

**Legislative Council
Panel on Security**

**Results of Study of Matters Raised in the
Annual Report 2019 to the Chief Executive by the
Commissioner on Interception of Communications and Surveillance**

Purpose

Pursuant to section 49 of the Interception of Communications and Surveillance Ordinance (Cap. 589) (ICSO), the Commissioner on Interception of Communications and Surveillance (the Commissioner) submitted his Annual Report 2019 (the Report) to the Chief Executive in June 2020. This note sets out the Government's views on the matters raised in the Report.

Background

2. Interception of communications and covert surveillance operations are critical to the capability of our law enforcement agencies (LEAs) in combating serious crimes and protecting public security. ICSO provides a statutory regime for the conduct of interception of communications and covert surveillance by LEAs. The Commissioner, appointed by the Chief Executive on the recommendation of the Chief Justice, is responsible for overseeing the compliance by LEAs and their officers with the relevant requirements of ICSO.

3. The Report covers the period from 1 January 2019 to 31 December 2019 (the report period). The Chief Executive has caused a copy of the Report to be laid on the table of the Legislative Council on 16 December 2020. The Security Bureau has studied the matters raised in the Report in consultation with LEAs concerned.

4. ICSO aims to strike a balance between the need for prevention and detection of serious crimes and the protection of public security on the one hand, and the need for safeguarding the privacy and other rights of individuals on the other. It provides a stringent regime with checks and balances to ensure that LEAs' covert operations are carried out in accordance with the requirements of ICSO.

5. During the report period, interception of communications and covert surveillance operations carried out by LEAs continued to be subject

to the tight regulation of the statutory framework under ICSO. LEAs and relevant parties provided the support and cooperation that the Commissioner needed to perform his oversight and review functions under ICSO.

The Commissioner's findings

6. Under section 54 of ICSO, heads of LEAs are required to submit a report to the Commissioner if they consider that there may have been any case of failure to comply with any relevant requirement of ICSO, irrespective of whether the failure was due to the fault of LEAs or their officers or not. LEAs are also required by the Commissioner to report to him cases of irregularity or incidents not covered by section 54, so that all cases of possible non-compliance could be brought to the attention of the Commissioner for examination and review without any delay.

7. There were a total of **1 339 authorization applications** for interception or covert surveillance in 2019. The Commissioner observed that LEAs continued to adopt a cautious approach in preparing their applications for interception and covert surveillance operations, and that panel judges handled LEAs' applications carefully and applied **stringent control** over the duration of the authorizations. The Commissioner stated in the Report that most of the interception and covert surveillance operations were conducted pursuant to prescribed authorizations granted and the additional conditions imposed, except for the few cases as detailed in paragraph 8 below, and there was **no sign of abuse of surveillance devices** for any unauthorised purposes during the report period.

8. In 2019, the Commissioner had reviewed 16 cases of non-compliance/irregularity/incident, with the review of 15 cases being completed. None of the cases involved reports submitted under section 54 of ICSO. For the 15 cases which the review had been completed, there were **two cases of non-compliance** (Cases 6.1 and 6.3) and 13 cases of irregularity / incident. In respect of the two cases of non-compliance, Case 6.1 is about an officer's inadvertent listening to a call involving a prohibited number specified in the additional conditions of the prescribed authorization for two seconds due to a system bug. For Case 6.3, the supervisor of an interception operation failed to make a timely report to the panel judge on a material change in the circumstances relating to a newly surfaced alias of the subject.

9. The Commissioner also reported in Chapter 6 the review result of an outstanding case brought forward from Annual Report 2018. In that case,

there were occasions where surveillance was conducted when the subject was not present in the specified premises, which was not in compliance with the term of the prescribed authorization. The Commissioner expressed concern that the mistakes were made by an officer of a rather senior level and were left unnoticed after a series of internal reviewing process of the LEA concerned. He appreciated that the LEA had taken his advice to reconsider the suitability of the officer in undertaking ICSO duties and posted out the officer subsequently.

10. In any of the completed non-compliance / irregularity / incident cases, the Commissioner did not find any deliberate disregard of the statutory provisions or the Code of Practice, or any ulterior motive or ill will on the part of the officers involved. Noting that most of these cases were occasions where officers were not vigilant and cautious enough in discharging ICSO duties, the Commissioner advised that LEAs should endeavour to provide their officers with training and guidance as well as enhance the procedures and technologies to help minimising the risk of human error.

