue of section 46(4) of the Ordinance, the Commissioner is not allowed to provide reasons for his determination or to inform the applicants whether or not the alleged or suspected interception or covert surveillance had indeed taken place.

Notification to relevant person

5.10 Section 48 of the Ordinance obliges the Commissioner to give notice to the relevant person whenever, during the performance of the functions under the Ordinance, the Commissioner discovers any interception or covert surveillance carried out by an officer of any one of the four LEAs covered by the Ordinance without a prescribed authorization. However, section 48(3) provides that the Commissioner

shall only give a notice when he considers that doing so would not be prejudicial to the prevention or detection of crime or the protection of public security. Section 48(6) also exempts the Commissioner from his obligation if the relevant person cannot, after the use of reasonable efforts, be identified or traced, or where he considers that the intrusiveness of the interception or covert surveillance on the relevant person is negligible.

5.11 Consideration of the application of section 48 may arise under a number of situations. For example, the interception of telephone communications on a telephone number other than that permitted by a prescribed authorization issued by a panel judge constitutes an unauthorized interception. The Commissioner will then consider whether he should, as obliged by section 48 of the Ordinance, give a notice to the relevant person of the wrong interception. If and when the notice is given, the relevant person will be invited to make written submissions in relation to the assessment of reasonable compensation to be paid to him by the Government.

5.12 During the report period, no notice pursuant to section 48 of the Ordinance was issued.

Prohibition against disclosure of reasons for determination

5.13 Section 46(4) expressly provides that in relation to an application for examination, the Commissioner is not allowed to provide reasons for his determination, or give details of any interception or covert surveillance concerned, or in a case where he has not found in the applicant's favour, indicate whether or not the suspected interception or covert surveillance has taken place.

5.14 During the year, I have observed that there were occasions where the applicants expressed strong discontent at not being given the

details of the reasons for my determinations. It is hoped that the public will understand that this statutory prohibition is designed to forbid the disclosure of any information which might prejudice the prevention or detection of crime or the protection of public security, preventing any advantage from being obtained by criminals or possible criminals over the LEAs in the latter's efforts in fighting crimes and in protecting the safety of the community in Hong Kong. There should not be any doubt that the Commissioner carries out his duties and functions under the Ordinance with the utmost good faith and sincerity.

CHAPTER 6

NON-COMPLIANCE, IRREGULARITIES AND INCIDENTS

Reporting of non-compliance, irregularities and incidents

6.1 By virtue of section 54 of the Ordinance, where the head of any LEA considers that there may have been any case of failure by the LEA or any of its officers to comply with any relevant requirement, he is obliged to submit to the Commissioner a report with details of the case (including any disciplinary action taken in respect of any officer). The head of any LEA is also required to submit to the Commissioner a report with details of the case even if the failure to comply with any relevant requirement is not due to the fault of the LEA or any of its officers. Relevant requirement is defined in the Ordinance to mean any applicable requirement under any provision of the ICSO, the COP, or any prescribed authorization or device retrieval warrant concerned.

6.2 Besides, there is a mechanism on reporting and monitoring of covert operations in place whereby the LEAs are required by the Commissioner to report cases of irregularity or even simply incidents which are not covered by section 54 of the Ordinance for his consideration and scrutiny so that any possible non-compliance will not escape his attention.

6.3 For cases of non-compliance, irregularity or incident discovered upon examination of documents, information and protected products during visits to LEAs, the LEA concerned is required to investigate the matter and submit a report or provide explanation to the Commissioner.

6.4 When reporting, normally the LEAs would adopt a two-step approach. They would first submit an initial report upon discovery of the event, to be followed by a full investigation report after an in-depth investigation into the case.

Outstanding cases brought forward from Annual Report 2019

6.5 In my Annual Report 2019, there were two outstanding cases. They are dealt with in the ensuing paragraphs.

Outstanding case (i) : An incident report relating to section 61 of the ICSO [Paragraph 6.6 of Annual Report 2019]

6.6 This incident was first reported by an LEA in late 2014. The case involved non-compliance with section 61(2) of the ICSO and the LEA submitted a further investigation report under section 54 of the Ordinance to my predecessor who completed review of the case in May 2015. The review result was not hitherto reported pending conclusion of the court proceedings that were relevant to the incident. The court proceedings were concluded during the report period and details of the review are set out in the ensuing paragraphs.

6.7 In the course of a crime investigation, intelligence was obtained from telecommunications interception operations by an LEA. When applying for prescribed authorizations for covert surveillance, the interception products were referred to in the statements in writing and affirmations in support of the applications ('the Documents'). Authorizations for surveillance were then granted to the LEA and covert surveillance was conducted. Subsequently, the subjects of the crime investigation were charged and some of the surveillance products obtained were adduced as evidence to prove the charges against the

subjects. Before the trial commenced, the solicitors of one of the subjects asked the LEA for disclosure of the Documents. The LEA then sought legal advice from the Department of Justice ('DoJ') as to whether the Documents should be disclosed to the defence and the appropriateness of providing its counsel with the Documents for examination while section 61(2) of the ICSO stipulates that any telecommunications interception products and any particulars as to a telecommunications interception shall not be made available to any party to any proceedings before any court. After consulting DoJ's advising counsel ('Prosecutor A') (who was not involved in the trial) and senior officers in the LEA, the officer who was in charge of the crime investigation ('Officer-in-charge') passed the Documents to Prosecutor A ('the first disclosure'). Later, the trial commenced and the Officer-in-charge provided the Documents to a fiat counsel ('Prosecutor B') ('the second disclosure') to assist him in preparing a written submission to the court. A few days later, it was brought to the attention of the LEA that section 61(2) of the ICSO might not have been complied with as a result of the two disclosures of the Documents to the prosecutors.

6.8 With regard to the first disclosure, the LEA stated in its investigation report that, given the involvement of Prosecutor A in the court case, she might be regarded as part of the prosecution and hence a party to the proceedings and disclosure was prohibited under section 61(2).

6.9 Concerning the second disclosure, Prosecutor B applied to the court to adopt the procedure under section 61(4) of the ICSO to deal with the defence's request for the Documents, albeit the criteria under section 61(4) were not fulfilled. According to the LEA's explanation, the Documents were provided to Prosecutor B at his request and the court's decision to adopt the procedure under section 61(4) might have led the LEA officers concerned to believe that they were obliged to disclose the

Documents to Prosecutor B, resulting in a further non-compliance with section 61(2) of the Ordinance.

6.10 The LEA considered that the non-compliance in this case was owing to the reliance of the officers concerned on the legal advice. The LEA agreed that clarifications should have been sought from the counsel concerned or counsel of a more senior level in DoJ should have been approached if the LEA officers had any doubts about the legal advice pertaining to the application or interpretation of any provisions of the ICSO. The LEA proposed that the Officer-in-charge, the immediate supervisor of the Officer-in-charge and two directorate officers who were responsible for the crime investigation be advised on the need to exercise vigilance in handling cases involving the application or interpretation of the provisions of the ICSO.

6.11 My predecessor pointed out that section 61 of the ICSO was an important provision protecting telecommunications interception products and it must be strictly observed by all officers engaged in ICSO-related duties. He was of the view that the officers involved in the incident should have taken proactive action to clarify with the senior management of DoJ on the disclosure issue. Having reviewed the case, my predecessor concluded that the two disclosures were non-compliances with section 61(2) of the ICSO and he noted that LEA's proposed actions against the four officers concerned.

6.12 As an improvement measure, the senior management of the LEA worked out with DoJ a set of formal procedures governing the disclosure of information under section 61 of the ICSO for observance by officers of the LEA since 2016.

6.13 As regards section 61(4) of the ICSO, in 2019, the Court of Appeal ruled that the section was unconstitutional because under it the

duty to make disclosure of extant information was imposed upon the LEAs rather than the prosecution and gave a remedial interpretation of the section. The LEA informed me that, pursuant to the Court of Appeal's remedial interpretation of section 61(4) of the ICSO, arrangement had then been put in place whereby extant information will be inspected by designated counsel of DoJ.

Outstanding case (ii) : Irregularities and non-compliance in a covert surveillance

[Case 6.13 (paragraphs 6.77 to 6.81) of Annual Report 2019]

6.14 This incident was first reported by an LEA in December 2019, followed by a full investigation report dated 31 March 2020. The report was submitted by the LEA under section 54 of the ICSO. The case was briefly reported in paragraphs 6.77 to 6.81 of the Annual Report 2019.

6.15 A prescribed authorization was granted to an LEA in October 2019 for the conduct of Type 1 surveillance ('the PA'). The PA authorized the LEA to conduct covert surveillance on Subject A when he was at a specified premises ('Part A') and on meetings between Subject B and Subject C at another specified premises ('Part B'). It was assessed at the time of application that the surveillance operation sought to be authorized would unlikely obtain information subject to LPP. However, in approving the application, the panel judge imposed an additional condition that the LEA was not allowed to use a specific function of surveillance devices when conducting the covert surveillance ('the Additional Condition') to guard against the risk of obtaining LPP information. For such kind of case, the panel judges used to mark the additional conditions on the prescribed authorizations in handwriting; but on this occasion, the Additional Condition was typed on the PA. The PA was then registered in the relevant computer system but the system record

did not explicitly indicate that the panel judge had imposed an additional condition.

6.16 For cases where LPP information is not involved but additional conditions are imposed on the prescribed authorizations concerned, the LEAs are required to preserve the related protected products and report to the Commissioner the imposition of the additional conditions through the weekly reports for checking purposes. In this case, the LEA only reported the imposition of the Additional Condition to me in December 2019 but not in the relevant weekly report in October 2019.

6.17 In December 2019, the LEA also reported to me an incident that in one of the Part A surveillance operations, a recording was made for about 30 seconds longer than it should be.

6.18 From the checking of the relevant weekly reports and the device register in respect of the PA, I observed that a surveillance device ('Device A') which was incompatible with the Additional Condition had been issued on three occasions. During a periodical visit, I required the LEA to provide explanations for the delay in reporting the imposition of the Additional Condition and the issue of incompatible surveillance device. After investigation, the LEA submitted a full investigation report dated 31 March 2020 to me under section 54 of the Ordinance.

6.19 According to the investigation report, the officer who made the application for the PA ('the Applicant') was entirely oblivious to the Additional Condition. After she had obtained the PA from the Panel Judges' Office, the Applicant, on seeing no handwriting on the PA, erroneously assumed that no additional condition had been imposed by the panel judge. The LEA found that the Applicant's oversight of the Additional Condition precipitated the litany of mistakes subsequently

committed by various officers in carrying out the covert surveillance and performing the ICSO-related duties. Apart from the Applicant, this case involved a number of officers in different sections of the LEA, including a directorate officer who approved the making of the application for the PA ('the Directorate Officer'), an officer who was in charge of the covert surveillance ('the Officer-in-charge') and her supervisor ('Supervisor A'), the head of the registry that was responsible for the preparation of weekly reports to the Commissioner ('the Head of Registry') and his supervisor ('Supervisor B'), four officers who prepared the forms requesting issue of surveillance devices ('the Device Requesting Officers'), two officers of the device store (hereinafter referred to as Device Issuing Officer and Device Store Manager), a senior officer who was the supervisor of both Supervisor B and Device Store Manager ('the Senior Officer') as well as the reviewing officer of the Type 1 surveillance conducted under the PA ('the Reviewing Officer'). The LEA explained that most of the officers involved in this case, basing on their experience and understanding of the practice adopted by the panel judges, shared the same honest belief that any additional conditions imposed by the panel judges for such kind of case would be in handwriting.

6.20 Regarding the preparation of the relevant weekly report in October 2019, the Head of Registry did not notice the omission of the reporting of the Additional Condition in the draft weekly report form prepared by the registry staff using the computer system. The form was then endorsed by Supervisor B and submitted by the Senior Officer to me. Both of them did not notice the omission which was later discovered in December 2019 when Supervisor B received an enquiry from the Reviewing Officer about the Additional Condition during his review.

6.21 Regarding the surveillance operation, on the day the PA was granted, the Officer-in-charge scrutinised its content and spotted the prohibition on the use of a specific function of surveillance devices though

she was not aware that it was an additional condition imposed by the panel judge. Supervisor A was away from the office at the material time and it was the first time for the Officer-in-charge to take charge of the conduct of a Type 1 surveillance in a capacity as acting the post of her supervisor. To ensure that all participating officers had a clear understanding of the terms and conditions of the PA, the Officer-in-charge conducted various briefings to the frontline officers who were tasked to perform the Type 1 surveillance pursuant to the PA and she reminded them that the use of the specific function of surveillance devices was prohibited in the surveillance operations.

6.22 After the briefings, four Device Requesting Officers prepared the device request forms for the issue of surveillance devices. Despite the imposition of the Additional Condition, they inserted inaccurate information in the request forms that there was no additional condition imposed by the panel judge on the use of surveillance devices. One of the Device Requesting Officers made a further inaccuracy in the forms he prepared about the covert surveillance plan, which implied that the surveillance would involve the use of that prohibited function of surveillance devices. The LEA explained that the four officers were not involved in drafting the application documents pertaining to the PA and they misconceived the prohibition on the use of the specific function of surveillance devices as part of the standard condition instead of an additional condition. Notwithstanding, the Officer-in-charge was not aware of the inaccuracies and confirmed all the details stated in the device request forms.

6.23 To facilitate the issue of surveillance devices by the device store, the Officer-in-charge had earlier provided a copy of the PA to the Device Store Manager. The Device Store Manager scrutinised the PA to keep himself abreast of the terms but the Additional Condition escaped his attention. Subsequently, requests for the issue of surveillance devices

were made to the device store on several consecutive days. Upon receipt of the device request forms, the Device Store Manager checked the details stated therein and confirmed the issue of the requested devices. On the first day, the Device Issuing Officer, without noticing the Additional Condition, issued Device A with the specific function which was incompatible with the Additional Condition to the frontline officers for Part B surveillance. He also retrieved from the device store an accessory for use with that particular function. The whole issuing process conducted by the Device Issuing Officer was witnessed by the Device Store Manager, who had verified the information inputted into the Device Management System ('DMS') and physically checked the device before granting approval through the DMS. The same mistakes were repeated when the same device was issued on the following days. As the accessories alone did not possess any functionalities of surveillance devices, their issue were not recorded in the device registers generated by the DMS.

6.24 For Part A surveillance, another three officers of the device store were responsible for the issue of devices. These issuing officers had duly disabled the specific function of the devices that possessed such function and inputted relevant remarks on the DMS. The issue of these devices was also approved by the Device Store Manager.

6.25 Eventually, no Part B surveillance was conducted and Device A had not been used whereas a few covert surveillance operations were conducted pursuant to Part A of the PA.

6.26 In one of the Part A surveillance operations, three surveillance devices (hereinafter referred to as Device B, Device C and Device D) were deployed. Upon departure of Subject A from the specified premises, the officers who operated the devices stopped the recording. For Device B, only one click of a button was involved. For Device C and Device D, the

system design required the user to go through multiple steps for ending the recording and the process took about ten seconds to complete if it ran smoothly in a normal pace. It turned out that recordings were obtained by Device C for about 30 seconds more and by Device D for about ten seconds more after the subject had left the specified premises.

6.27 A few days later, the Officer-in-charge examined the recording obtained by Device C and found that it was about 30 seconds longer than it should last. She then made enquiries with the officer who operated Device C and he explained that the stopping process did not run smoothly and he could only stop the device from recording after several unsuccessful attempts. The Officer-in-charge reported the matter to the Applicant. The circumstances surrounding the excessive recording by Device C were recorded in the relevant operation report prepared by one of the Device Requesting Officers but the time sequence of identifying the excessive recording was not clearly reflected in the report.

6.28 Technically speaking, the unauthorized part of recording resulting from the time gap between the subject's departure from the specified premises and the actual cessation of recording was unavoidable. However, as the PA specifically authorized that the devices would be turned on for recording upon Subject A's arrival at a specified premises and turned off when the subject left the specified premises, the continuous recording for about 30 seconds and ten seconds more by Device C and Device D respectively after the subject's departure constituted a non-compliance with the term as it was worded in the PA.

6.29 A few weeks later, Supervisor A resumed office and prepared a review folder in respect of the PA. Without noticing the Additional Condition, Supervisor A wrongly stated in a review form that no additional condition was imposed on the PA. She also missed out the inaccuracies when she inspected the relevant device request forms and overlooked the

issue of an incompatible surveillance device on three occasions when she perused the device register. The review form was endorsed by the Applicant and the Directorate Officer without any comments. Supervisor A then submitted the review folder containing the review form and the PA through the Applicant and the Directorate Officer to the Reviewing Officer for review.

6.30 During his inspection of the review folder, the Reviewing Officer took notice of the Additional Condition but he did not detect the wrong statement made by Supervisor A in the review form. Besides, judging from the description of Device A, he misconceived that the device should be incapable of performing the specific function.

6.31 The LEA proposed to give a verbal warning (disciplinary) to the Officer-in-charge and the Device Issuing Officer each, and an advice (non-disciplinary) to the Reviewing Officer, Supervisor A, Supervisor B and the Head of Registry each. Concerning the Device Requesting Officers, the LEA proposed no sanction be imposed on them but these four officers and all the frontline officers in general be reminded to be careful when preparing device request form. The LEA also proposed not to take any actions against the officers involved in the operation of Device C and Device D. These proposals were considered acceptable.

