

Annual Report 2021 to the Chief Executive

by

The Commissioner on
Interception of Communications
and Surveillance

June 2022



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

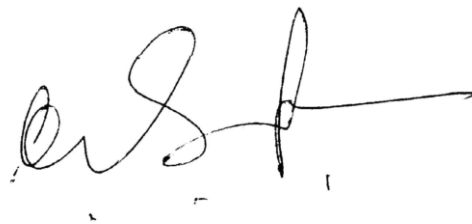
CONFIDENTIAL

Dear Madam,

Annual Report for the Year 2021

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 2021, together with its Chinese translation.

Yours sincerely,



(Yeung Chun Kuen)
Commissioner on Interception of
Communications and Surveillance

Encl: Annual Report for 2021

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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
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 case	a case that is likely to involve information protected by LPP
LPP information	information protected by LPP
non-ICSO purpose	purpose which is not related to ICSO
PJO	Panel Judges' Office
QR Code	Quick Response Code
renewal application	application for renewal of a prescribed authorization
RSM	removable storage media
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 panel judge	all or any of the panel judges appointed under section 6 of the Ordinance
the report period	the period from 1 January to 31 December 2021
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. I was appointed as the Commissioner on 17 August 2021 for a term of three years and this is my first annual report. This report covers the period from 1 January to 31 December 2021 which partly overlaps the term of office of my predecessor, Mr A. R. Suffiad, SBS, the third Commissioner whose term expired on 16 August 2021.

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^{Note 1} and Independent Commission Against Corruption. The statutory provisions ensure that the statutory activities can only be carried out when the relevant requirements stipulated in the Ordinance are satisfied.

^{Note 1} Immigration Department is not entitled to conduct interception of communications under the Ordinance.

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 on 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 the safeguarding of the freedom, privacy and other rights of Hong Kong residents 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 July 2021, my predecessor, Mr A. R. Suffiad, SBS, delivered a talk to relevant officers of the four LEAs at a forum on the interception of

communications and covert surveillance organised by the Security Bureau which I also attended. Mr A. R. Suffiad, SBS, reiterated the importance of the protection of legal professional privileged ('LPP') information and journalistic materials ('JM'), highlighted some past cases of non-compliance/irregularity, provided advices and emphasised important points to note in the application and execution of covert operations. The forum provided a good opportunity in refreshing and enhancing the knowledge and understanding of the relevant officers of the LEAs in conducting interception and covert surveillance under the ICSO regime.

1.7 Upon assuming office on 17 August 2021, I took charge of the Secretariat, Commissioner on Interception of Communications and Surveillance ('Secretariat') which has put in place well-established mechanisms and procedures to assist the Commissioner in performing his various functions under the Ordinance. I found that since the inception of the Ordinance in 2006, much has been achieved in the regulation of the statutory activities conducted under the Ordinance. I would like to acknowledge the dedication and significant contribution made by my predecessors and the staff of the Secretariat.

1.8 In September 2021, I had meetings with the panel judge in following up the recommendations put forth to the Secretary for Security by my predecessor on the amendment of the COP. Paragraphs 22 and 116 of the COP were subsequently amended and promulgated in the gazette by the Secretary for Security in October 2021. We also exchanged views on other issues including the understanding of the LEAs of the likelihood of obtaining LPP information and the current approach adopted by them in assessing such likelihood.

1.9 From September to November 2021, I met with the heads of the four LEAs, namely, the Commissioner of Customs and Excise, the Commissioner of Police, the Director of Immigration and the Commissioner, Independent Commission Against Corruption, and was

briefed by them and their senior officers on the operation of the ICSO in their respective agencies.

1.10 Between September and December 2021, I, together with the staff of the Secretariat, continued to check the compliance of the LEAs with the relevant requirements in various ways. During the periodical visits to the LEAs on the checking of files and documents and after the examination of protected products, I noticed that the LEAs had taken very cautious approaches in conducting covert operations and handling protected products in order to guard against the obtainment of information subject to LPP and JM. I rendered my views and recommendations to the LEAs on the mechanism for a more realistic assessment of the likelihood of obtaining LPP information during covert operations. I also highlighted the need for a reasonable duration of a prescribed authorization, which the LEAs should apply for based on the operational need with full justifications provided. Details of my recommendations are set out in Chapter 7 of this report.