Legal professional privilege

11. The Commissioner also observed that LEAs recognised the importance of protecting legal professional privilege (LPP) information or journalistic material (JM), and continued to adopt a very **cautious approach** in handling these cases, save for some occasions where more vigilance and care from the LEA officers was expected. The Commissioner noted that LEAs had repeatedly reminded their officers to be vigilant in this regard.

12. The Commissioner observed that for cases assessed to have likelihood of involving LPP information, panel judges would impose additional conditions if they granted the authorization or allowed the operations to continue. These additional conditions were stringent and effective in safeguarding the right of individuals to confidential legal advice. In the single case of actual obtainment of information suspected to be subject to LPP in 2019, the panel judge had imposed additional conditions on the prescribed authorization to guard against the risk of obtaining LPP information at the grant of the prescribed authorization. The Commissioner had reviewed the case and did not find any irregularities. The LPP information was considered to be obtained inadvertently and had been screened out when passing to the investigators.

The Commissioner's recommendations to the Government

13. Under ICSO, the Commissioner may make recommendations to the Secretary for Security and the heads of LEAs as and when necessary. During the report period, the Commissioner continued to give advice and recommendations on various procedural matters in the course of overseeing LEAs' compliance with ICSO requirements. The Commissioner was pleased to see that in the report period, LEAs continued to be positive to his recommendations in every aspect 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.

14. The Commissioner's recommendations are summarised in Chapter 7 of the Report and were all accepted by LEAs. The key recommendations made by the Commissioner in the report period and the Government's response are set out at **Annex**.

Conclusion

15. The control regime under ICSO has continued to operate smoothly during the report period. The Government will continue to closely monitor the operation of ICSO, and fully co-operate with the Commissioner and the panel judges, with a view to better carrying out the objects of ICSO.

Security Bureau
December 2020

**Response of the Government
to the Key Recommendations Made in the Annual Report 2019
of the Commissioner on Interception of Communications and Surveillance**

	Recommendations by the Commissioner	The Government's response
1.	<i>Justifications for not restricting monitoring of interception to officers at a specific rank or above in LPP and JM cases (paragraph 7.2(a))</i>	
	For LPP and JM cases, officers below a specific rank should not be assigned for the monitoring duties of the interception concerned. If the LEAs propose not to restrict monitoring of the interception concerned to officers at a specific rank or above when making an application for a prescribed authorization or making a report to the panel judge regarding the altered assessment on the likelihood of obtaining LPP information or JM, they should state in the related application or REP-11 report detailed justifications for the panel judge's consideration.	Recommendation accepted. The recommendation has been adopted by LEAs.
2.	<i>Reporting and preservation requirements for cases where additional conditions are imposed on prescribed authorizations not involving LPP information or JM (paragraph 7.2(b))</i>	
	For cases involving LPP information or JM, there is already a set of reporting and preservation requirements. For cases where LPP information or JM is not involved but additional conditions are imposed on the prescribed authorizations concerned, the LEAs	Recommendation accepted. The recommendation has been adopted by the relevant LEAs.

	should preserve the related protected products as if they are LPP or JM cases and report to the Commissioner the imposition of the additional conditions through the weekly reports submitted to him. This will facilitate the Commissioner's checking of the LEAs' compliance with these additional conditions.	
3.	<i>Record of assessment on heightened LPP likelihood (paragraph 7.2(c))</i>	
	In cases where an officer suspects that there may be an indication of heightened LPP likelihood in an intercepted communication but it is later assessed after deliberation by the officer's supervisor that no LPP likelihood is involved, a note should be made in the relevant transcript to record the assessment made.	Recommendation accepted. The recommendation has been adopted by the relevant LEAs.
4.	<i>Reporting of intercepted communications revealing arrest of the subject (paragraph 7.2(d))</i>	
	If the arrest of the subject is revealed from an intercepted communication, the contents of the communication should also be stated in the section 58 report submitted to the panel judge to report the arrest of the subject.	Recommendation accepted. The recommendation has been adopted by the relevant LEAs.