6.32 The LEA proposed to give a verbal warning (disciplinary) to the Applicant, which I considered too lenient. Her oversight of the Additional Condition precipitated the litany of mistakes subsequently committed by various officers in carrying out the ICSO-related duties. Besides, it was the first time for the Officer-in-charge to take charge of the conduct of Type 1 surveillance in an acting capacity. However, the Applicant failed to give proper instructions to the Officer-in-charge and closely monitor her performance in conducting covert surveillance pursuant to the PA. As the applicant for the PA and the supervisor of the

Officer-in-charge and Supervisor A, the Applicant has a much higher responsibility than the Officer-in-charge in this case.

6.33 For the Directorate Officer, the LEA proposed to give an advice (non-disciplinary) to him. I considered the proposed action not proportionate. He was the officer who approved the making of the application for the PA and he had perused the relevant affirmation and other related documents before they were submitted to the panel judge. However, when he came across the documents again during the review process, he failed to spot the imposition of the Additional Condition in the PA. Besides, being the head of the section who oversaw the performance of the Applicant, the Directorate Officer had a greater responsibility than Supervisor A in this case.

6.34 Concerning the Device Store Manager, I considered the proposed issue of a verbal warning (disciplinary) to him not proportionate. The control on the use of surveillance devices relied heavily on the device store keeper who was rested with the approving authority for the issue of devices. As the device store keeper, he should read the terms and conditions of each prescribed authorization carefully or otherwise he would not be able to decide what sorts of devices are allowed under the authorization and which devices can be issued. In this case, the Device Store Manager failed to spot the Additional Condition on scrutiny of the PA. His performance was neither satisfactory nor professional. Due to his inadequate performance, I had concern about his reliability as the approving officer for issuing surveillance devices. Besides, the Device Store Manager was more culpable and he should accept a higher responsibility than the Device Issuing Officer.

6.35 I requested the LEA to review its proposed actions against the Applicant, the Directorate Officer and the Device Store Manager. I also requested the LEA to review whether any actions should be taken against

the Senior Officer who oversaw the work of the registry and the device store and had supervisory accountability in this case. In determining the action for the Senior Officer, I requested the LEA to take into account her involvement in another case of non-compliance/irregularity/incident referred to in Case 6.3.

6.36 After review, the LEA proposed that a written warning (disciplinary) each be given to the Applicant and the Device Store Manager and a verbal warning (disciplinary) be given to the Directorate Officer. The LEA considered that, judging from this case and Case 6.3, the Senior Officer over-relied on her subordinates to duly perform ICSO-related duties and she should be more critical in scrutinising the work of her officers. The LEA proposed that an advice (non-disciplinary) be given to the Senior Officer. Having considered the appropriateness of the revised actions, I accepted the LEA's revised proposal.

6.37 As an improvement measure, the LEA enhanced the computer system in registering a prescribed authorization and in generating weekly report forms to the Commissioner. The DMS was also enhanced to facilitate the work of designated officers in the LEA in reviewing covert surveillance operations. Besides, the LEA proposed that the accessories that were intended for use with surveillance devices for a certain function be maintained under the DMS and their issue be recorded in relevant device registers. All members of the registry and the device store were reminded to carefully scrutinise the prescribed authorizations. The LEA also recommended that the circumstances surrounding this case be brought to the attention of officers who might perform ICSO-related duties, for reminding them of the need to exercise vigilance when reading the terms and conditions of the prescribed authorizations and preparing ICSO-related documents. I considered these measures appropriate and necessary.

6.38 I had examined the protected products relating to the PA and had reviewed the case. With regard to the LEA officers' awareness of the Additional Condition at various stages of the Type 1 surveillance under the PA, from the time the authorization was granted to the execution of the authorization and the subsequent internal review, I found no evidence suggesting that the officers involved had deliberately disregarded the Additional Condition when discharging their respective duties. With regard to the non-compliance with the PA that the recording continued after Subject A had left the specified premises in one of the Type 1 surveillance operations, it was due to the lead time required to operate the devices concerned in ceasing the recording and there was no indication of any foul play.

6.39 I observed that certain number of officers concerned were unaware or have not been mindful of the Additional Condition when carrying out their respective duties. The situation was not satisfactory. It should be emphasised that LEA officers were required to pay attention to each and every term and condition of a prescribed authorization and ensure the compliance of all the terms and conditions throughout the covert operation.

6.40 I advised the designated reviewing officers for covert surveillance operations in the LEA that, in reviewing whether the issue and the use of a surveillance device comply with the terms and conditions of an authorization, they must not only rely on their past experience or general understanding, or refer to the simple description of the surveillance device as shown in the device register. In particular, in a surveillance operation for which the prescribed authorization concerned prohibited use of certain functions of a device, the reviewing officers should check the detailed functionality of the device so as to determine whether the issue and the use of such device comply with the terms and conditions of the authorization.

6.41 In addition, I advised the LEA that a brief buffer time for operation of surveillance devices could be included in future applications for the panel judge's consideration to avoid similar technical non-compliance due to the lead time required for operating the surveillance devices.

6.42 In the report period, I had meetings with the panel judges and matters arising from this case, including imposition of additional conditions by the panel judges and the lead time required for the operation of surveillance devices, were discussed.

Cases occurring in 2020

6.43 In 2020, there were ten cases of non-compliance/irregularity/incident while three of them involved reports submitted under section 54 of the Ordinance. The review of all cases had been completed and details of the review are set out below.

Case 6.1 : Delay in reporting an alias of a subject of covert surveillance

6.44 In accordance with paragraph 116 of the Code of Practice, an alias of the subject which is relevant to the investigation should be reported to the relevant authority as a material change in circumstances under section 58A of the ICSO as soon as reasonably practicable if such an alias is made known to the LEA after the authorization is granted and the authorization or its renewal is still valid. In this case, checking of the weekly reports submitted by an LEA revealed that there was a delay in reporting an alias of a subject. After examination of the relevant documents during a periodical visit, I required the LEA concerned to provide an explanation for the delay. Subsequently, the LEA submitted a detailed investigation report pursuant to section 54 of the Ordinance to me.

6.45 The LEA conducted interception operation on a subject whose identity was already known at the grant of the relevant prescribed authorization ('the PA for interception').

6.46 Several months later, the LEA applied for a renewal of the PA for interception and a senior officer who made the application for the renewal stated in the supporting affirmation that a prescribed authorization for covert surveillance would be applied for in due course for the purpose of monitoring a meeting involving the subject. Meanwhile, the LEA applied for conducting Type 1 surveillance on the subject as well and a prescribed authorization was granted by the panel judge ('the PA for surveillance').

6.47 As the interception operation progressed, one day, the LEA became aware of an alias of the subject. The supervisor of a registry, which was the central depository of all ICSO records in the LEA, instructed the registry to prepare the required REP-11 reports for her to report the alias to the panel judge. An officer of the registry then conducted checking on the information relating to the alias on the relevant computer system and computer file. She found that the subject was a subject of an ongoing interception operation at the material time. However, she did not check the computer file thoroughly to ascertain whether the subject was also a subject of any ongoing covert surveillance operations. As a result, the officer had only prepared a draft REP-11 report in respect of the PA for interception.

6.48 The draft REP-11 report was then submitted to the supervisor who endorsed its accuracy and forwarded it to the senior officer for clearance for submission to the panel judge. The senior officer did not recall that the subject was also a subject of covert surveillance and made no comment on the report. Upon consideration of the REP-11 report submitted by the LEA ('the first REP-11 report'), the panel judge allowed

the PA for interception to continue.

6.49 Later, when the PA for surveillance would soon expire, the officer proceeded with the preparation of a discontinuance report pursuant to section 57 of the ICSO. While drafting the discontinuance report, the officer noticed that the subject of the PA for surveillance was the same as that of the PA for interception but his alias had not been reported to the panel judge in respect of the PA for surveillance. The omission was then reported to the supervisor and the senior officer. Another REP-11 report in respect of the PA for surveillance reporting the same alias ('the second REP-11 report'), which was endorsed by the supervisor and cleared by the senior officer, was finally submitted to the panel judge about ten days after the submission of the first REP-11 report.

6.50 The supervisor admitted that the two REP-11 reports should have been submitted concurrently. She indicated that she normally could recall if an individual was a subject of both interception and covert surveillance operations ongoing at the time. She explained that, on the day when the first REP-11 report was submitted, the omission of an REP-11 report in respect of the PA for surveillance was due to a slip in attention.

6.51 With regard to the senior officer, she was directly involved in the supervision of the execution of interception and other ICSO-related matters and she should be cognizant of the authorizations then in force. In this case, there was possibly an ongoing prescribed authorization for surveillance on the same person but the senior officer failed to take a further step to ascertain if a separate REP-11 report was required for concurrent submission with the first REP-11 report.

6.52 In the second REP-11 report, nothing about the first REP-11 report or the late reporting of the alias as far as the Type 1 surveillance was concerned was mentioned. The officer and the supervisor explained that

they only focused on submitting the belated REP-11 report to the panel judge at the time. The supervisor stressed that she had never tried to conceal the fact from the panel judge that the submission of the second REP-11 report had been delayed by not explicitly mentioning it in the report.

6.53 The LEA stated that the second REP-11 report failed to provide to the panel judge a full picture on the delay in submission, and the supervisor and the senior officer were not vigilant in the handling of this case as they did not timely report the matter to another team of the LEA that was responsible for overseeing the compliance by its officers with the ICSO in accordance with the established internal requirement.

6.54 The investigation by the LEA concluded that there was no indication of deliberate neglect or any sinister motive on the part of any of the officers concerned. The late reporting of the alias in respect of the PA for surveillance and the inadequacy in the content of the second REP-11 report were attributed to the failure on the parts of the officer, the supervisor and the senior officer in performing their respective duties with prudence and diligence. The LEA proposed to give a verbal warning (disciplinary) to each of these officers. To prevent recurrence of similar incidents, the LEA revised the workflow regarding the reporting of a newly surfaced alias of a subject and strengthened the related procedures. Besides, the LEA would enhance the computer system to better facilitate the checking process.

6.55 In this case, the report on the alias of the subject of the Type 1 surveillance was not made as soon as practicable. This was a non-compliance with the provision of the Ordinance and the Code of Practice. Having reviewed the case, I found no evidence to contradict the findings of the LEA that there was no indication of deliberate neglect or any sinister motive since the alias of the subject was already reported to the

panel judge in the first REP-11 report in respect of the PA for interception and so nothing was to be gained by the delay in reporting the same alias of the subject in respect of the PA for surveillance. As far as the Type 1 surveillance was concerned, by virtue of sections 63(5) and 64(1) of the Ordinance, I considered that the delay in reporting the alias did not affect the validity of the prescribed authorization. The revised workflow and procedures for the reporting of an alias of a subject and the recommended enhancement to the computer system were considered appropriate.

6.56 I agreed with the proposed disciplinary actions against the three officers concerned. Notwithstanding, the performance of the supervisor was considered unsatisfactory. When perusing the draft first REP-11 report, the supervisor relied on her personal memory and on the officer who prepared the draft without going through any verification process. The supervisor was also found lacking vigilance in the performance of her duties in another case of non-compliance/irregularity/incident referred to in Outstanding case (ii). As regards the senior officer, she was involved in another two cases referred to in Outstanding case (ii) and Case 6.3.

Case 6.2 : Delay in removal of interception products from the designated computer workstations after a checking visit

6.57 Examination of interception products by the Commissioner and his delegated officers is arranged by the Team mentioned in paragraph 2.27 of Chapter 2 and conducted at the LEAs' offices. An LEA reported to me an incident in which some interception products were not removed from the designated computer workstations after a checking visit conducted by me and my delegated officers. The incident was only discovered when my delegated officers conducted another checking visit to the LEA concerned three months later. Nevertheless, the interception products which remained in the computer workstations could not be

accessed by any officers other than the Commissioner and his delegated officers according to the security design of the system.

6.58 The Team submitted an investigation report and concluded that the incident was caused by the overlooking of the duty officer without ulterior motive. To prevent recurrence of similar incidents, the Team had reviewed the work procedures. The removal of interception products from the designated computer workstations after the Commissioner's checking visit would be double-checked by a supervisor of the Team. The LEA concerned would also confirm with the responsible duty officer of the Team whether the interception products have been completely removed after examination of interception products by the Commissioner. I noted the proposed improvement measures and considered them acceptable.

Case 6.3 : Delay in reporting an assessment of a call which might indicate heightened JM likelihood in the weekly report

6.59 The incident was related to a case of assessed LPP likelihood and heightened JM likelihood referred to in Chapter 4.

6.60 At the grant of the fresh prescribed authorization concerned, the interception operation was assessed to have a likelihood of obtaining LPP information and additional conditions were imposed by the panel judge to guard against the risk of obtaining LPP information. The interception operation progressed and the LEA concerned discovered heightened likelihood of obtaining JM on a few occasions. The panel judge, having considered the relevant REP-11 reports, allowed the prescribed authorization to continue with additional conditions imposed to guard against the risk of obtaining JM.

6.61 One day, an officer listened to a call and found that the call contained information which might indicate heightened likelihood of

obtaining JM. The matter was reported to the officer's supervisor and a senior officer. The senior officer assessed that there was no indication of heightened JM likelihood. The supervisor documented the assessment accordingly but he forgot to provide a copy of the relevant document to the officer-in-charge of a registry in accordance with the internal reporting requirement of the LEA after the document was cleared by the senior officer.

6.62 The registry, which was also under the command of the senior officer, was responsible for the preparation of weekly reports to the Commissioner. With no knowledge of the assessment of the call, the registry had not included the assessment result of the call in the weekly report for the period in which the call was listened to. When the senior officer perused the draft of the weekly report in which the assessment ought to have been covered, she did not notice the omission of the assessment that was made by herself not long ago. She then forwarded the weekly report to a directorate officer for endorsement and onward submission to me.

6.63 In the month that followed, the LEA held a training in which the call was discussed. The senior officer recalled her assessment pertaining to the call. Upon the senior officer's enquiry, the supervisor came to realise that he had forgotten to inform the registry of the assessment of the call. Subsequently, the LEA reported the matter to me in a weekly report about two months after the call was listened to.

6.64 Later, the LEA submitted an investigation report to me. The LEA explained that the late reporting of the call was due to a momentary lapse of mind of the supervisor and there was no indication of deliberate neglect or sinister motive involved. The LEA proposed to advise the supervisor on the need to be more vigilant in discharging ICSO-related duties, while the senior officer and the directorate officer should not be

held accountable for the mistake. To prevent recurrence of similar mistakes in future, the LEA proposed a remedial measure to tighten up the procedure in relation to the reporting of intercepted calls that were considered not involving heightened risk or likelihood of obtaining JM or LPP information after assessment.

6.65 The senior officer was involved in another two cases of non-compliance/irregularity/incident referred to in Outstanding case (ii) and Case 6.1. With regard to Outstanding case (ii), I required the LEA to review whether any appropriate actions should be taken against the senior officer and take into account her involvement in this case when doing so. In its reply, the LEA considered that, judging from this case and Outstanding case (ii), the senior officer over-relied on her subordinates to duly perform ICSO-related duties and she should be more critical in scrutinising the work of her officers. The LEA proposed that an advice (non-disciplinary) be given to the senior officer on the need to be more vigilant in performing supervisory duties, given that she failed to ensure that the assessment of the call was timely reported to me.

6.66 In reviewing this case, I examined the protected product of the call and confirmed that it contained no information indicating heightened JM likelihood.

6.67 Having reviewed the case, I found no evidence to contradict the findings of the LEA that there was no deliberate neglect or ulterior motive involved in the incident. The proposed actions against the officers concerned and the remedial measure proposed were considered appropriate.

Case 6.4 : Access to an interception product during suspension of monitoring of the interception concerned

6.68 An LEA reported an incident where an officer accessed an interception product when monitoring of the interception operation should have been put on hold. This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.

6.69 At the grant of the prescribed authorization concerned, the identity of the subject was not known by the LEA and the interception operation was not assessed to have a likelihood of obtaining LPP information. As the interception operation progressed, one day, the LEA learnt of the identity of the subject. A few days later, when reviewing the relevant investigation record, the investigation team found that the subject might have been arrested. Later the same day, checking of the relevant computer record revealed that the subject had been arrested. The LEA then submitted to the panel judge an REP-11 report to report the identity of the subject and a section 58 report to report the arrest status of the subject. After considering the reports, the panel judge allowed the authorization to continue with additional conditions imposed to guard against the risk of obtaining LPP information.

6.70 While awaiting the checking result concerning the status in respect of the subject's arrest, an officer who was assigned monitoring duty of the interception operation for that day was instructed to suspend her monitoring. The officer then turned to compile summaries in respect of the calls that she had listened to earlier the day. Despite the instruction of suspending the monitoring of the interception which was received only about half an hour ago, the officer inadvertently re-listened to one of the calls in the course of preparing a summary for the call. When she was informed by another officer about removal of her access right to the

interception products, the officer came to realise her mistake and then immediately reported the matter to her supervisor.

6.71 The investigation by the LEA found that the mistake was attributed to her momentary absentmindedness when the officer was too focused on the compilation of the summaries. The LEA concluded that there was no deliberate neglect or any sinister motive involved in the incident. The sole intent of the officer to re-listen to the call in question was to verify certain contents of the call recorded in her notes in respect of the call which she had already listened to earlier. The LEA proposed to issue an advice (non-disciplinary) to the officer on the need to be more vigilant in discharging ICSO-related duties. To prevent recurrence of similar mistakes in future, the LEA tightened up the control on access to interception products.

6.72 In reviewing the case, I listened to the call in question and did not find any abnormality. I agreed that there was no foul play or ulterior motive involved in the incident since that call had already been listened to by the officer and nothing was gained by the officer in re-accessing the call. The LEA's proposed action against the officer as well as the improvement measure were considered appropriate.