1.11 In the report period, there was a slight increase in the number of reported new cases that were likely to involve LPP information ('LPP cases') as compared with last year while the number of non-compliance/irregularity cases has reduced. Details are given in Chapter 4 and Chapter 6 of this report respectively.

1.12 This report follows the format established by my predecessors and like them I consider it necessary to continue the practice of providing the utmost transparency of the work of the Commissioner and at the same time, taking great care not to divulge any information the disclosure of which may prejudice the prevention or detection of crime or the protection of public security, as expressly required by various provisions of the Ordinance. With that in mind, I hope I have included as

much information as possible insofar as its publication does not amount to contravention of this 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 1,259 written applications for interception made by the LEAs, of which 1,257 were granted and two were refused by the panel judge. Among the successful applications, 577 were for authorizations for the first time ('fresh applications') and 680 were for renewals of authorizations that had been granted earlier ('renewal applications').

Reasons for refusal

2.3 The two refused applications were fresh applications, which were refused because the panel judge considered that the materials provided to support the applications were insufficient.

Emergency authorizations

2.4 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 an 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.

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

Oral applications

2.6 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 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 thereon 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.

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

Duration of authorizations

2.8 For over 87% of the cases (fresh authorizations as well as renewals) granted by the panel judge 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 71 days, the shortest one was for several days only. Overall, the average duration of all the authorizations was about 31 days.

Offences

2.9 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

2.10 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.

2.11 The number of authorizations for interception revoked fully under section 57 during the report period was 486. Another 26 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.

2.12 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.

2.13 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 105 arrests but only 30 section 58 reports 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 five cases 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 or the offence(s) for which the subject was arrested were minor in nature. As regards the other arrest cases, decisions were made by the LEAs concerned to discontinue the interception operations pursuant to section 57.

2.14 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

2.15 There were 27 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 to be in order during periodical visits to the LEAs.

Arrests attributable to interception

2.16 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 76 persons, who were subjects of prescribed authorizations, were arrested as a result of or further to interception operations. In addition, 24 non-subjects were also arrested consequent upon the interception operations.

Procedure of oversight for interception

2.17 The LEAs' compliance with the requirements of the Ordinance in respect of the interception cases reported in 2021 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

2.18 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 judge/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.

2.19 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.

2.20 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

2.21 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.

2.22 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.

2.23 In addition to matters relating to minor discrepancies in the weekly reports from the LEAs and the PJO, a total of 719 applications for interception and 531 related documents/matters had been checked during the Commissioner's periodical visits to the LEAs in the report period.

Examination of interception products

2.24 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.

2.25 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.

2.26 During the report period, with the basis of selection as mentioned in paragraph 2.25 above, the interception products of 364 selected authorizations were examined.

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

2.27 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.

2.28 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

2.29 Various forms of checking, including examination of interception products in respect of the specific cases (such as LPP cases) and 364 selected authorizations, 719 applications and 531 related documents/matters, were conducted in the report period as mentioned in paragraphs 2.18 to 2.28. No unauthorized interception was found but two cases of irregularity 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) 28 written applications for Type 1 surveillance including 21 fresh and seven renewal applications; and
 - (b) five written applications for Type 2 surveillance including four fresh and one renewal applications.
- 3.4 All applications for Type 1 and Type 2 surveillance were approved.

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, one authorization for Type 2 surveillance was granted pursuant to oral application and confirmed in writing within 48 hours from the issue of the authorization. No oral application for Type 1 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 70 days whereas the shortest one was about 12 days. Overall, the average duration for such authorizations was about 28 days. The longest approved duration of Type 2 surveillance granted in the report period was about 30 days while the shortest one was about six days. The overall average duration of Type 2 surveillance executive authorizations was about 12 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, 18 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 that the subject had been arrested, the surveillance had been carried out, the anticipated activities did not materialise, the surveillance operation was not productive or the LEA concerned needed to modify the scope of the surveillance authorized. 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, 13 prescribed authorizations were subsequently revoked fully by the panel judge under section 57. The remaining five prescribed authorizations had already expired by the time the panel judge received the discontinuance reports. Thus, the panel judge could only note the discontinuance reported instead of revoking the prescribed authorizations.

3.13 As regards Type 2 surveillance, during the report period, five Type 2 surveillance operations were discontinued under section 57 before their natural expiration. The ground for discontinuance was mainly that the surveillance had been carried out. All the prescribed authorizations concerned were subsequently revoked by the authorizing officers.