Case 6.5 : Failure in reporting a call with likelihood of obtaining LPP information

6.73 Checking of protected products of a case selected from weekly report revealed that a call with information which indicated heightened LPP likelihood had been overlooked by an LEA.

6.74 One day, after listening to a call, an officer reported to her supervisor that the call might contain information leading to heightened LPP likelihood. However, without verifying the actual contents of the call,

the supervisor interpreted the information obtained in the call in an opposite way and considered that there was no indication of information leading to heightened likelihood of obtaining LPP information. Besides, she did not record her deliberation on relevant document according to the laid down directive. The LEA explained that the incident was mainly caused by the inattention of the officer and her supervisor in interpreting the contents of the call.

6.75 After reviewing the case, I considered that the officer had done her part in reporting the call to her supervisor immediately after detecting information which led to possible heightened likelihood of obtaining LPP information. However, she failed to exercise judgement independently and make suitable recommendation to her supervisor when the latter erred in her decision. The handling of the matter by the supervisor after receiving the officer's report was unsatisfactory and unprofessional. Without listening to the call, the supervisor misinterpreted the contents of the call and did not make a proper record of her deliberation on the assessment on LPP likelihood in relevant document according to the laid down directive.

6.76 The misperception of the contents of the call by the supervisor led to overlooking of an indication of heightened LPP likelihood in the call. Notwithstanding the above, on the basis of the information provided, I found no evidence of deliberate neglect or any sinister motive. The proposed actions of giving a verbal advice (disciplinary) to the officer and a verbal warning (disciplinary) to her supervisor were considered appropriate.

Case 6.6 : Access to interception products during suspension of monitoring of the interception concerned and improper handling of information indicating heightened LPP likelihood

6.77 This case was related to an on-going case of heightened LPP likelihood referred to in Chapter 4. The LEA concerned first discovered an irregularity in the handling of information that indicated heightened likelihood of obtaining LPP information. While preparing an initial report to me, it was further discovered that an officer had accessed interception products when monitoring of the interception should have been put on hold. Subsequently, the LEA submitted a full investigation report to me pursuant to section 54 of the ICSO.

6.78 A prescribed authorization was granted for interception of a facility used by a subject ('the Subject'). At the grant of the authorization, the interception operation concerned was assessed to have a likelihood of obtaining LPP information and the panel judge imposed additional conditions on the authorization to guard against the risk of obtaining LPP information. The additional conditions, inter alia, required the LEA to suspend the monitoring of the interception and cause a report to be provided to the panel judge under certain circumstances.

6.79 As the interception progressed, one day, an officer of the interception unit of the LEA ('Officer A1') listened to a call and found that the call contained information indicating heightened LPP likelihood. Officer A1 was supposed to block the access to the facility so as to restrict monitoring of the interception concerned but she forgot to do so. She proceeded to report the call to her supervisor ('Supervisor A') who instructed Officer A1 to obtain more background information about the issue mentioned in the call in order to facilitate an LPP assessment. Meanwhile, when the monitoring of the interception concerned should

have been put on hold, Supervisor A performed supervisory check and listened to seven other calls of the facility ('the Seven Calls') which had been listened to by his subordinates previously.

6.80 After conducting background enquiries, Officer A1 reported the result to Supervisor A and he assessed that there was a heightened LPP likelihood. After reminding Officer A1 to block the access to the facility, Supervisor A reported the LPP call to a senior officer. The senior officer directed that suspension of monitoring of the interception concerned should continue pending submission of an REP-11 report to the panel judge to report the heightened LPP likelihood.

6.81 On the morning of the following day, when the REP-11 report was being prepared by a registry which was also under the command of the senior officer, a surveillance (not covert surveillance) operation was conducted on the Subject. The Subject was seen entering a multi-purpose building in which some premises in relation to legal proceedings and lawyers were accommodated ('the Building'). According to the prevailing reporting mechanism, the officer-in-charge of the surveillance operation ('the Officer-in-charge') notified the frontline officer who was responsible for the crime investigation concerned ('the Investigating Officer'). The Officer-in-charge also made a similar notification to another officer of the interception unit who took charge of the interception operation pursuant to the prescribed authorization at the material time ('Officer A2'). The Investigating Officer then informed both the interception unit and the registry of the matter. When he approached the registry, the Investigating Officer only talked to a registry staff ('Officer B1') as the supervisor of the registry ('Supervisor B') was not in the office and Officer B1 requested him to ascertain which places inside the Building the Subject had visited and the purpose of the visit.

6.82 Later the same morning, the LEA became aware that the Subject had entered a premises in relation to legal proceedings ('the Premises') inside the Building. The Officer-in-charge reported the development to the Investigating Officer but she did not similarly update Officer A2 according to the prevailing reporting mechanism. Immediately afterwards, the Investigating Officer tried to call Supervisor B with a view to updating her on the latest development but she was again not in the office.

6.83 Later, when Supervisor B returned to her office, Officer B1 duly reported to her the Subject's visit to the Building and that the Investigating Officer would obtain more information about the visit. Supervisor B did not actively follow up on the matter and waited for the Investigating Officer to give her an update on the situation. Besides, it did not occur to Supervisor B that she might need to report the matter to the senior officer for assessment or mention this matter in the REP-11 report that was under preparation.

6.84 On the afternoon of the same day, the REP-11 report was submitted to the panel judge. The report, which was signed by Supervisor B and endorsed by the senior officer, stated only the LPP call but nothing about the Subject's visit to the Building. After considering the REP-11 report, the panel judge allowed the monitoring of the interception to continue subject to more additional conditions. Upon receipt of the panel judge's determination, another registry staff ('Officer B2') sent a message to all other officers of the registry informing them of it.

6.85 As regards the Subject's visit to the Building, Supervisor B eventually called the Investigating Officer more than six hours after the LEA became aware of the matter and only then did she learn that the Subject had entered the Premises inside the Building. Supervisor B then reported the matter to the senior officer. Meanwhile, as arranged by

Officer B2, the restriction on the access to the facility was removed. Shortly before the removal of the restriction, Officer A2 was informed of the arrangement but no one informed Supervisor A of the same. When the restriction on the access to the facility had been removed, Officer A2 listened to a call that was intercepted after the LPP call ('the Eighth Call'). Supervisor B was not aware of such resumption of monitoring either as she had not yet read the relevant message from Officer B2. Without knowledge of the resumption of the monitoring of the interception (although by then she had been told of the Subject's visit to the Premises), the senior officer instructed that the suspension of the monitoring be continued. Upon the senior officer's instruction, the access to the facility was blocked again.

6.86 On the next day when more information was obtained about the Subject's visit to the Premises, the senior officer assessed that there was a heightened LPP likelihood in respect of the interception operation. The senior officer instructed that suspension of monitoring of the interception be continued pending submission of another REP-11 report to the panel judge. On perusing the draft REP-11 report together with the relevant ATR, the senior officer became aware of Officer A2's listening to the Eighth Call and then she made enquiries with Supervisor A, Supervisor B and the Investigating Officer. Following a review of the whole incident, the senior officer considered that there might be an irregularity in respect of the handling of the information concerning the Subject's visit to the Premises. She then reported the incident to another team of the LEA that was responsible for overseeing the compliance by its officers with the ICSO. She also caused the REP-11 report, which contained the relevant information including Officer A2's listening to the Eighth Call and the report of the incident to the team, to be submitted to the panel judge. After considering this second REP-11 report, the panel judge allowed the prescribed authorization concerned to continue.

6.87 Supervisor A's listening to the Seven Calls while the monitoring of the interception on the facility was being suspended constituted a non-compliance with the additional conditions of the prescribed authorization. Though the panel judge allowed monitoring of the interception on the facility to be resumed after considering the REP-11 report on the LPP call, the monitoring should continue to be suspended while the Subject's visit to the Premises was yet to be reported to the panel judge. Thus, Officer A2's listening to the Eighth Call also breached the additional conditions of the prescribed authorization and amounted to non-compliance. Besides, the mishandling of the information relating to the Subject's visit to the Building caused a considerable delay in determining whether there might be a heightened LPP likelihood.

6.88 For Supervisor A, he explained that as he was prepared to conduct supervisory check on the facility around that time, it slipped his mind that it was in fact the same facility that he had instructed Officer A1 to suspend monitoring. For Officer A2, he explained that he listened to the Eighth Call soon after the restriction on the access to the facility had been removed since he was of the belief that the issue in relation to the Subject's visit to the Building had already been properly dealt with. The LEA concluded that the non-compliance and the irregularity in this case was due to a series of mistakes committed by the relevant officers because of their lack of vigilance and misjudgement.

6.89 The LEA had reviewed the prevailing reporting mechanism and found it still effective if the officers concerned had discharged their duties properly. The LEA stated that a briefing had been held to all the officers concerned, including staff of the registry and the interception unit, and they had been reminded to stay vigilant and enhance their mutual communication and teamwork to ensure that all covert operations were in compliance with the relevant requirements under the ICSO regime. To

prevent recurrence of similar mistakes in future, the LEA tightened up the control on the resumption of monitoring of interception pursuant to the panel judge's decision.

6.90 The reporting mechanism and the related arrangements were not clearly stated in any specific guidelines or operation manuals. I had doubt on whether all officers involved in the mechanism were fully aware of their roles and responsibilities. To facilitate my review of the case, I requested the LEA to provide me with more details about the reporting mechanism. I also required the LEA to consider implementing (a) some measures to ensure that the access to a facility was blocked when monitoring of it have to be put on hold and (b) some improvements to ensure that all officers concerned were properly informed when restriction on the access to a facility was to be removed.

6.91 The LEA took my advice and revised the procedures for blocking the access to a facility. The LEA also enhanced the mechanism for resuming monitoring of an interception. Besides, the LEA had enhanced the reporting mechanism and proposed to promulgate it as a set of written instructions and to incorporate such instructions into the LEA's operation manual.

6.92 I have reviewed the case. In the review process, I listened to the eight calls in question and confirmed that all of them did not contain any LPP information or JM. I found no evidence to contradict the findings of the LEA that there was no indication of deliberate neglect or any sinister motive on the part of any of the officers involved. I agreed with the LEA's recommendation that a written warning (disciplinary) be given to Supervisor A, a verbal warning (disciplinary) each be given to Supervisor B and the senior officer and an advice (non-disciplinary) be given to each of the Investigating Officer, Officer A1, Officer A2 and Officer B1. All the enhancement measures taken or proposed by the LEA were considered

appropriate.

6.93 I emphasised to the LEA that a subject's entry to a premises in relation to legal proceedings and lawyers definitely gave rise to a heightened risk or likelihood of obtaining information subject to LPP. It is a statutory requirement under section 58A of the ICSO and paragraph 130 of the COP that the LEA should cause a report on material change in circumstances to be provided to the panel judge as soon as reasonably practicable after becoming aware of the matter. The improper handling of information in relation to the Subject's visit to the Building and the resumption of monitoring of the interception when the matter was yet to be reported to the panel judge reflected the inadequacy of the officers involved and the lack of communication among themselves. The situation was unsatisfactory.

6.94 In its investigation report, the LEA did not mention any disciplinary or administrative actions against the Officer-in-charge who, after knowing that the Subject had entered the Premises, failed to follow the reporting mechanism and update Supervisor A or Officer A2 accordingly. I requested the LEA to review whether any appropriate actions should be taken against the Officer-in-charge. After review, the LEA issued an advice (non-disciplinary) to the Officer-in-charge. I noted the action taken by the LEA and made no further remarks.

Case 6.7 : Mistake in recording the obtained information from an interception operation

6.95 This incident was related to two cases of heightened likelihood of obtaining LPP information referred to in Chapter 4. The two LPP cases ('Case 1' and 'Case 2') were inter-related. The concerned call was made between the respective subjects of Case 1 and Case 2. During a periodical visit, it was noticed in the relevant transcript of Case 1 that the

call might contain information indicating heightened likelihood of obtaining LPP information. However, when checking the protected products of Case 1, the ATR indicated that the call had not been accessed by any officers of the LEA concerned. The LEA was requested to advise the source of the content of the call and whether any assessment on the likelihood of obtaining LPP information arising from the call was made.

6.96 The LEA replied that the officer had in fact listened to the concerned call when he conducted monitoring of the interception of Case 2. However, he recorded the obtained information in the transcript of Case 1 instead of Case 2. The mistake was caused by the officer's momentary lapse of concentration due to his tiredness. The officer's supervisor did not notice the mistake made by the officer when he conducted the routine inspection of the relevant transcript though he had assessed the concerned call that there was no information which indicated heightened likelihood of obtaining LPP information. Subsequent checking of recordings, ATR and relevant transcript of Case 2 confirmed what had been reported by the LEA.

6.97 The mistake reflected a lack of vigilance on the part of the officer and his supervisor. In view of the mistake, the LEA proposed to give an advice (non-disciplinary) each to the officer and the supervisor for reminding them to be more vigilant in performing the ICSO duties.

6.98 Having reviewed the case, I accepted the LEA's findings that no foul play or ulterior motive was involved as the content of the concerned call was recorded and assessed by the LEA officers. Besides, after checking the relevant recordings, I shared the view that the call did not contain information which indicated heightened likelihood of obtaining LPP information. The officer's explanation of momentary lapse of concentration leading to the failure in proper recording of the content of the call in the document was not implausible. The LEA's proposed actions against the two officers concerned were considered

appropriate.

Case 6.8 : Handling of interception products with information indicating arrest of a person

6.99 In accordance with section 58 of the ICSO, the LEA concerned should, after becoming aware of the arrest of the subject of the interception or covert surveillance, assess the effect of the arrest on the likelihood that any information which may be subject to LPP will be obtained by continuing the interception or covert surveillance and cause a report to be provided to the relevant authority.

6.100 During my periodical visits to an LEA, I examined the documents in relation to various telecommunications interception operations and observed from the transcripts that certain information indicating arrest of a person ('the Information') was mentioned in the conversations of six calls. The six calls in question were listened to by different officers of the interception unit of the LEA, hereinafter referred to as Officer A, Officer B, Officer C and Officer D. I found that these officers seemed to have different approaches in handling intercepted calls with the Information. At that time, the LEA had an established practice in handling interception products with certain information indicating LPP likelihood. As the Information mentioned in the calls might give rise to a heightened risk or likelihood of obtaining LPP information but different approaches were adopted by the officers, I requested a full report from the LEA on the procedures adopted in handling such calls and how the approach would be regularised.

6.101 The LEA submitted an investigation report to me which set out the investigation results and proposed revision to the procedures on handling of interception products with information indicating the arrest of a person. The six calls in question were related to three cases of

heightened likelihood of obtaining LPP information referred to in Chapter 4, one was reported in 2019 and discontinued in 2020 and the other two were new LPP cases reported in 2020.

6.102 For the six calls in question, four subjects hereafter referred to as Subject 1, Subject 2, Subject 3 and Subject 4 were involved. Four of the six calls were related to Subject 1 for whom the interception operation was assessed to have an LPP likelihood at the time of application for the fresh prescribed authorization in view that Subject 1 had been arrested about one month ago. For the first call, Officer A considered that the Information mentioned in the call was related to the other party of the call instead of Subject 1 and hence she did not bring up the matter to the supervisor. A few days later, Subject 1 was arrested again and the LEA submitted to the panel judge a section 58 report to report the arrest status of the subject. Shortly afterwards, Officer A listened to another call and the Information mentioned in the call suggested that Subject 1 might have been arrested. Given the proximity in time, it occurred to Officer A that the Information was possibly relating to the arrest of the subject that had already been reported in the section 58 report. A check on the arrest status of Subject 1 confirmed that there was no new arrest record concerning the subject. Officer A then made a relevant remark on the transcript. For both the first and second calls, the supervisor had inspected the transcripts and found the assessments made by Officer A appropriate.

6.103 About two weeks after the second call, another call with a mention of the Information was intercepted. For this third call, Officer B considered that the Information might relate to a more recent arrest of Subject 1 other than that reported in the section 58 report. A further check on the arrest status of the subject showed that there was no new arrest record concerning Subject 1. Officer B then reported the matter to the supervisor and made a relevant record on the transcript. The

supervisor recorded the course of actions in an event log but the time of Officer B's listening to the call and reporting to the supervisor recorded therein was inaccurate. Notwithstanding, the LEA considered that the inaccuracy did not amount to any material misrepresentation.

6.104 About one month after the third call, Officer C listened to a call in which the Information was mentioned and he considered that Subject 1 might have been arrested. He then reported the matter to the supervisor who arranged for a further check on the arrest status. The checking results indicated no heightened LPP likelihood. The supervisor reported the matter to a senior officer who also assessed that there was no heightened LPP likelihood. Subsequently, the LEA reported the circumstances surrounding this call to me in a relevant weekly report.

6.105 The remaining two calls in which the Information was mentioned involved Subject 2. Officer D listened to a call that was intercepted pursuant to the prescribed authorization for interception on Subject 2 and found that the Information was mentioned. It occurred to Officer D that the Information related to the arrest of Subject 3 rather than Subject 2 since on the same day before he listened to the call, the LEA became aware that Subject 3 might have been arrested and the LEA had decided to discontinue the interception operation on Subject 3 by submitting a section 57 report to the panel judge. He considered that no further assessment of LPP likelihood was required. During a routine inspection of the transcript, the supervisor noticed the mention of the Information in the call. He enquired with Officer D about the details of the call and concurred with the assessment made by Officer D.

6.106 The sixth call was made between Subject 2 and Subject 4. In the call, Subject 2 talked to Subject 4 about the Information concerning Subject 3 and two other persons. After listening to the call that was recorded through interception on Subject 4, Officer D formed the view that

there was no information indicating heightened LPP likelihood. Besides, in view that the interception operation on Subject 3 had already been discontinued by that time, Officer D did not consider a need to report the call to the supervisor for assessment. Similarly, the supervisor noticed the mention of the Information in the call during his routine inspection of the relevant transcript and enquired with Officer D about the details of the call. The supervisor found Officer D's assessment appropriate. With regard to the written record in respect of this call, while the content of the call should have been recorded on the transcript for Subject 4, Officer D mistakenly made record on the transcript for Subject 2. Details of my review on this irregularity are set out in Case 6.7.

6.107 The LEA concluded that Officers A, B, C and D and the supervisor had already given due consideration to the mention of the Information in the conversations of the six calls. No deviation from the usual work procedure was revealed and the different actions taken by these four officers were judgements based on their understanding of the unique circumstances of each call and their experience. For the inaccurate information the supervisor recorded in the event log in respect of the third call, the LEA proposed to issue an advice (non-disciplinary) to him.

6.108 The LEA considered that the absence of specific instructions leading to the officers' inconsistencies in handling the six calls in question was unsatisfactory. The LEA took my advice and introduced a set of procedures on the handling of interception products with information indicating arrest of a person.

6.109 In reviewing the case, I examined the protected products of the six calls in question and confirmed that all the six calls did not contain any information indicating LPP likelihood. I found the clarifications provided by the four officers and their supervisor acceptable and agreed

with the LEA that there was no evidence of deliberate neglect of duty or sinister motive or otherwise lax attitude on the part of the officers involved. The LEA's proposed action against the supervisor as well as the introduction of the new procedures were considered appropriate.

Case 6.9 : Type 1 surveillance conducted outside the ambit of the prescribed authorization

6.110 This incident was related to a case of Type 1 surveillance which was assessed at the time of application that the operation sought to be authorized would likely obtain information subject to LPP referred to in Chapter 4.

6.111 A prescribed authorization was granted by the panel judge to an LEA in conducting Type 1 Surveillance amongst a subject and any one or combination of other subjects on meeting(s) at public places and on the activities carried out by any one of the subjects inside or in the vicinity of the meeting venue during and/or after the meeting(s).

6.112 In checking the surveillance products of the case, I found that of the 76 minutes of recording obtained, the first 73 minutes of it captured the scene of a closed frosted glass door of a room which was only opened occasionally for people to enter or leave the room. The glass door did not allow any clear view of what was going on inside the room, except that shadows could be seen on occasions of people moving about inside the room. As no clear images or activities carried out by the subject(s) by way of meeting could be seen from the first 73 minutes of the recording, this part of surveillance product failed to comply properly with the terms as they were worded in the prescribed authorization. Only in the last few minutes of the recording when the glass door was shown to open and some people including the subject(s) inside the room were shown to emerge from the room can it be said that the terms of the prescribed authorization

were complied with.

6.113 The above circumstances of the surveillance operation were not reported to the Reviewing officer of the LEA in the review process. The LEA concerned was requested to submit a full investigation report to me on how the surveillance operation came about.

6.114 The LEA subsequently submitted an investigation report pursuant to section 54 of the ICSO. According to the LEA's explanation, the officer-in-charge of the surveillance operation ('Officer') had planned for different scenarios of the surveillance operation including deploying the surveillance device(s) outside the meeting room targeting at its entrance/exit to monitor and record the activities of the subjects when they entered or left the meeting room. He had envisaged the possibility that if the subjects met inside the room, the activities therein would not be visible from the outside when the door was closed. It was also within his anticipation that operationally, the recording would not be stopped intermittently until the meeting concluded. He believed that the terms and scope of the prescribed authorization had been clear and wide enough to cover the above circumstances. Thus, he had not perceived that majority of the surveillance product obtained being a possible breach of the terms of the prescribed authorization.

6.115 After reviewing the case, I considered that conducting the surveillance operation outside the meeting room without recording the activities of the subjects inside the room did not comply with the terms of the prescribed authorization. This was a case of non-compliance. The wording of the prescribed authorization did not support the surveillance operation as planned by the Officer.

6.116 The terms of the prescribed authorization only permitted direct monitoring and recording of the activities of the subjects inside or

in the vicinity of the meeting venue. It did not go so far as to allow for indirect monitoring or recording, i.e. capturing something on the screen other than the actual individuals permitted by the prescribed authorization. In this case, capturing the closed frosted glass door of the room in which the meeting was being held, but not the actual meeting and the actual individuals taking part constituted an indirect monitoring. The wording in the prescribed authorization simply left no room to allow for such indirect monitoring or recording of the meeting contemplated.

6.117 Notwithstanding the non-compliance identified, I found no evidence showing that there was foul play, ulterior motive or deliberate act involved in the unauthorized surveillance. The recommended action of giving an advice (non-disciplinary) each to the Officer and his supervisor (the applicant of the prescribed authorization) was considered appropriate. I have also suggested the LEA modifying the wording of its application for prescribed authorization in an appropriate case which would be wide enough for indirect monitoring should a similar situation or scenario arise in future, subject of course to whether the panel judge would grant such a widely worded prescribed authorization.

Other report

6.118 There was one report on deficiencies of the computer systems. The case had been reviewed and nothing untoward was found. The LEA concerned had taken appropriate actions to remedy the problems.

CHAPTER 7

RECOMMENDATIONS TO THE SECRETARY FOR SECURITY AND HEADS OF LAW ENFORCEMENT AGENCIES

7.1 Pursuant to Section 51(1), in the course of performing any of the Commissioner's functions under the Ordinance, if the Commissioner considers that any provision of the COP should be revised to better carry out the objects of the Ordinance, the Commissioner may make such recommendations to the Secretary for Security as he thinks fit.

7.2 During the report period, I made a recommendation to the Secretary for Security to revise paragraph 22 of the COP. It is stated in paragraph 22 of the COP that "*In general, a person is likely to have a reasonable expectation of privacy if he has secluded himself in private premises, such as his home or office. However, where the individual is in plain view (for example, he is right before an open window) and is visible to the naked eyes of passers-by, an officer may observe the individual's activities without infringing the latter's privacy, whether the observation is done with his naked eyes or a pair of ordinary binoculars.*" (Emphasis added.) A pair of ordinary binoculars falls under the definition of "optical surveillance device" given in section 2 of the Ordinance. I consider that the use of a pair of ordinary binoculars by an officer to carry out the observation as described in the sentence above might constitute the conduct of Type 2 surveillance (as it is defined under sub-paragraph (b)(i) in the Interpretation section of ICSO), which needs to be authorized by a prescribed authorization. In this regard, I wrote to the Secretary for Security asking him to consider amending paragraph 22 of the COP by deletion of the words "*or a pair of ordinary binoculars*" in that sentence.

7.3 Section 52(1) of the Ordinance provides that if the Commissioner considers that any arrangements made by any LEA should be changed to better carry out the objects of the Ordinance or the provisions of the COP, the Commissioner may make such recommendations to the head of the LEA as he thinks fit.

7.4 Through discussions with the LEAs during the visits to the LEAs, and the exchange of correspondence with them in the review of their compliance with the relevant requirements of the Ordinance, I made the following recommendations in the report period to the LEAs to better carry out the objects of the Ordinance:

(a) Provision of additional information when reporting cases of non-compliance, irregularity or incident

When reporting to the Commissioner cases of non-compliance, irregularity or incident, LEAs should provide in the relevant reports information on any action (disciplinary or non-disciplinary) relating to ICSO-related duties that had been taken against the officers involved in the previous five years. This will facilitate the Commissioner's review of the proposed actions to be taken against the officers.

(b) Including a buffer time for operation of surveillance devices in applications for covert surveillance

If a prescribed authorization specifically authorizes that a surveillance device should be turned off upon the subject's departure from a specified premises, the continuous recording for even a very short period of time more thereafter due to the lead time required to turn off the device can be a case of non-compliance. For avoidance of technical breach

of this kind, a buffer time for operation of surveillance devices should, where appropriate, be included in applications for covert surveillance for the relevant authority's consideration.

CHAPTER 8

STATUTORY TABLES

8.1 In accordance with section 49(2) of the Ordinance, this chapter provides separate statistical information in relation to the statutory activities in the report period. The information is set out in table form and comprises the following tables:

- (a) Table 1(a) – interception – number of authorizations issued/renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)];
- (b) Table 1(b) – surveillance – number of authorizations issued/renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)];
- (c) Table 2(a) – interception – major categories of offences for the investigation of which prescribed authorizations have been issued or renewed [section 49(2)(b)(i)];
- (d) Table 2(b) – surveillance – major categories of offences for the investigation of which prescribed authorizations have been issued or renewed [section 49(2)(b)(i)];
- (e) Table 3(a) – interception – number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)];

- (f) Table 3(b) – surveillance – number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)];
- (g) Table 4 – interception and surveillance – number of device retrieval warrants issued and number of applications for the issue of device retrieval warrants refused [section 49(2)(c)(i) and (ii)];
- (h) Table 5 – summary of reviews conducted by the Commissioner under section 41 [section 49(2)(d)(i)];
- (i) Table 6 – number and broad nature of cases of irregularities or errors identified in the reviews [section 49(2)(d)(ii)];
- (j) Table 7 – number of applications for examination that have been received by the Commissioner [section 49(2)(d)(iii)];
- (k) Table 8 – respective numbers of notices given by the Commissioner under section 44(2) and section 44(5) further to examinations [section 49(2)(d)(iv)];
- (l) Table 9 – number of cases in which a notice has been given by the Commissioner under section 48 [section 49(2)(d)(v)];
- (m) Table 10 – broad nature of recommendations made by the Commissioner under sections 50, 51 and 52 [section 49(2)(d)(vi)];
- (n) Table 11 – number of cases in which information subject to legal professional privilege has been obtained in consequence of any interception or surveillance carried out pursuant to a prescribed authorization [section 49(2)(d)(vii)]; and

- (o) Table 12 – number of cases in which disciplinary action has been taken in respect of any officer of a department according to any report submitted to the Commissioner under section 42, 47, 52 or 54 and the broad nature of such action [section 49(2)(d)(viii)].

Table 1(a)

Interception – Number of authorizations issued/renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)]

		Judge's Authorization	Emergency Authorization
(i)	Number of authorizations issued	572	0
	Average duration	30 days	—
(ii)	Number of authorizations renewed	578	Not applicable
	Average duration of renewals	31 days	—
(iii)	Number of authorizations issued as a result of an oral application	0	0
	Average duration	—	—
(iv)	Number of authorizations renewed as a result of an oral application	0	Not applicable
	Average duration of renewals	—	—
(v)	Number of authorizations that have been renewed during the report period further to 5 or more previous renewals	14	Not applicable
(vi)	Number of applications for the issue of authorizations refused	0	0
(vii)	Number of applications for the renewal of authorizations refused	0	Not applicable
(viii)	Number of oral applications for the issue of authorizations refused	0	0
(ix)	Number of oral applications for the renewal of authorizations refused	0	Not applicable

Table 1(b)

Surveillance – Number of authorizations issued/renewed with the average duration of the respective authorizations and number of applications refused [section 49(2)(a)]

		Judge's Authorization	Executive Authorization	Emergency Authorization
(i)	Number of authorizations issued	5	1	0
	Average duration	18 days	4 days	—
(ii)	Number of authorizations renewed	0	0	Not applicable
	Average duration of renewals	—	—	—
(iii)	Number of authorizations issued as a result of an oral application	0	0	0
	Average duration	—	—	—
(iv)	Number of authorizations renewed as a result of an oral application	0	0	Not applicable
	Average duration of renewals	—	—	—
(v)	Number of authorizations that have been renewed during the report period further to 5 or more previous renewals	0	0	Not applicable
(vi)	Number of applications for the issue of authorizations refused	0	0	0
(vii)	Number of applications for the renewal of authorizations refused	0	0	Not applicable
(viii)	Number of oral applications for the issue of authorizations refused	0	0	0
(ix)	Number of oral applications for the renewal of authorizations refused	0	0	Not applicable

Table 2(a)

**Interception – Major categories of offences for the investigation of which prescribed authorizations have been issued or renewed ^{Note 5}
[section 49(2)(b)(i)]**

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
Trafficking in dangerous drug	Cap. 134	Section 4, Dangerous Drugs Ordinance
Manufacture of dangerous drug	Cap. 134	Section 6, Dangerous Drugs Ordinance
Making or possession of explosive	Cap. 200	Section 55, Crimes Ordinance
Destroying or damaging property	Cap. 200	Section 60, Crimes Ordinance
Bribery	Cap. 201	Section 4, Prevention of Bribery Ordinance
Robbery	Cap. 210	Section 10, Theft Ordinance
Conspiring or soliciting to commit murder	Cap. 212	Section 5, Offences against the Person Ordinance
Shooting or attempting to shoot, or wounding or striking with intent to do grievous bodily harm	Cap. 212	Section 17, Offences against the Person Ordinance
Possession of arms or ammunition without a licence	Cap. 238	Section 13, Firearms and Ammunition Ordinance
Dealing with property known or believed to represent proceeds of indictable offence	Cap. 455	Section 25, Organized and Serious Crimes Ordinance

Note 5 The offences are arranged in the order of the respective chapter numbers of the related Ordinances.

Table 2(b)

**Surveillance – Major categories of offences for the investigation of which prescribed authorizations have been issued or renewed ^{Note 6}
[section 49(2)(b)(i)]**

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
Trafficking in dangerous drug	Cap. 134	Section 4, Dangerous Drugs Ordinance
Bribery	Cap. 201	Section 4, Prevention of Bribery Ordinance
Corrupt transactions with agents	Cap. 201	Section 9, Prevention of Bribery Ordinance
Conspiracy to defraud	—	Common Law

^{Note 6} The offences are arranged in the order of the respective chapter numbers of the related Ordinances.

Table 3(a)

Interception – Number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)]

	Number of persons arrested ^{Note 7}		
	Subject	Non-subject	Total
Interception	85	56	141

Table 3(b)

Surveillance – Number of persons arrested as a result of or further to any operation carried out pursuant to a prescribed authorization [section 49(2)(b)(ii)]

	Number of persons arrested ^{Note 8}		
	Subject	Non-subject	Total
Surveillance	7	0	7

^{Note 7} Of the 141 persons arrested, seven were attributable to both interception and surveillance operations that had been carried out.

^{Note 8} All of the seven persons arrested were attributable to both interception and surveillance operations that had been carried out. The total number of persons arrested under all statutory activities was in fact 141.

Table 4

Interception and surveillance – Number of device retrieval warrants issued and number of applications for the issue of device retrieval warrants refused [section 49(2)(c)(i) & (ii)]

(i)	Number of device retrieval warrants issued	0
	Average duration	—
(ii)	Number of applications for device retrieval warrants refused	0

Table 5

**Summary of reviews conducted by the Commissioner under section 41
[section 49(2)(d)(i)]**

Section 41(1)

Reviews on compliance by departments and their officers with relevant requirements, as the Commissioner considers necessary

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
(a) Regular reviews on weekly reports	208	Interception & Surveillance	LEAs are required to submit weekly reports to the Secretariat providing relevant information on authorizations obtained, applications refused and operations discontinued in the preceding week, for checking and review purposes. During the report period, a total of 208 weekly reports were submitted by the LEAs.
(b) Periodical visits to LEAs	32	Interception & Surveillance	During the report period, 32 visits were made to the LEAs for detailed checking of the application files of doubtful cases as identified from the weekly reports. Moreover, random inspection of other cases and checking of surveillance devices would also be made during the visits. Whenever he considered necessary, the Commissioner would seek clarification or explanation from LEAs directly. From the said visits, a total of 749 applications and 639 related documents/matters had been checked. (See paragraph 2.22 of Chapter 2 and paragraphs 3.22 and 3.23 of Chapter 3.)
(c) Examination of protected products at the LEAs' offices	32	Interception & Surveillance	In 2020, 32 visits were made to the LEAs for examination of protected products. Specific cases such as LPP and JM cases reported by the LEAs, interception products of 352 authorizations and surveillance