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 four Type 1 and two Type 2 surveillance operations involving LEAs being aware of the arrest of subjects. The LEAs concerned were aware that 19 subjects of the Type 1 surveillance operations and three subjects of the Type 2 surveillance operations had been arrested. The LEAs concerned did not seek continuation of prescribed authorizations by way of section 58 report to the relevant authority and the covert surveillance operations concerned were discontinued pursuant to section 57.

Authorizations with five or more previous renewals

3.15 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

3.16 During the report period, one device retrieval warrant was issued by the panel judge to an LEA for retrieving a device authorized to be used under a prescribed authorization for Type 1 surveillance. While the maximum duration of device retrieval warrants allowed under the Ordinance is three months, the approved duration of such warrant was about 27 days. As regards the other Type 1 and Type 2 surveillance in the report period, no application for device retrieval warrant was made by the LEAs concerned as the devices were removed at the time of the completion of the surveillance operation, successful or otherwise.

Arrests attributable to covert surveillance

3.17 As a result of or further to surveillance operations, a total of 18 persons who were subjects of the prescribed authorizations were arrested and six non-subjects were also arrested.

Procedure of oversight for covert surveillance

3.18 The LEAs' compliance with the requirements of the Ordinance in respect of covert surveillance cases reported in 2021 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

3.19 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

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

3.21 During the year, 20 applications for Type 1 surveillance and 33 related documents/matters had been checked.

3.22 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, six applications for Type 2 surveillance and seven related documents/matters had been checked.

3.23 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

3.24 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.

3.25 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.

3.26 During the report period, with the basis of selection as mentioned in paragraph 3.25 above, the surveillance products of six selected authorizations were examined.

Checking of surveillance devices

3.27 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. All the LEAs have adopted computerised device management system ('DMS') in their device stores to keep track of surveillance devices used either for ICSO purposes or non-ICSO purposes. An inventory list of surveillance devices for each device registry is maintained with a unique serial number assigned to each

single surveillance device item for identification as well as for checking purposes.

3.28 The LEAs have also established a control mechanism for issuing and collecting surveillance devices. They maintain a register of devices withdrawn based on loan requests supported by a prescribed authorization. They also maintain a separate register of devices withdrawn for administrative or other non-surveillance purposes based on loan requests for surveillance devices in respect of which no prescribed authorization is required. Both types of register also record the return of the devices so withdrawn. 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.

Removable storage media

3.29 To better control the issue and return of removable storage media ('RSM') (e.g. memory cards, discs and tapes) along with surveillance devices, the LEAs have adopted the use of tamper-proof labels to seal the RSM 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 are clearly documented in the device register.

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 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 in 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 against the copy registers;
- (g) to compare the unique number on each item as shown in 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 necessary, 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.

Devices for non-ICSO purposes

3.32 Surveillance devices did not fall within the regulatory ambit of the Commissioner under the ICSO as long as they were not used for covert surveillance. Notwithstanding, surveillance devices that are allegedly used for non-ICSO purposes only should also be kept under close scrutiny and control because of the possibility that they might be used without authorization or unlawfully. 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. Where necessary, the LEAs are required to provide copies of the device request memo for examination by the Commissioner.

3.33 During the year, no report relating to surveillance devices for non-ICSO purposes was received from LEAs.

Results of various forms of checking

3.34 Various forms of checking, including examination of surveillance products in respect of the specific cases (such as LPP cases)

and six selected authorizations, 26 applications and 40 related documents/matters, were conducted in the report period as mentioned in paragraphs 3.19 to 3.31. During the year, there was one case of unauthorized surveillance reported by an LEA with details set out in Chapter 6. Other than that, no non-compliance or irregularity was revealed during the checking.

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. Section 31 of the Ordinance stipulates that no interception of telecommunication service of a lawyer used to provide legal advice to clients or covert surveillance at an office or residence of a lawyer ('relevant premises') may be authorized unless the lawyer concerned or the relevant premises is involved in a serious crime or a threat to public security.

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 it transpires that there is anything 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. Section 58 of the Ordinance requires that when an LEA becomes aware that the subject of interception or covert surveillance has been arrested, the LEA should submit to the relevant authority a report assessing the effect of the arrest on the likelihood that any LPP information would be obtained by continuing the interception or covert surveillance. Section 58A further requires an LEA to report to the relevant authority any inaccurate information or change of circumstances. 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 normally 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 also be notified of such occurrence. 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 2020

4.7 It was reported in paragraph 4.16 of the Annual Report 2020 that there were ten cases of heightened/assessed LPP likelihood which were still on-going beyond 2020. The authorized operations of these ten cases were discontinued in 2021 and my predecessor had completed the review of these cases in the report period. Other than one case which involved an incident referred to in Case 6.6 of Chapter 6 of the Annual Report 2020, nothing untoward was revealed by various forms of checking of the other nine LPP cases.