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>products of six selected authorizations were examined.</p> <p>(See paragraph 2.25 of Chapter 2 and paragraph 3.27 of Chapter 3.)</p>
(d) LPP cases reviewed by the Commissioner	144	Interception (15 reviews)	<p><u>Outstanding LPP cases in 2019</u> 15 cases of heightened/assessed LPP likelihood were still on-going beyond 2019 and the authorized operations of these cases were discontinued in 2020.</p> <p>The review of these cases had been completed. Other than one case which involved two incidents referred to in Case 6.7 and Case 6.8 of Chapter 6, nothing untoward was revealed.</p> <p>(See paragraph 4.7 of Chapter 4.)</p>
		Interception	<p><u>One case of obtaining information suspected to be subject to LPP</u> At the grant of a prescribed authorization for interception, the operation concerned was not assessed to have a likelihood of obtaining LPP information.</p> <p>As the interception progressed, one day, the LEA concerned encountered a call which contained information suspected to be subject to LPP. The LEA submitted an REP-11 report to the panel judge and sought approval to continue with the prescribed authorization. After considering the REP-11 report, the panel judge allowed the prescribed authorization to continue with additional conditions imposed. The interception operation was later discontinued by the LEA because it was not productive.</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>The Commissioner reviewed the case and did not find any irregularity. As regards the call which involved suspected LPP information, the Commissioner had listened to the call and considered that the information concerned was LPP information, which was obtained by the LEA inadvertently.</p> <p>(See paragraphs 4.13 and 4.14 of Chapter 4.)</p>
		Interception & Surveillance (128 reviews)	<p><u>101 cases of heightened LPP likelihood and 27 cases of assessed LPP likelihood</u></p> <p>All the relevant documents and records were checked and the protected products were examined. Except for the five LPP cases (one of them involved three incidents) mentioned in Case 6.3, Case 6.4, Case 6.6, Case 6.7, Case 6.8 (involved two LPP cases in 2020) and Case 6.9 of Chapter 6, nothing untoward was found.</p> <p>(See paragraph 4.15 of Chapter 4.)</p>
(e) JM cases reviewed by the Commissioner	4	Interception	<p><u>Four cases of heightened JM likelihood</u></p> <p>One of the four heightened JM likelihood cases involved an incident referred to in Case 6.3 of Chapter 6. Apart from that, nothing untoward was found in the checking of the relevant documents, records and protected products of all these four cases.</p> <p>(See paragraphs 4.19 to 4.21 of Chapter 4.)</p>
(f) Non-compliance/ irregularities/ incidents reviewed by the Commissioner	7	Interception	<p><u>Case 6.2</u></p> <p>The Commissioner and his delegated officers examine interception products at the LEAs' offices and the technical logistics concerned are arranged by a dedicated team.</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>An LEA reported to the Commissioner an incident in which interception products had not been removed from the designated computer workstations after the Commissioner and his delegated officers had finished checking. The interception products concerned were still available on the computers when another checking visit was conducted three months later. According to the security design of the system, those interception products could not be accessed by any officers other than the Commissioner and his delegated officers.</p> <p>In its investigation report, the team concluded that the incident was caused by the oversight of the duty officer without ulterior motive. To prevent recurrence of similar incidents, the team and the LEA concerned had reviewed and improved their work procedures. The Commissioner noted the improvement measures and considered them acceptable.</p> <p>(See paragraphs 6.57 and 6.58 of Chapter 6.)</p>
		Interception	<p><u>Case 6.3</u></p> <p>The incident was related to a case of assessed LPP likelihood and heightened JM likelihood referred to in Chapter 4.</p> <p>At the grant of the prescribed authorization concerned, the interception operation was assessed to have a likelihood of obtaining LPP information and additional conditions were imposed by the panel judge. The interception operation progressed and the LEA concerned discovered heightened JM likelihood on a few occasions. The panel judge</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>allowed the prescribed authorization to continue with additional conditions.</p> <p>One day, an officer listened to a call and found that the call contained information which might indicate heightened likelihood of obtaining JM. The matter was reported to the officer's supervisor and a senior officer. The senior officer assessed that there was no indication of heightened JM likelihood. The supervisor documented the assessment but he forgot to provide a copy of the relevant document to the officer-in-charge of a registry.</p> <p>The registry, which was also under the command of the senior officer, was responsible for the preparation of weekly reports to the Commissioner. With no knowledge of the assessment of the call, the registry had not included the assessment result in the weekly report for the period in which the call was listened to. When the senior officer perused the draft of the weekly report, she did not notice the omission of the assessment. The weekly report was then submitted to the Commissioner.</p> <p>In the month that followed, the LEA held a training in which the call was discussed. Upon the senior officer's enquiry, the supervisor realised that he had forgotten to inform the registry of the assessment of the call. Subsequently, the LEA reported the matter to the Commissioner in a weekly report about two months after the call was listened to.</p> <p>In its investigation report, the LEA explained that the late reporting was due to a momentary lapse of mind of the supervisor and there was no</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>indication of deliberate neglect or sinister motive involved. The LEA proposed to advise the supervisor to be more vigilant in discharging ICSO-related duties. To prevent recurrence of similar mistakes in future, the LEA proposed to tighten up the procedure in relation to the reporting of intercepted calls that were considered not involving heightened risk or likelihood of obtaining JM or LPP information after assessment.</p> <p>The senior officer was involved in another two cases of non-compliance/irregularity/incident referred to in Outstanding case (ii) and Case 6.1. The Commissioner required the LEA to review whether any appropriate actions should be taken against the senior officer. In its reply, the LEA proposed that an advice (non-disciplinary) be given to the senior officer on the need to be more vigilant in performing supervisory duties.</p> <p>The Commissioner examined the protected product of the call and confirmed that it contained no information indicating heightened JM likelihood.</p> <p>Having reviewed the case, the Commissioner found no evidence to contradict the findings of the LEA that there was no deliberate neglect or ulterior motive involved in the incident. The proposed actions against the officers concerned and the remedial measure proposed were considered appropriate.</p> <p>(See paragraphs 6.59 to 6.67 of Chapter 6.)</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
		Interception	<p><u>Case 6.4</u></p> <p>An LEA reported an incident where an officer accessed an interception product when monitoring of the interception operation should have been put on hold. This incident was related to a case of heightened likelihood of obtaining LPP information referred to in Chapter 4.</p> <p>At the grant of the prescribed authorization concerned, the identity of the subject was not known by the LEA and the interception operation was not assessed to have a likelihood of obtaining LPP information. As the interception operation progressed, one day, the LEA learnt of the identity of the subject. A few days later, the investigation team found that the subject might have been arrested. Later the same day, checking of the relevant computer record revealed that the subject had been arrested. The LEA then submitted to the panel judge an REP-11 report to report the identity of the subject and a section 58 report to report the arrest status of the subject. After considering the reports, the panel judge allowed the authorization to continue with additional conditions imposed to guard against the risk of obtaining LPP information.</p> <p>While awaiting the checking result concerning the status in respect of the subject's arrest, an officer who was assigned monitoring duty of the interception operation for that day was instructed to suspend her monitoring. The officer then turned to compile summaries in respect of the calls that she had listened to earlier the day. Despite the instruction of suspending the monitoring of the interception which was received only about half an hour</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>ago, the officer inadvertently re-listened to one of the calls in the course of preparing a summary for the call.</p> <p>The investigation by the LEA found that the mistake was attributed to her momentary absentmindedness when the officer was too focused on the compilation of the summaries. The sole intent of the officer to re-listen to the call in question was to verify certain contents of the call recorded in her notes in respect of the call which she had already listened to earlier. The LEA proposed to issue an advice (non-disciplinary) to the officer. To prevent recurrence of similar mistakes in future, the LEA tightened up the control on access to interception products.</p> <p>In reviewing the case, the Commissioner listened to the call in question and did not find any abnormality. The Commissioner agreed that there was no foul play or ulterior motive involved in the incident. The LEA's proposed action against the officer as well as the improvement measure were considered appropriate.</p> <p>(See paragraphs 6.68 to 6.72 of Chapter 6.)</p>
	Interception	<p><u>Case 6.5</u> Checking of protected products of a case selected from weekly report revealed that a call with information indicating heightened LPP likelihood had been overlooked by an LEA.</p> <p>One day, an officer listened to a call and then reported to her supervisor that the call might contain information leading to heightened LPP likelihood. Without verifying</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>the contents of the call, the supervisor interpreted the information obtained in an opposite way and considered that there was no indication of heightened LPP likelihood. Besides, she did not record her deliberation on relevant document according to the laid down directive. The LEA explained that the incident was mainly caused by the inattention of both officers in interpreting the contents of the call.</p> <p>After reviewing the case, the Commissioner considered that the officer had done her part in reporting the call to her supervisor immediately after detecting information which led to possible heightened likelihood of obtaining LPP information. However, the officer failed to exercise judgement independently and make suitable recommendation to the supervisor when the latter erred in her decision. The handling of the matter by the supervisor was unsatisfactory and unprofessional. The supervisor did not listen to the call and misinterpreted its contents. She also did not make proper record of her deliberation on the assessment on LPP likelihood in relevant document.</p> <p>On the basis of the information provided, the Commissioner found no evidence of deliberate neglect or sinister motive. The proposed actions of giving a verbal advice (disciplinary) to the officer and a verbal warning (disciplinary) to the supervisor were considered appropriate.</p> <p>(See paragraphs 6.73 to 6.76 of Chapter 6.)</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
	Interception	<p><u>Case 6.7</u> This incident was related to two cases of heightened likelihood of obtaining LPP information referred to in Chapter 4. The two LPP cases ('Case 1' and 'Case 2') were inter-related. The concerned call was made between the respective subjects of Case 1 and Case 2. During a periodical visit, it was noticed in the relevant transcript of Case 1 that the call might contain information indicating heightened likelihood of obtaining LPP information. However, when checking the protected products of Case 1, the relevant ATR indicated that the call had not been accessed by any officers of the LEA concerned. The LEA was requested to check the source of the content of the call and whether any assessment on the likelihood of obtaining LPP information arising from the call had been made.</p> <p>The LEA replied that an officer had listened to the call when he conducted monitoring of the interception of Case 2. However, he recorded the information obtained in the transcript of Case 1 instead of Case 2. The mistake was caused by the officer's momentary lapse of concentration due to his tiredness. The officer's supervisor did not notice the mistake when he conducted a routine inspection of the relevant transcript though he assessed that the call did not contain information indicating heightened LPP likelihood.</p> <p>The mistake reflected a lack of vigilance on the part of the officer and his supervisor. The LEA proposed to give an advice (non-disciplinary) each to the officer and the supervisor.</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>Subsequent checking of recordings, ATR and relevant transcript in respect of Case 2 confirmed what had been reported by the LEA. Having reviewed the case, the Commissioner accepted the LEA's findings that no foul play or ulterior motive was involved as the content of the call was recorded and assessed by the LEA officers. Besides, after checking the relevant recordings, the Commissioner shared the view that the call did not contain information which indicated heightened LPP likelihood. The officer's explanation of momentary lapse of concentration leading to the failure in proper documentation of the content of the call was not implausible. The LEA's proposed actions against the two officers were considered appropriate.</p> <p>(See paragraphs 6.95 to 6.98 of Chapter 6.)</p>
		Interception	<p><u>Case 6.8</u></p> <p>In accordance with section 58 of the ICSO, the LEA concerned should, after becoming aware of the arrest of the subject of the interception or covert surveillance, assess the effect of the arrest on the likelihood that any information which may be subject to LPP will be obtained by continuing the interception or covert surveillance and cause a report to be provided to the relevant authority.</p> <p>The Commissioner examined the documents in relation to various telecommunications interception operations and observed from the transcripts that certain information indicating arrest of a person ('the Information') was mentioned in the conversations of six calls. The six calls in question were related to three</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>cases of heightened likelihood of obtaining LPP information referred to in Chapter 4, one was reported in 2019 and discontinued in 2020 and the other two were new LPP cases reported in 2020.</p> <p>The six calls were listened to by different officers of the interception unit of the LEA, hereinafter referred to as Officers A, B, C and D. These officers seemed to have different approaches in handling intercepted calls with the Information. At that time, the LEA had an established practice in handling interception products with certain information indicating LPP likelihood. As the Information mentioned in the calls might give rise to a heightened risk or likelihood of obtaining LPP information but different approaches were adopted by the officers, the Commissioner requested a full report from the LEA on the procedures adopted in handling such calls and how the approach would be regularised.</p> <p>The LEA submitted an investigation report to the Commissioner.</p> <p>For the six calls in question, four subjects hereafter referred to as Subjects 1, 2, 3 and 4 were involved. Four of the six calls were related to Subject 1 for whom the interception operation was assessed to have an LPP likelihood in view that Subject 1 had been arrested about one month ago. For the first call, Officer A considered that the Information mentioned in the call was related to the other party of the call and hence she did not bring up the matter to the supervisor. A few days later, Subject 1 was arrested again and the LEA submitted to the panel judge a</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>section 58 report to report the arrest status of the subject. Shortly afterwards, Officer A listened to another call and the Information mentioned in the call suggested that Subject 1 might have been arrested. Given the proximity in time, it occurred to Officer A that the Information was possibly relating to the arrest of the subject that had already been reported in the section 58 report. A check on the arrest status of Subject 1 confirmed that there was no new arrest record concerning the subject. Officer A then made a relevant remark on the transcript. For both the first and second calls, the supervisor had inspected the transcripts and found the assessments made by Officer A appropriate.</p> <p>About two weeks after the second call, another call with a mention of the Information was intercepted. For this third call, Officer B considered that the Information might relate to a more recent arrest of Subject 1 other than that reported in the section 58 report. A further check on the arrest status of the subject showed that there was no new arrest record concerning Subject 1. Officer B then reported the matter to the supervisor and made a relevant record on the transcript. The supervisor recorded the course of actions in an event log but the time of Officer B's listening to the call and reporting to the supervisor recorded therein was inaccurate. Notwithstanding, the LEA considered that the inaccuracy did not amount to any material misrepresentation.</p> <p>About one month after the third call, Officer C listened to a call in which the Information was mentioned and he</p>

Number of reviews conducted under section 41(1)	Interception/ Surveillance	Summary of reviews
		<p>considered that Subject 1 might have been arrested. He then reported the matter to the supervisor who arranged for a further check on the arrest status. The checking results indicated no heightened LPP likelihood. The supervisor reported the matter to a senior officer who also assessed that there was no heightened LPP likelihood. Subsequently, the LEA reported the circumstances surrounding this call to the Commissioner in a relevant weekly report.</p> <p>The remaining two calls in which the Information was mentioned involved Subject 2. Officer D listened to a call that was intercepted pursuant to the prescribed authorization for interception on Subject 2 and found that the Information was mentioned. It occurred to Officer D that the Information related to the arrest of Subject 3 rather than Subject 2 since on the same day before he listened to the call, the LEA became aware that Subject 3 might have been arrested and the LEA had decided to discontinue the interception operation on Subject 3 by submitting a section 57 report to the panel judge. He considered that no further assessment of LPP likelihood was required. During a routine inspection of the transcript, the supervisor noticed the mention of the Information in the call. He enquired with Officer D about the details of the call and concurred with the assessment made by Officer D.</p> <p>The sixth call was made between Subject 2 and Subject 4. In the call, Subject 2 talked to Subject 4 about the Information concerning Subject 3 and two other persons. After listening to the call through interception on</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>Subject 4, Officer D formed the view that there was no information indicating heightened LPP likelihood. Besides, in view that the interception operation on Subject 3 had already been discontinued by that time, Officer D did not consider a need to report the call to the supervisor for assessment. Similarly, the supervisor noticed the mention of the Information in the call during his routine inspection of the relevant transcript and enquired with Officer D about the details of the call. The supervisor found Officer D's assessment appropriate. With regard to the written record in respect of this call, while the content of the call should have been recorded on the transcript for Subject 4, Officer D mistakenly made record on the transcript for Subject 2. Details of the Commissioner's review on this irregularity are set out in Case 6.7.</p> <p>The LEA concluded that Officers A, B, C and D and the supervisor had already given due consideration to the mention of the Information in the conversations of the six calls. No deviation from the usual work procedure was revealed and the different actions taken by these four officers were judgements based on their understanding of the unique circumstances of each call and their experience. For the inaccurate information the supervisor recorded in the event log in respect of the third call, the LEA proposed to issue an advice (non-disciplinary) to him.</p> <p>The LEA considered that the absence of specific instructions leading to the officers' inconsistencies in handling the six calls in question was unsatisfactory. The LEA took the Commissioner's advice and</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>introduced a set of procedures on the handling of interception products with information indicating arrest of a person.</p> <p>In reviewing the case, the Commissioner examined the relevant protected products and confirmed that all the six calls did not contain any information indicating LPP likelihood. The Commissioner found the clarifications provided by the four officers and their supervisor acceptable and agreed with the LEA that there was no evidence of deliberate neglect of duty or sinister motive or otherwise lax attitude on the part of the officers involved. The LEA's proposed action against the supervisor as well as the introduction of the new procedures were considered appropriate.</p> <p>(See paragraphs 6.99 to 6.109 of Chapter 6.)</p>
		Interception	<p><u>Other case</u></p> <p>It involved deficiencies of the computer systems. Nothing untoward was found. The LEA concerned had taken appropriate actions to remedy the problems.</p> <p>(See paragraph 6.118 of Chapter 6.)</p>

Section 41(2)

The Commissioner shall conduct reviews on cases in respect of which a report has been submitted to him under section 23(3)(b), 26(3)(b)(ii) or 54

Number of reviews conducted under section 41(2)		Interception/ Surveillance	Summary of reviews
(a) Report submitted under section 23(3)(b) by the head of department on cases in default of application being made for confirmation of emergency authorization within 48 hours of issue	Nil	Not applicable	For the report period, there was no report submitted under this category.
(b) Report submitted under section 26(3)(b)(ii) by the head of department on cases in default of application being made for confirmation of prescribed authorization or renewal issued or granted upon oral application within 48 hours of issue	Nil	Not applicable	For the report period, there was no report submitted under this category.
(c) Report submitted under section 54 by the head of department on any case of failure by the department or any of its officers to comply with any relevant requirement	5	Interception	<u>Outstanding case (i)</u> This incident was first reported by an LEA in late 2014. The case involved non-compliance with section 61(2) of the ICSO and the LEA submitted a further investigation report under section 54 of the Ordinance to the then Commissioner who completed review of the case in May 2015. The review result was not hitherto reported pending conclusion of the court proceedings that were relevant to the incident. The court proceedings were concluded during the report period.

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>In the course of a crime investigation, intelligence was obtained from telecommunications interception operations by an LEA. When applying for prescribed authorizations for covert surveillance, the interception products were referred to in the statements in writing and affirmations in support of the applications ('the Documents'). Authorizations for surveillance were then granted to the LEA and covert surveillance was conducted. Subsequently, the subjects of the crime investigation were charged and some of the surveillance products obtained were adduced as evidence. Before the trial commenced, the solicitors of one of the subjects asked the LEA for disclosure of the Documents. The LEA then sought legal advice from the Department of Justice ('DoJ') as to whether the Documents should be disclosed to the defence and the appropriateness of providing its counsel with the Documents for examination while section 61(2) of the ICSO stipulates that any telecommunications interception products and any particulars as to a telecommunications interception shall not be made available to any party to any proceedings before any court. After consulting DoJ's advising counsel ('Prosecutor A') (who was not involved in the trial) and senior officers in the LEA, the officer who was in charge of the crime investigation ('Officer-in-charge') passed the Documents to Prosecutor A ('the first disclosure'). Later, the trial commenced and the Officer-in-charge provided the Documents to a fiat counsel ('Prosecutor B') ('the second disclosure') to assist him in preparing a written submission to the court. It was later brought to the attention of the LEA that section 61(2) of the ICSO might not have been complied with as a result of the two disclosures of the Documents to the prosecutors.</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>With regard to the first disclosure, given the involvement of Prosecutor A in the court case, she might be regarded as part of the prosecution and hence a party to the proceedings and disclosure was prohibited under section 61(2).</p> <p>Concerning the second disclosure, Prosecutor B applied to the court to adopt the procedure under section 61(4) of the ICSO to deal with the defence's request for the Documents, albeit the criteria under section 61(4) were not fulfilled. According to the LEA's explanation, the Documents were provided to Prosecutor B at his request and the court's decision to adopt the procedure under section 61(4) might have led the LEA officers concerned to believe that they were obliged to disclose the Documents to Prosecutor B.</p> <p>The LEA considered that the non-compliance in this case was owing to the reliance of the officers concerned on the legal advice. The LEA agreed that clarifications should have been sought from the counsel concerned or counsel of a more senior level in DoJ should have been approached if the LEA officers had any doubts about the legal advice pertaining to the application or interpretation of any provisions of the ICSO. The LEA proposed that the Officer-in-charge, the immediate supervisor of the Officer-in-charge and two directorate officers who were responsible for the crime investigation be advised on the need to exercise vigilance in handling cases involving the application or interpretation of the provisions of the ICSO.</p> <p>The then Commissioner pointed out that section 61 of the ICSO was an important provision protecting telecommunications interception products and it must be strictly</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>observed by all officers engaged in ICSO-related duties. He was of the view that the officers involved in the incident should have taken proactive action to clarify with the senior management of DoJ on the disclosure issue. Having reviewed the case, the then Commissioner concluded that the two disclosures were non-compliances with section 61(2) of the ICSO and he noted that LEA's proposed actions against the four officers concerned.</p> <p>As an improvement measure, the senior management of the LEA worked out with DoJ a set of formal procedures governing the disclosure of information under section 61 of the ICSO for observance by officers of the LEA since 2016.</p> <p>As regards section 61(4) of the ICSO, in 2019, the Court of Appeal gave a remedial interpretation of the section. The LEA informed the Commissioner that, pursuant to the Court of Appeal's remedial interpretation of section 61(4) of the ICSO, arrangement had then been put in place whereby extant information will be inspected by designated counsel of DoJ.</p> <p>(See paragraphs 6.6 to 6.13 of Chapter 6.)</p>
	Surveillance	<p><u>Outstanding case (ii)</u> This incident was first reported by an LEA in December 2019, followed by a full investigation report dated 31 March 2020 submitted by the LEA under section 54 of the ICSO.</p> <p>A prescribed authorization was granted to the LEA in October 2019 for the conduct of Type 1 surveillance ('the PA'). The PA authorized the LEA to conduct covert surveillance on Subject A when he</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>was at a specified premises ('Part A') and on meetings between Subject B and Subject C at another specified premises ('Part B'). It was assessed at the time of application that the surveillance operation would unlikely obtain information subject to LPP. However, in approving the application, the panel judge imposed an additional condition that the LEA was not allowed to use a specific function of surveillance devices when conducting the covert surveillance ('the Additional Condition'). For such kind of cases, the panel judges used to mark the additional conditions on the prescribed authorizations in handwriting; but on this occasion, the Additional Condition was typed on the PA. The PA was then registered in the relevant computer system but the system record did not explicitly indicate that the panel judge had imposed an additional condition.</p> <p>For cases where LPP information is not involved but additional conditions are imposed on the prescribed authorizations concerned, the LEAs are required to preserve the related protected products and report to the Commissioner the imposition of the additional conditions through the weekly reports. In this case, the LEA only reported the imposition of the Additional Condition to the Commissioner in December 2019 but not in the relevant weekly report in October 2019.</p> <p>In December 2019, the LEA also reported to the Commissioner an incident that in one of the Part A surveillance operations, a recording was made for about 30 seconds longer than it should be.</p> <p>From the checking of the relevant weekly reports and the device register in respect of the PA, the Commissioner observed</p>

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		<p>that a surveillance device ('Device A') which was incompatible with the Additional Condition had been issued on three occasions. The Commissioner required the LEA to provide explanations.</p> <p>According to the investigation report, the officer who made the application for the PA ('the Applicant') was entirely oblivious to the Additional Condition. After she had obtained the PA from the Panel Judges' Office, the Applicant, on seeing no handwriting on the PA, erroneously assumed that no additional condition had been imposed by the panel judge. The LEA found that the Applicant's oversight of the Additional Condition precipitated the litany of mistakes subsequently committed by various officers. Apart from the Applicant, this case involved a number of officers in different sections of the LEA, including a directorate officer who approved the making of the application for the PA ('the Directorate Officer'), an officer who was in charge of the covert surveillance ('the Officer-in-charge') and her supervisor ('Supervisor A'), the head of the registry that was responsible for the preparation of weekly reports to the Commissioner ('the Head of Registry') and his supervisor ('Supervisor B'), four officers who prepared the forms requesting issue of surveillance devices ('the Device Requesting Officers'), two officers of the device store (hereinafter referred to as Device Issuing Officer and Device Store Manager), a senior officer who was the supervisor of both Supervisor B and Device Store Manager ('the Senior Officer') as well as the reviewing officer of the Type 1 surveillance conducted under the PA ('the Reviewing Officer'). The LEA explained that most of the officers involved in this case shared the same honest belief that any additional</p>

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		<p>conditions imposed by the panel judges for such kind of case would be in handwriting.</p> <p>Regarding the preparation of the relevant weekly report in October 2019, the Head of Registry did not notice the omission of the reporting of the Additional Condition in the draft weekly report form prepared using the computer system. The form was then endorsed by Supervisor B and submitted by the Senior Officer to the Commissioner. Both of them did not notice the omission which was later discovered in December 2019 when Supervisor B received an enquiry from the Reviewing Officer about the Additional Condition.</p> <p>Regarding the surveillance operation, on the day the PA was granted, the Officer-in-charge scrutinised its content and spotted the prohibition on the use of a specific function of surveillance devices though she was not aware that it was an additional condition imposed by the panel judge. Supervisor A was away from the office at the material time and it was the first time for the Officer-in-charge to take charge of the conduct of a Type 1 surveillance in a capacity as acting the post of her supervisor. To ensure that all participating officers had a clear understanding of the terms and conditions of the PA, the Officer-in-charge conducted various briefings to the frontline officers who were tasked to perform the Type 1 surveillance and she reminded them that the use of the specific function of surveillance devices was prohibited.</p> <p>After the briefings, four Device Requesting Officers prepared the device request forms for the issue of surveillance devices. They inserted</p>

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		<p>inaccurate information in the request forms that there was no additional condition imposed by the panel judge on the use of surveillance devices. One of the Device Requesting Officers made a further inaccuracy in the forms which implied that the surveillance would involve the use of that prohibited function of surveillance devices. The LEA explained that the four officers were not involved in drafting the application documents and they misconceived the prohibition on the use of the specific function of surveillance devices as part of the standard condition instead of an additional condition. Notwithstanding, the Officer-in-charge was not aware of the inaccuracies and confirmed all the details stated in the device request forms.</p> <p>To facilitate the issue of surveillance devices by the device store, the Officer-in-charge had earlier provided a copy of the PA to the Device Store Manager. The Device Store Manager scrutinised the PA but the Additional Condition escaped his attention. Subsequently, requests for the issue of surveillance devices were made to the device store on several consecutive days. Upon receipt of the device request forms, the Device Store Manager checked the details stated therein and confirmed the issue of the requested devices. On the first day, the Device Issuing Officer, without noticing the Additional Condition, issued Device A with the specific function which was incompatible with the Additional Condition to the frontline officers for Part B surveillance. He also retrieved from the device store an accessory for use with that particular function. The whole issuing process conducted by the Device Issuing Officer was witnessed by the Device Store Manager, who had verified the information inputted into</p>

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		<p>the Device Management System ('DMS') and physically checked the device before granting approval through the DMS. The same mistakes were repeated when the same device was issued on the following days. As the accessories alone did not possess any functionalities of surveillance devices, their issue were not recorded in the device registers generated by the DMS.</p> <p>For Part A surveillance, another three officers of the device store were responsible for the issue of devices. These issuing officers had duly disabled the specific function of the devices that possessed such function and inputted relevant remarks on the DMS. The issue of these devices was also approved by the Device Store Manager.</p> <p>Eventually, no Part B surveillance was conducted and Device A had not been used whereas a few covert surveillance operations were conducted pursuant to Part A of the PA.</p> <p>In one of the Part A surveillance operations, three surveillance devices (hereinafter referred to as Devices B, C and D) were deployed. Upon departure of Subject A from the specified premises, the officers who operated the devices stopped the recording. For Device C and Device D, the system design required the user to go through multiple steps for ending the recording and the process normally took about ten seconds to complete. It turned out that recordings were obtained by Device C for about 30 seconds more and by Device D for about ten seconds more after the subject had left the specified premises.</p> <p>A few days later, the Officer-in-charge examined the recording obtained by Device C and found that it was about 30 seconds longer than it should last.</p>

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		<p>She then made enquiries with the officer who operated Device C and he explained that the stopping process did not run smoothly and he could only stop the device from recording after several unsuccessful attempts. The Officer-in-charge reported the matter to the Applicant. The circumstances surrounding the excessive recording by Device C were recorded in the relevant operation report prepared by one of the Device Requesting Officers but the time sequence of identifying the excessive recording was not clearly reflected in the report.</p> <p>Technically speaking, the unauthorized part of recording resulting from the time gap between the subject's departure from the specified premises and the actual cessation of recording was unavoidable. However, as the PA specifically authorized that the devices would be turned on for recording upon Subject A's arrival at a specified premises and turned off when the subject left the specified premises, the continuous recording for about 30 seconds and ten seconds more by Device C and Device D respectively after the subject's departure constituted a non-compliance with the term as it was worded in the PA.</p> <p>A few weeks later, Supervisor A resumed office and prepared a review folder in respect of the PA. Without noticing the Additional Condition, Supervisor A wrongly stated in a review form that no additional condition was imposed on the PA. She also missed out the inaccuracies when she inspected the relevant device request forms and overlooked the issue of an incompatible surveillance device on three occasions when she perused the device register. The review form was endorsed by the Applicant and the Directorate Officer</p>

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		<p>without any comments. Supervisor A then submitted the review folder containing the review form and the PA through the Applicant and the Directorate Officer to the Reviewing Officer for review.</p> <p>The Reviewing Officer took notice of the Additional Condition but he did not detect the wrong statement made by Supervisor A in the review form. Besides, judging from the description of Device A, he misconceived that the device should be incapable of performing the specific function.</p> <p>The LEA proposed to give a verbal warning (disciplinary) to the Officer-in-charge and the Device Issuing Officer each, and an advice (non-disciplinary) to the Reviewing Officer, Supervisor A, Supervisor B and the Head of Registry each. Concerning the Device Requesting Officers, the LEA proposed no sanction be imposed on them but these four officers and all the frontline officers in general be reminded to be careful when preparing device request form. The LEA also proposed not to take any actions against the officers involved in the operation of Devices C and D. These proposals were considered acceptable.</p> <p>The LEA proposed to give a verbal warning (disciplinary) to the Applicant, which the Commissioner considered too lenient. Her oversight of the Additional Condition precipitated the litany of mistakes subsequently committed by various officers in carrying out the ICSO-related duties. Besides, it was the first time for the Officer-in-charge to take charge of the conduct of Type 1 surveillance in an acting capacity. However, the Applicant failed to give proper instructions to the Officer-in-charge and closely monitor</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>her performance in conducting covert surveillance pursuant to the PA. As the applicant for the PA and the supervisor of the Officer-in-charge and Supervisor A, the Applicant has a much higher responsibility than the Officer-in-charge in this case.</p> <p>For the Directorate Officer, the LEA proposed to give an advice (non-disciplinary) to him. The Commissioner considered the proposed action not proportionate. He was the officer who approved the making of the application for the PA and he had perused the relevant affirmation and other related documents before they were submitted to the panel judge. However, when he came across the documents again during the review process, he failed to spot the imposition of the Additional Condition. Besides, being the head of the section who oversaw the performance of the Applicant, the Directorate Officer had a greater responsibility than Supervisor A.</p> <p>Concerning the Device Store Manager, the Commissioner considered the proposed issue of a verbal warning (disciplinary) to him not proportionate. As the device store keeper, he should read the terms and conditions of each prescribed authorization carefully or otherwise he would not be able to decide what sorts of devices are allowed under the authorization and which devices can be issued. In this case, the Device Store Manager failed to spot the Additional Condition on scrutiny of the PA. His performance was neither satisfactory nor professional. Due to his inadequate performance, the Commissioner had concern about his reliability as the approving officer for issuing surveillance devices. Besides, the Device Store Manager was more culpable and he should accept a higher responsibility</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>than the Device Issuing Officer.</p> <p>The Commissioner requested the LEA to review its proposed actions against the Applicant, the Directorate Officer and the Device Store Manager. The Commissioner also requested the LEA to review whether any actions should be taken against the Senior Officer who oversaw the work of the registry and the device store and had supervisory accountability in this case.</p> <p>After review, the LEA proposed that a written warning (disciplinary) each be given to the Applicant and the Device Store Manager and a verbal warning (disciplinary) be given to the Directorate Officer. The LEA considered that the Senior Officer over-relied on her subordinates to duly perform ICSO-related duties and she should be more critical in scrutinising the work of her officers. The LEA proposed that an advice (non-disciplinary) be given to the Senior Officer. The Commissioner accepted the LEA's revised proposal.</p> <p>As an improvement measure, the LEA enhanced the computer system in registering a prescribed authorization and in generating weekly report forms to the Commissioner. The DMS was also enhanced to facilitate the work of designated officers in the LEA in reviewing covert surveillance operations. Besides, the LEA proposed that the accessories that were intended for use with surveillance devices for a certain function be maintained under the DMS and their issue be recorded in relevant device registers. All members of the registry and the device store were reminded to carefully scrutinise the prescribed authorizations. The LEA also recommended that the circumstances surrounding this case be brought to the attention of officers who</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>might perform ICSO-related duties, for reminding them of the need to exercise vigilance when reading the terms and conditions of the prescribed authorizations and preparing ICSO-related documents. The Commissioner considered these measures appropriate and necessary.</p> <p>The Commissioner had examined the protected products relating to the PA and had reviewed the case. The Commissioner found no evidence suggesting that the officers involved had deliberately disregarded the Additional Condition when discharging their respective duties. With regard to the non-compliance with the PA that the recording continued after Subject A had left the specified premises in one of the Type 1 surveillance operations, it was due to the lead time required to operate the devices concerned in ceasing the recording and there was no indication of any foul play.</p> <p>The Commissioner observed that certain number of officers concerned were unaware or have not been mindful of the Additional Condition when carrying out their respective duties. The situation was not satisfactory. It should be emphasised that LEA officers were required to pay attention to each and every term and condition of a prescribed authorization and ensure the compliance of all the terms and conditions throughout the covert operation.</p> <p>The Commissioner advised the designated reviewing officers for covert surveillance operations in the LEA that, in reviewing whether the issue and the use of a surveillance device comply with the terms and conditions of an authorization, they must not only rely on their past experience or general understanding, or refer to the simple</p>