LPP reports received in 2021

4.8 In the report period, LEAs submitted notifications, in accordance with the COP, on 147 new cases that were likely to involve LPP information.

4.9 Amongst these 147 new LPP cases, 22 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 22 cases.

4.10 For the remaining 125 cases ^{Note 2}, 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 125 cases included:

- (a) two cases of obtaining LPP information;
- (b) one case of obtaining information suspected to be subject to LPP; and
- (c) 122 cases of heightened likelihood of obtaining LPP information:
 - (i) in 102 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;
 - (ii) in one case the panel judge allowed the continuation of the prescribed authorization but no additional condition was imposed as the case was further assessed to be without LPP likelihood; and
 - (iii) in 19 cases the concerned LEA discontinued the operations of its own accord.

4.11 Of the 147 new LPP cases, the authorized operations for 128 cases were discontinued by end of the report period. My predecessor and I had completed the review of these 128 cases. In the review of these LPP cases, all the relevant documents and records

^{Note 2} 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.

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. 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 128 LPP cases were also examined with particular reference to 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 but had not been reported to the relevant authority.

Two cases of obtaining LPP information

Case 1:

4.13 The case where LPP information was obtained involved an interception operation. At the grant of the prescribed authorization

concerned, the interception operation was not assessed to have a likelihood of obtaining LPP information. As the interception progressed, one day, the LEA concerned listened to a call and found that the call indicated heightened likelihood of obtaining LPP information. The LEA submitted to the panel judge an REP-11 report to report the LPP case. Having considered the REP-11 report, the panel judge allowed the prescribed authorization to continue with additional conditions imposed to guard against the risk of obtaining LPP information.

4.14 After listening to the call, my predecessor and I considered that the call contained information subject to LPP, but the LPP information was obtained inadvertently. I had completed the review of the case and did not find any further irregularities and decided not to take any further action.

Case 2:

4.15 The case where the LEA concerned reported the obtainment of information suspected to be subject to LPP involved an interception operation. At the grant of the prescribed authorization, the interception operation was not assessed to have a likelihood of obtaining LPP information.

4.16 As the interception progressed, one day, an officer of the LEA listened to part of a call and found that utterance indicating LPP likelihood was made in the conversation. After checking, the LEA discovered that the telephone line of the other party of the call was subscribed by a lawyer. It was also revealed that the subject under the crime investigation and this lawyer worked in the same organisation. After assessment, the LEA considered that information suspected to be subject to LPP might have been obtained.

4.17 The LEA submitted to the panel judge an REP-11 report in relation to the prescribed authorization 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. One of the additional conditions was that officers of the LEA should refrain from accessing interception products involving specified telephone numbers ('the prohibited numbers'). The interception operation was later discontinued by the LEA because it was not productive.

4.18 Having reviewed the case, my predecessor did not find any irregularities. As regards the call which involved suspected LPP information, he had listened to the call and considered that the information concerned was LPP information, which was obtained by the LEA inadvertently.

4.19 My predecessor was of the view that the obtainment of LPP information in this case could have been avoided by prohibiting those telephone numbers at the outset. As a preventive measure, my predecessor advised the LEA to ascertain the particulars of any lawyers relating to the institution/organisation that a subject is working for and include their telephone numbers as prohibited numbers when making an application for interception.

One case of obtaining information suspected to be subject to LPP

4.20 The case where suspected LPP information was obtained involved an interception operation. At the grant of the prescribed authorization concerned, 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 discontinued the operation of its own accord and submitted an REP-11 report and a discontinuance report to the panel judge, who revoked the prescribed authorization accordingly.

4.21 My predecessor had reviewed the case and did not find any irregularities. As regards the call which involved suspected LPP information, my predecessor had listened to the call and considered that the information concerned was not LPP information.

109 cases of heightened LPP likelihood and 16 cases of assessed LPP likelihood

4.22 The review of the 125 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 125 cases, two cases were related to the incidents referred to in Case 6.2 and Case 6.3 of Chapter 6. Nothing untoward was found for the remaining 123 cases.