Number of reviews conducted under section 41(2)		Interception/ Surveillance	Summary of reviews
			<p>description of the surveillance device as shown in the device register. In particular, in a surveillance operation for which the prescribed authorization concerned prohibited use of certain functions of a device, the reviewing officers should check the detailed functionality of the device so as to determine whether the issue and the use of such device comply with the terms and conditions of the authorization.</p> <p>In addition, the Commissioner advised the LEA that a brief buffer time for operation of surveillance devices could be included in future applications for the panel judge's consideration to avoid similar technical non-compliance due to the lead time required for operating the surveillance devices.</p> <p>(See paragraphs 6.14 to 6.42 of Chapter 6.)</p>
		Surveillance	<p><u>Case 6.1</u></p> <p>In accordance with paragraph 116 of the COP, an alias of the subject which is relevant to the investigation should be reported to the relevant authority as a material change in circumstances under section 58A of the ICSO as soon as reasonably practicable if such an alias is made known to the LEA after the authorization is granted and the authorization or its renewal is still valid. In this case, checking of the weekly reports submitted by an LEA revealed that there was a delay in reporting an alias of a subject. After examination of the relevant documents, the Commissioner required the LEA concerned to provide an explanation for the delay. Subsequently, the LEA submitted a detailed investigation report pursuant to section 54 of the Ordinance.</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>The LEA conducted interception operation on a subject whose identity was already known at the grant of the relevant prescribed authorization ('the PA for interception').</p> <p>Several months later, the LEA applied for a renewal of the PA for interception and a senior officer who made the application for the renewal stated in the supporting affirmation that a prescribed authorization for covert surveillance would be applied for in due course for the purpose of monitoring a meeting involving the subject. Meanwhile, the LEA applied for conducting Type 1 surveillance on the subject as well and a prescribed authorization was granted by the panel judge ('the PA for surveillance').</p> <p>As the interception operation progressed, one day, the LEA became aware of an alias of the subject. The supervisor of a registry, which was the central depository of all ICSO records in the LEA, instructed the registry to prepare the required REP-11 reports for her to report the alias to the panel judge. An officer of the registry then conducted checking on the information relating to the alias on the relevant computer system and computer file. She found that the subject was a subject of an ongoing interception operation at the material time. However, she did not check the computer file thoroughly to ascertain whether the subject was also a subject of any ongoing covert surveillance operations. As a result, the officer had only prepared a draft REP-11 report in respect of the PA for interception.</p> <p>The draft REP-11 report was then submitted to the supervisor who endorsed its accuracy and forwarded it to the senior officer for clearance for</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>submission to the panel judge. The senior officer made no comment on the report. Upon consideration of the REP-11 report submitted by the LEA ('the first REP-11 report'), the panel judge allowed the PA for interception to continue.</p> <p>Later, when the PA for surveillance would soon expire, the officer proceeded with the preparation of a discontinuance report pursuant to section 57 of the ICSO. While drafting the discontinuance report, the officer noticed that the subject of the PA for surveillance was the same as that of the PA for interception but his alias had not been reported to the panel judge in respect of the PA for surveillance. The omission was then reported to the supervisor and the senior officer. Another REP-11 report in respect of the PA for surveillance reporting the same alias ('the second REP-11 report') was finally submitted to the panel judge about ten days after the submission of the first REP-11 report.</p> <p>The supervisor admitted that the two REP-11 reports should have been submitted concurrently. She indicated that she normally could recall if an individual was a subject of both interception and covert surveillance operations ongoing at the time. She explained that, on the day when the first REP-11 report was submitted, the omission of an REP-11 report in respect of the PA for surveillance was due to a slip in attention.</p> <p>With regard to the senior officer, she was directly involved in the supervision of the execution of interception and other ICSO-related matters and she should be cognizant of the authorizations then in force. In this case, there was possibly an ongoing prescribed authorization for surveillance on the same person but the</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>senior officer failed to take a further step to ascertain if a separate REP-11 report was required for concurrent submission with the first REP-11 report.</p> <p>In the second REP-11 report, nothing about the first REP-11 report or the late reporting of the alias as far as the Type 1 surveillance was concerned was mentioned. The officer and the supervisor explained that they only focused on submitting the belated REP-11 report to the panel judge at the time. The supervisor stressed that she had never tried to conceal the fact from the panel judge that the submission of the second REP-11 report had been delayed.</p> <p>The LEA stated that the second REP-11 report failed to provide to the panel judge a full picture on the delay in submission, and the supervisor and the senior officer were not vigilant in the handling of this case as they did not timely report the matter to another team of the LEA that was responsible for overseeing the compliance by its officers with the ICSO in accordance with the established internal requirement.</p> <p>The LEA concluded that the late reporting of the alias in respect of the PA for surveillance and the inadequacy in the content of the second REP-11 report were attributed to the failure on the parts of the officer, the supervisor and the senior officer in performing their respective duties with prudence and diligence. The LEA proposed to give a verbal warning (disciplinary) to each of these officers. To prevent recurrence of similar incidents, the LEA revised the workflow regarding the reporting of a newly surfaced alias of a subject and strengthened the related procedures. Besides, the LEA would enhance the</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>computer system to better facilitate the checking process.</p> <p>In this case, the report on the alias of the subject of the Type 1 surveillance was not made as soon as practicable. This was a non-compliance with the provision of the ICSO and the COP. Having reviewed the case, the Commissioner found no evidence to contradict the findings of the LEA that there was no indication of deliberate neglect or any sinister motive. As far as the Type 1 surveillance was concerned, by virtue of sections 63(5) and 64(1) of the Ordinance, the Commissioner considered that the delay in reporting the alias did not affect the validity of the prescribed authorization. The revised workflow and procedures for the reporting of an alias of a subject and the recommended enhancement to the computer system were considered appropriate.</p> <p>The Commissioner agreed with the proposed disciplinary actions against the three officers concerned. Notwithstanding, the performance of the supervisor was considered unsatisfactory. When perusing the draft first REP-11 report, the supervisor relied on her personal memory and on the officer who prepared the draft without going through any verification process.</p> <p>(See paragraphs 6.44 to 6.56 of Chapter 6.)</p>
	Interception	<p><u>Case 6.6</u></p> <p>This case was related to an on-going case of heightened LPP likelihood referred to in Chapter 4. The LEA concerned first discovered an irregularity in the handling of information that indicated heightened likelihood of obtaining LPP</p>

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		<p>information. While preparing an initial report to the Commissioner, it was further discovered that an officer had accessed interception products when monitoring of the interception should have been put on hold. Subsequently, the LEA submitted a full investigation report to the Commissioner pursuant to section 54 of the ICSO.</p> <p>A prescribed authorization was granted for interception of a facility used by a subject ('the Subject'). At the grant of the authorization, the interception operation concerned was assessed to have a likelihood of obtaining LPP information and the panel judge imposed additional conditions on the authorization. The additional conditions required the LEA to suspend the monitoring of the interception and cause a report to be provided to the panel judge under certain circumstances.</p> <p>One day, an officer of the interception unit of the LEA ('Officer A1') found that a call contained information indicating heightened LPP likelihood. Officer A1 was supposed to block the access to the facility so as to restrict monitoring of the interception concerned but she forgot to do so. She reported the call to her supervisor ('Supervisor A') who instructed Officer A1 to obtain more background information about the issue mentioned in the call in order to facilitate an LPP assessment. Meanwhile, when the monitoring of the interception concerned should have been put on hold, Supervisor A performed supervisory check and listened to seven other calls of the facility ('the Seven Calls') which had been listened to by his subordinates previously.</p> <p>After conducting background enquiries, Officer A1 reported the result to Supervisor A and he assessed that there</p>

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		<p>was a heightened LPP likelihood. After reminding Officer A1 to block the access to the facility, Supervisor A reported the LPP call to a senior officer. The senior officer directed that suspension of monitoring of the interception concerned should continue pending submission of an REP-11 report to the panel judge to report the heightened LPP likelihood.</p> <p>On the morning of the following day, when the REP-11 report was being prepared by a registry which was also under the command of the senior officer, a surveillance (not covert surveillance) operation was conducted on the Subject. The Subject was seen entering a building in which some premises in relation to legal proceedings and lawyers were accommodated ('the Building'). According to the prevailing reporting mechanism, the officer-in-charge of the surveillance operation ('the Officer-in-charge') notified the frontline officer who was responsible for the crime investigation concerned ('the Investigating Officer'). The Officer-in-charge also made a similar notification to another officer of the interception unit who took charge of the interception operation ('Officer A2'). The Investigating Officer then informed both the interception unit and the registry of the matter. When he approached the registry, the Investigating Officer only talked to a registry staff ('Officer B1') as the supervisor of the registry ('Supervisor B') was not in the office and Officer B1 requested him to ascertain which places inside the Building the Subject had visited and the purpose of the visit.</p> <p>Later the same morning, the LEA became aware that the Subject had entered a premises in relation to legal proceedings</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>(‘the Premises’) inside the Building. The Officer-in-charge reported the development to the Investigating Officer but she did not similarly update Officer A2 according to the prevailing reporting mechanism. Immediately afterwards, the Investigating Officer tried to call Supervisor B with a view to updating her on the latest development but she was again not in the office.</p> <p>Later, when Supervisor B returned to her office, Officer B1 duly reported to her the Subject’s visit to the Building and that the Investigating Officer would obtain more information about the visit. Supervisor B waited for the Investigating Officer to give her an update on the situation. Besides, it did not occur to Supervisor B that she might need to report the matter to the senior officer for assessment or mention this matter in the REP-11 report that was under preparation.</p> <p>On the afternoon of the same day, the REP-11 report was submitted to the panel judge. The report stated only the LPP call but nothing about the Subject’s visit to the Building. After considering the REP-11 report, the panel judge allowed the monitoring of the interception to continue subject to more additional conditions. Upon receipt of the panel judge’s determination, another registry staff (‘Officer B2’) sent a message to all other officers of the registry informing them of it.</p> <p>As regards the Subject’s visit to the Building, Supervisor B eventually called the Investigating Officer more than six hours after the LEA became aware of the matter and only then did she learn that the Subject had entered the Premises inside the Building. Supervisor B then reported the matter to the senior officer. Meanwhile, as</p>

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		<p>arranged by Officer B2, restriction on the access to the facility was removed. Shortly before the removal of the restriction, Officer A2 was informed of the arrangement but no one informed Supervisor A of the same. When the restriction on the access to the facility had been removed, Officer A2 listened to a call ('the Eighth Call'). Supervisor B was not aware of such resumption of monitoring either as she had not yet read the relevant message from Officer B2. Without knowledge of the resumption of the monitoring of the interception (although by then she had been told of the Subject's visit to the Premises), the senior officer instructed that the suspension of the monitoring be continued. Upon the senior officer's instruction, the access to the facility was blocked again.</p> <p>On the next day when more information was obtained about the Subject's visit to the Premises, the senior officer assessed that there was a heightened LPP likelihood in respect of the interception operation. The senior officer instructed that suspension of monitoring of the interception be continued pending submission of another REP-11 report to the panel judge. On perusing the draft REP-11 report together with the relevant ATR, the senior officer became aware of Officer A2's listening to the Eighth Call. The senior officer considered that there might be an irregularity in respect of the handling of the information concerning the Subject's visit to the Premises. She caused the REP-11 report, which contained the relevant information including Officer A2's listening to the Eighth Call and the report of the incident to the team that was responsible for overseeing the compliance by its officers with the ICSO, to be submitted to the panel judge. After considering this REP-11 report, the panel judge allowed</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>the prescribed authorization concerned to continue.</p> <p>Supervisor A's listening to the Seven Calls while the monitoring of the interception on the facility was being suspended constituted a non-compliance with the additional conditions of the prescribed authorization. Though the panel judge allowed monitoring of the interception on the facility to be resumed after considering the REP-11 report on the LPP call, the monitoring should continue to be suspended while the Subject's visit to the Premises was yet to be reported to the panel judge. Thus, Officer A2's listening to the Eighth Call also breached the additional conditions and amounted to non-compliance. Besides, the mishandling of the information relating to the Subject's visit to the Building caused a considerable delay in determining whether there might be a heightened LPP likelihood.</p> <p>For Supervisor A, he explained that as he was prepared to conduct supervisory check on the facility around that time, it slipped his mind that it was in fact the same facility that he had instructed Officer A1 to suspend monitoring. For Officer A2, he explained that he listened to the Eighth Call soon after the restriction on the access to the facility had been removed since he believed that the issue in relation to the Subject's visit to the Building had already been properly dealt with. The LEA concluded that the non-compliance and the irregularity in this case was due to a series of mistakes committed by the relevant officers because of their lack of vigilance and misjudgement.</p> <p>The LEA had reviewed the prevailing reporting mechanism and found it still effective if the officers concerned had</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>discharged their duties properly. The LEA held a briefing for all the officers concerned and reminded them to stay vigilant and enhance their mutual communication and teamwork to ensure that all covert operations were in compliance with the relevant requirements under the ICSO regime. To prevent recurrence of similar mistakes in future, the LEA tightened up the control on the resumption of monitoring of interception pursuant to the panel judge's decision.</p> <p>The reporting mechanism and the related arrangements were not clearly stated in any specific guidelines or operation manuals. The Commissioner had doubt on whether all officers involved in the mechanism were fully aware of their roles and responsibilities. The Commissioner requested the LEA to provide him with more details about the reporting mechanism. The Commissioner also required the LEA to consider implementing (a) some measures to ensure that the access to a facility was blocked when monitoring of it have to be put on hold and (b) some improvements to ensure that all officers concerned were properly informed when restriction on the access to a facility was to be removed.</p> <p>The LEA took the Commissioner's advice and revised the procedures for blocking the access to a facility. The LEA also enhanced the mechanism for resuming monitoring of an interception. Besides, the LEA had enhanced the reporting mechanism and proposed to promulgate it as a set of written instructions and to incorporate such instructions into the LEA's operation manual.</p> <p>The Commissioner have reviewed the case. In the review process, the Commissioner listened to the</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>eight calls in question and confirmed that all of them did not contain any LPP information or JM. The Commissioner found no evidence to contradict the findings of the LEA that there was no indication of deliberate neglect or any sinister motive on the part of any of the officers involved. The Commissioner agreed with the LEA's recommendation that a written warning (disciplinary) be given to Supervisor A, a verbal warning (disciplinary) each be given to Supervisor B and the senior officer and an advice (non-disciplinary) be given to each of the Investigating Officer, Officer A1, Officer A2 and Officer B1. All the enhancement measures taken or proposed by the LEA were considered appropriate.</p> <p>The Commissioner emphasised to the LEA that a subject's entry to a premises in relation to legal proceedings and lawyers definitely gave rise to a heightened risk or likelihood of obtaining LPP information. It is a statutory requirement under section 58A of the ICSO and paragraph 130 of the COP that the LEA should cause a report on material change in circumstances to be provided to the panel judge as soon as reasonably practicable after becoming aware of the matter. The improper handling of information in relation to the Subject's visit to the Building and the resumption of monitoring of the interception when the matter was yet to be reported to the panel judge reflected the inadequacy of the officers involved and the lack of communication among themselves. The situation was unsatisfactory.</p> <p>In its investigation report, the LEA did not mention any disciplinary or administrative actions against the Officer-in-charge who, after knowing that the Subject had entered the</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>Premises, failed to follow the reporting mechanism and update Supervisor A or Officer A2 accordingly. The Commissioner requested the LEA to review whether any appropriate actions should be taken against the Officer-in-charge. After review, the LEA issued an advice (non-disciplinary) to the Officer-in-charge. The Commissioner noted the action taken by the LEA and made no further remarks.</p> <p>(See paragraphs 6.77 to 6.94 of Chapter 6.)</p>
	Surveillance	<p><u>Case 6.9</u> This incident was related to a case of Type 1 surveillance which was assessed at the time of application that the operation sought to be authorized would likely obtain information subject to LPP referred to in Chapter 4.</p> <p>A prescribed authorization was granted by the panel judge to an LEA in conducting Type 1 Surveillance amongst a subject and any one or combination of other subjects on meeting(s) at public places and on the activities carried out by any one of the subjects inside or in the vicinity of the meeting venue during and/or after the meeting(s).</p> <p>In checking the surveillance products of the case, the Commissioner found that of the 76 minutes of recording obtained, the first 73 minutes of it captured the scene of a frosted glass door of a room which was only opened occasionally for people to enter or leave the room. The closed glass door did not allow any clear view of what was going on inside the room, except that shadows could be seen on occasions of people moving about inside the room. As no clear images or activities carried out by the subjects by way of meeting could be seen from the</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>first 73 minutes of the recording, this part of surveillance product failed to comply with the terms as they were worded in the prescribed authorization. Only in the last few minutes of the recording when the glass door was opened and some people including the subjects emerged from the room, can it be said that the terms of the prescribed authorization were complied with.</p> <p>The above circumstances of the surveillance operation were not reported to the reviewing officer of the LEA. The LEA was requested to submit a full investigation report to the Commissioner on how the surveillance operation came about.</p> <p>The LEA subsequently submitted an investigation report pursuant to section 54 of the ICSO. According to the LEA's explanation, the officer-in-charge of the surveillance operation ('Officer') had planned for different scenarios of the surveillance operation including deploying the surveillance device(s) outside the meeting room targeting at its entrance/exit to monitor and record the activities of the subjects when they entered or left the meeting room. He had envisaged the possibility that if the subjects met inside the room, the activities therein would not be visible from the outside when the door was closed. It was also within his anticipation that operationally, the recording would not be stopped intermittently until the meeting concluded. He believed that the terms and scope of the prescribed authorization had been clear and wide enough to cover the above circumstances.</p> <p>After reviewing the case, the Commissioner considered that the wording of the prescribed authorization</p>

Number of reviews conducted under section 41(2)	Interception/ Surveillance	Summary of reviews
		<p>did not support the surveillance operation as planned by the Officer and conducting such surveillance operation outside the meeting room without recording the activities of the subjects inside the room did not comply with the terms.</p> <p>The terms of the prescribed authorization only permitted direct monitoring and recording of the activities of the subjects inside or in the vicinity of the meeting venue. It did not go so far as to allow for capturing something other than the actual individuals permitted by the prescribed authorization. In this case, capturing the closed frosted glass door of the room in which the meeting was being held, but not the actual meeting and the actual individuals taking part constituted an indirect monitoring.</p> <p>The Commissioner found no evidence showing that there was foul play, ulterior motive or deliberate act involved in the unauthorized surveillance. The proposed action of giving an advice (non-disciplinary) each to the Officer and his supervisor (the applicant of the prescribed authorization) was considered appropriate.</p> <p>The Commissioner suggested the LEA modifying the wording of its application for prescribed authorization which would be wide enough for indirect monitoring should a similar situation or scenario arise in future.</p> <p>(See paragraphs 6.110 to 6.117 of Chapter 6.)</p>

Table 6

Number and broad nature of cases of irregularities or errors identified in the reviews [section 49(2)(d)(ii)]

Section 41(1)

Number of cases of irregularities or errors identified in the reviews under section 41(1)		Interception/ Surveillance	Broad nature of irregularities or errors identified
(a) Reviews of LPP/JM cases	4	Interception	<p><u>Case 6.3</u> Delay in reporting to the Commissioner an assessment of a call which might indicate heightened JM likelihood in the weekly report.</p>
		Interception	<p><u>Case 6.4</u> An officer accessed an interception product during suspension of monitoring of the interception.</p>
		Interception	<p><u>Case 6.7</u> An officer mistakenly recorded the information obtained from an interception operation in the transcript of another interception operation.</p>
		Interception	<p><u>Case 6.8</u> Different approaches were adopted by different officers in handling interception products with information indicating arrest of a person.</p> <p>(For details, see item (f) under section 41(1) in Table 5 and Chapter 6.)</p>

Number of cases of irregularities or errors identified in the reviews under section 41(1)		Interception/ Surveillance	Broad nature of irregularities or errors identified
(b) Other reviews	3	Interception	<u>Case 6.2</u> Interception products for which examination by the Commissioner and his designated officers had been completed were not removed from the designated computer workstations in the LEA concerned.
		Interception	<u>Case 6.5</u> An intercepted call with likelihood of obtaining LPP information was not reported to the panel judge.
		Interception	<u>One other case</u> Deficiencies of the computer systems. (For details, see item (f) under section 41(1) in Table 5 and Chapter 6.)

Section 41(2)

Number of cases of irregularities or errors identified in the reviews under section 41(2)		Interception/ Surveillance	Broad nature of irregularities or errors identified
(a) Reviews on cases in default of application being made for confirmation of emergency authorization within 48 hours as reported by the head of department under section 23(3)(b)	Nil	Not applicable	As mentioned in Table 5 above, there was no report submitted under this category.
(b) Reviews on cases in default of application being made for confirmation of prescribed authorization or renewal issued or granted upon oral application within 48 hours as reported by the head of department under section 26(3)(b)(ii)	Nil	Not applicable	As mentioned in Table 5 above, there was no report submitted under this category.
(c) Reviews on non-compliance cases as reported by the head of department under section 54	5	Interception	<u>Outstanding case (i)</u> Non-compliance with section 61(2) of the ICSO that some documents in support of applications for prescribed authorizations for covert surveillance, in which interception products obtained from telecommunications interception operations were referred to, were disclosed to the prosecution.

Number of cases of irregularities or errors identified in the reviews under section 41(2)	Interception/ Surveillance	Broad nature of irregularities or errors identified
	Surveillance	<p><u>Outstanding case (ii)</u> Surveillance was conducted not in compliance with the terms of the prescribed authorization concerned.</p> <p>Other irregularities identified include:</p> <p>(a) Delay in reporting to the Commissioner the imposition of an additional condition on the prescribed authorization which did not involve LPP information or JM;</p> <p>(b) Inaccuracies in the relevant device request forms and review form;</p> <p>(c) Issue of surveillance devices and an accessory which was incompatible with the additional condition; and</p> <p>(d) Incompetency of the reviewing officer who did not detect mistake in the review form and misconceived that the surveillance devices issued should be incapable of performing a specific function that was prohibited by the panel judge.</p>
	Surveillance	<p><u>Case 6.1</u> Delay in reporting an alias of a subject of covert surveillance to the panel judge under section 58A of the ICSSO and paragraph 116 of the COP.</p>
	Interception	<p><u>Case 6.6</u> Non-compliance with the additional conditions imposed on the prescribed authorization concerned as access was made to interception products during suspension of monitoring of the interception.</p>

Number of cases of irregularities or errors identified in the reviews under section 41(2)	Interception/ Surveillance	Broad nature of irregularities or errors identified
		Delay in making an LPP assessment due to improper handling of information indicating heightened LPP likelihood.
	Surveillance	<u>Case 6.9</u> Surveillance was conducted outside the ambit of the prescribed authorization.
		(For details, see item (c) under section 41(2) in Table 5 and Chapter 6.)

Table 7

Number of applications for examination that have been received by the Commissioner [section 49(2)(d)(iii)]

Number of applications received	Applications for examination in respect of			
	Interception	Surveillance	Both Interception and Surveillance	Cases that could not be processed
5	0	0	5	0

Table 8

Respective numbers of notices given by the Commissioner under section 44(2) and section 44(5) further to examinations [section 49(2)(d)(iv)]

Number of notices to applicants given by the Commissioner		Nature of applications for examination		
		Interception	Surveillance	Both Interception and Surveillance
Number of cases that the Commissioner had found in the applicant's favour [section 44(2)]	0	—	—	—
Number of cases that the Commissioner had not found in the applicant's favour [section 44(5)] ^{Note 9}	5	0	0	5

Note 9 Of the five notices, four were issued during the report period and one thereafter.

Table 9

**Number of cases in which a notice has been given by
the Commissioner under section 48 [section 49(2)(d)(v)]**

	Number of cases in which a notice has been given in relation to	
	Interception	Surveillance
Notice to the relevant person by the Commissioner stating that he considers that there has been a case of interception or surveillance carried out by an officer of a department without the authority of a prescribed authorization and informing the relevant person of his right to apply for an examination [section 48(1)]	0	0

Table 10

Broad nature of recommendations made by the Commissioner under sections 50, 51 and 52 [section 49(2)(d)(vi)]

Recommendations made by the Commissioner		Interception/ Surveillance	Broad nature of recommendations
Reports to the Chief Executive on any matter relating to the performance of the Commissioner's functions [section 50]	Nil	Not applicable	Not applicable
Recommendations to the Secretary for Security on the COP [section 51]	1	Surveillance	Paragraph 22 of the COP should be amended to avoid the confusion as to whether the use of a pair of ordinary binoculars by an officer to carry out the observation as described therein constitutes the conduct of Type 2 surveillance which needs to be authorized by a prescribed authorization. (See paragraph 7.2 of Chapter 7.)
Recommendations to departments for better carrying out the objects of the Ordinance or the provisions of the COP [section 52]	2	Interception & Surveillance	(a) Providing additional information when reporting cases of non-compliance, irregularity or incident to the Commissioner. (b) Including a buffer time for operation of surveillance devices in applications for covert surveillance. (See paragraph 7.4 of Chapter 7.)

Table 11

Number of cases in which information subject to legal professional privilege has been obtained in consequence of any interception or surveillance carried out pursuant to a prescribed authorization [section 49(2)(d)(vii)]

	Number of cases
Interception	1
Surveillance	0

Table 12

Number of cases in which disciplinary action has been taken in respect of any officer of a department according to any report submitted to the Commissioner under section 42, 47, 52 or 54 and the broad nature of such action [section 49(2)(d)(viii)]

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
<p><u>Case 1</u> Surveillance</p>	<p>A senior officer failed to detect that covert surveillance had been conducted outside the ambit of the prescribed authorization in the reviewing process.</p> <p>(See paragraph 6.106 of Chapter 6 of Annual Report 2018 and paragraphs 6.7 to 6.18 of Chapter 6 of Annual Report 2019.)</p>	<p>Verbal advice</p>
<p><u>Case 2</u> Interception</p>	<p>An officer failed to report a call with indication of heightened LPP likelihood.</p> <p>(See paragraphs 6.67 to 6.73 of Chapter 6 of Annual Report 2019.)</p>	<p>Verbal warning</p>
<p><u>Case 3</u> Interception</p>	<p>(i) An officer failed to exercise judgement independently and make suitable recommendation to her supervisor concerning a call with likelihood of obtaining LPP information.</p> <p>(ii) The supervisor of the officer mentioned in (i) above misinterpreted the contents of the call and failed to record her deliberation on the assessment on LPP likelihood.</p> <p>(See paragraphs 6.73 to 6.76 of Chapter 6.)</p>	<p>Verbal advice</p> <p>Verbal warning</p>

8.2 In accordance with section 49(2)(e) of the Ordinance, the Commissioner is required to give an assessment on the overall compliance with the relevant requirements during the report period. Such assessment and the reasons in support can be found in Chapter 9.

CHAPTER 9

REVIEW OF COMPLIANCE BY LAW ENFORCEMENT AGENCIES

Overall compliance

9.1 As set out in section 40 of the Ordinance, the functions of the Commissioner are to oversee the compliance by the LEAs and their officers with the relevant requirements and to conduct reviews, etc. It is stipulated under section 49(2)(e) of the Ordinance that the Commissioner shall set out in the annual report an assessment on the overall compliance with the relevant requirements during the report period. My assessment of the overall performance of the LEAs and their officers in their compliance with the relevant requirements of the ICSO in 2020 is set out below.

Preparation of applications

9.2 The first and foremost of the requirements under the Ordinance is that any statutory activity can only be lawfully and properly conducted by an officer of an LEA pursuant to a prescribed authorization granted by a relevant authority. Whether a prescribed authorization should be granted is expressly based on the necessity and proportionality principles i.e. the interception or covert surveillance is necessary for, and proportionate to, the purpose sought to be furthered by carrying it out upon balancing the relevant factors against the intrusiveness of the interception or covert surveillance on any person who is to be the subject of or may be affected by the interception or covert surveillance; and considering whether the purpose sought to be furthered by carrying out the interception or covert surveillance can reasonably be furthered by other less intrusive means.

9.3 During the report period, all the 1,150 applications for interception and six applications for covert surveillance were granted by the relevant authorities.

9.4 In general, the LEAs were observed to have continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations.

Reviews by the Commissioner

9.5 There were different ways to review the LEAs' compliance with the requirements of the Ordinance in respect of interception and covert surveillance as set out in paragraph 2.16 of Chapter 2 and paragraph 3.19 of Chapter 3. These included checking of the weekly reports submitted by the LEAs and the PJO, and examination of the contents of the LEA files and documents as well as the protected products during visits to the LEAs. Where necessary, the LEA concerned would be requested to respond to queries. For interception operations, counter-checking the facilities intercepted with non-LEA parties and through other means would be done. For covert surveillance operations, the records kept by the surveillance device recording system of the LEAs would be checked.

9.6 In the report period, the interception/covert surveillance operations were in general conducted pursuant to prescribed authorizations granted by the relevant authorities and the additional conditions imposed but there were still a few cases of non-compliance as reported in Chapter 6. There was no sign of abuse of surveillance devices for any unauthorized purposes.

Handling of LPP and JM cases

9.7 The COP obliges the concerned LEA to notify the Commissioner of cases that are likely to involve LPP information or JM. The Commissioner is also timeously alerted to cases involving or possibly involving LPP information or JM through the examination of the weekly reports submitted by the LEAs, with sanitised copies of the relevant REP-11/REP-13 reports reporting on any material change in circumstances after the issue of a prescribed authorization including changed LPP and JM risks.

9.8 Through the examination of protected products, I am able to check the veracity of the gist of the communications or information stated in the REP-11/REP-13 reports and whether there were any communications or information subject to LPP or with JM that had been accessed by the LEA officers but not reported to the relevant authority.

9.9 A total of 143 new LPP and JM cases were reported in 2020. Except ten LPP cases which were still on-going beyond the report period, review of 129 LPP and four JM cases had been completed. Of the 129 LPP cases, except for those specifically mentioned in Cases 6.3, 6.4, 6.6, 6.7, 6.8, and 6.9 of Chapter 6, nothing untoward was found for these cases. As for the four JM cases, one of them involved an incident referred to in Case 6.3 of Chapter 6. Others were all found in order. There was one case on actual obtainment of information subject to LPP as detailed in paragraphs 4.13 and 4.14 of Chapter 4. At the grant of the relevant prescribed authorization, the interception operation was not assessed to have a likelihood of obtaining LPP information. When the LEA concerned encountered a call which contained information suspected to be subject to LPP, it submitted an REP-11 report to the panel judge and sought approval to continue with the prescribed authorization. The panel judge allowed the prescribed authorization to continue with additional conditions

imposed. I have listened to the call and considered that the information concerned was LPP information which was obtained by the LEA inadvertently. I have reviewed the case and did not find any irregularity.

9.10 With regard to the 15 on-going LPP cases reported in Annual Report 2019, the authorized operations concerned were discontinued in 2020. Except for the case which involved two incidents referred to in Case 6.7 and Case 6.8 of Chapter 6, nothing untoward was found in the other 14 cases.

9.11 The LEAs were observed to have recognised the importance of protecting information which might be subject to LPP or JM. They continued to adopt a very cautious approach in handling these cases though there were several occasions reflecting the misjudgement and lack of vigilance of some officers as revealed in the cases reported in Chapter 6. The continued efforts of the LEAs concerned in reminding their officers to be vigilant when they encounter situations indicating heightened LPP likelihood in the course of performing interception monitoring duties, and tightening up measures to minimise the risk of inadvertently obtaining information subject to LPP were appreciated.

Non-compliance, irregularities or incidents

9.12 Under section 54 of the Ordinance, the head of an LEA is required to submit a report to the Commissioner if he considers that there may have been any case of failure to comply with any relevant requirement of the Ordinance, irrespective of whether the failure is due to the fault of the LEA or its officers or not. LEAs are also required to report to the Commissioner cases of irregularity or even simply incidents. Hence, all cases of possible non-compliance are brought to the attention of the Commissioner for examination and review without any delay. Furthermore, whenever necessary, the LEAs are required to provide a

report, clarification or explanation for anything unusual detected in the course of examination of documents and protected products by the Commissioner. In 2020, there were ten cases of non-compliance/irregularity/incident.

9.13 For all the cases reported in Chapter 6, I did not find any deliberate disregard of the statutory provisions or the COP nor have I found any ulterior motive or ill will on the part of the officers involved. However, as reflected in Outstanding case (ii) in paragraphs 6.14 to 6.42, the oversight of an officer could lead to a series of mistakes subsequently committed by various officers in performing ICSO-related duties. Besides, the cases mentioned under Cases 6.1 to 6.9 reflected that some of the officers were still not vigilant and cautious enough in discharging ICSO duties. The supervisory roles of senior officers in monitoring the discharge of ICSO duties and communications amongst some of the LEA officers should also be strengthened. The heads of LEAs should endeavour to review the workflow and operation guidelines regularly to prevent occurrence of irregularities and to provide their officers with sufficient advice and training to facilitate them to better perform the ICSO duties especially when officers are newly deployed to take up ICSO duties either on a long term basis or in short term acting capacity. Furthermore, officers of the LEAs should always stay alert and exercise care in different stages of the operations conducted under the ICSO.

Response from LEAs

9.14 I am pleased to see that in the report period, LEAs continued to be positive to my recommendations and in reviewing and tightening up procedures and guidelines aiming for better operation of the ICSO regime and took initiative to implement system enhancements to prevent recurrence of technical mistakes or to avoid human errors.

CHAPTER 10

ACKNOWLEDGEMENT AND WAY FORWARD

Acknowledgement

10.1 I would like to express my sincere thanks to various parties including the panel judges, the Security Bureau, the LEAs and the communications services providers that have continued to render great assistance to me in performing the oversight and reviewing functions under the ICSO during the report period. Their continued cooperation and support enabled me to carry out my tasks as the Commissioner smoothly and efficiently.

Way forward

10.2 The ICSO aims to strike a balance between the need for the prevention and detection of serious crime and the protection of public security on the one hand and the need for safeguarding the privacy and other rights of individuals on the other. The express power of examining the protected products vested in me since the legislative amendments in 2016 exerted effective deterrence against any deliberate non-compliance of the LEAs with the Ordinance. The suggestions and recommendations on the procedural matters and control mechanism put forth in previous years were well implemented by the LEAs to enhance compliance with the Ordinance and the COP. After reviewing the irregularities or incidents during the report period, I discussed with the LEAs concerned and panel judges whenever necessary and recommended targeted measures to address any deficiencies in technologies, procedures or control mechanism identified. I would like to stress that there is always room for improvement and fine-tuning for established procedures and systems but addressing these issues alone is never sufficient in achieving full

compliance with the ICSO requirements. What is more important is to strengthen the knowledge and experience of individual officers on ICSO duties and to enhance their alertness and awareness while discharging their duties to minimise any mistakes committed inadvertently due to their negligence or insufficient knowledge. The heads of LEAs should recognise the need for a strong management in performing adequate supervisory role in monitoring and providing guidance and training to the officers concerned as well as reviewing the procedures and systems regularly in identifying and addressing any deficiencies.

10.3 I look forward to the concerted efforts of each and every one of the officers involved in ICSO duties in observing the spirit and requirements of the Ordinance and also the continuous support and cooperation of all the parties involved in facilitating the oversight work of the Commissioner.



30 September 2021

Mr TANG Ping-keung, PDSM
Secretary for Security
10th Floor, East Wing,
Central Government Offices,
2 Tim Mei Avenue, Tamar,
Hong Kong

Dear Mr Tang,

**Annual Report 2020 by the Commissioner on
Interception of Communications and Surveillance**

The Chief Executive has, pursuant to section 49(4) of the Interception of Communications and Surveillance Ordinance (Cap. 589), directed that a copy of the Annual Report 2020 by the Commissioner on Interception of Communications and Surveillance, together with a copy of this letter, be laid on the table of the Legislative Council at its sitting on 20 October 2021. The Chief Executive has not excluded any matter from the Report under section 49(5) of the Ordinance without the agreement of the Commissioner.

I should be grateful if you would follow up with the Legislative Council Secretariat accordingly.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Wallace Lau', written over a white background.

(Mr Wallace Lau)

Private Secretary to the Chief Executive

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