19 on-going cases of heightened/assessed LPP likelihood

4.23 As the authorized operations for 19 cases of heightened/assessed LPP likelihood reported in 2021 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

4.24 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 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 2021

4.25 In 2021, my predecessor and I did not receive any notifications on cases with heightened/assessed likelihood of obtaining JM submitted in accordance with the COP.

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 to 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 2021

5.8 During the report period, there were four applications for examination. Of these applications, one application was received by my predecessor more than one year after the day on which the interception or covert surveillance was alleged to have taken place which came within the ambit of the exception covered by section 45(1) and could not be entertained. The remaining three applications all 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), my predecessor or 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, my predecessor or I found all the three cases not in the applicants' favour and accordingly notified each of the applicants in writing of the findings, with two 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 such 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 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, to prevent any advantage from being obtained by criminals or possible criminals over the LEAs in the latter's efforts in fighting crimes and to protect 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, including incidents which are not covered by section 54 of the Ordinance for his consideration and scrutiny so that any possible non-compliance will be properly dealt with.

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, the LEAs would normally 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 was made.

Cases occurring in 2021

6.5 In 2021, there were three cases of non-compliance/irregularity/incident while one of them involved report submitted under section 54 of the Ordinance. The review of these three cases had been completed and details of the review are set out below.

Case 6.1 : Wrong information concerning the subject in the executive authorization and the application document in support of the authorization

6.6 The incident related to an executive authorization for Type 2 surveillance reported by an LEA. An initial report and a full investigation report on the incident were submitted by the LEA pursuant to section 54 of the ICSO.

6.7 A report centre of the LEA received a report from an informant alleging that a male person ('the Subject') who was residing at Address A might have committed a crime. When making the report, the informant could only provide the Chinese name of the Subject. An officer of the report centre ('the Officer') checked the Chinese name of the Subject from a computer system and found that a male person with the same Chinese name ('the Person') was related to a completed investigation case. Without any identity document number or other identifying particulars of the Subject, the Officer simply regarded the Subject as the Person and proceeded to prepare a draft information report based on materials provided by the informant. A brief summary showing the full name in

English and Chinese as well as some other personal particulars and information of the Person generated by the computer system, was appended to the information report. These documents were passed to a duty officer of the report centre for checking. The duty officer did not observe any abnormalities.

6.8 Subsequently, the crime report was assigned to an investigation team of the LEA for investigation. Upon receipt of the information report, an officer of the team ('Case Officer') noticed that the Subject was identified as the Person who was involved in a completed investigation case. As the investigation commenced, the informant provided the phone number of the Subject ('Facility A') to the LEA to assist the investigation.

6.9 The Case Officer noted that the background of the Subject and the Person had some similarities. He also noted from examination of the investigation file relating to the completed investigation case that the Person was a resident of Address B and he used Facility B, whereas the information provided by the informant indicated that the Subject had been residing at Address A and could be reached at Facility A ('the Discrepancies'). Despite the Discrepancies, it never crossed the Case Officer's mind that the Subject might be someone other than the Person.

6.10 The Case Officer caused various background checks. However, no further personal particulars about the Subject were obtained. Since the assumption that the Person was the Subject was not disproved, the Case Officer eventually came to a conclusion that they were the same person who probably had more than one residence and one phone number.

6.11 The supervisor of the Case Officer had knowledge of the Discrepancies. However, she wrongly took the same view as that of the Case Officer and prematurely jumped to the conclusion that the Person

and the Subject were the same person. Besides, the supervisor did not bring the Discrepancies to the attention of the head of the investigation team.

6.12 As the crime investigation progressed, the LEA intended to conduct Type 2 surveillance on conversations between the informant and the Subject. Based on the wrong assumption that the Subject and the Person were the same person, the supervisor set out the full name in Chinese and English of the Person, Address A and Address B in the statement in writing in support of his application for the Type 2 surveillance operation. The English name of the Person was mentioned repeatedly in the entire statement in writing and the draft executive authorization. The making of the application was endorsed by the head of the investigation team and an executive authorization for Type 2 surveillance was granted by an authorizing officer of the LEA. A surveillance operation was carried out pursuant to the authorization on the following day.

6.13 Several months later, when the Subject was arrested, the LEA discovered from his identity card that his English name was different from that of the Person and became aware that the Subject and the Person were in fact different persons. The supervisor then realised that she had mistaken the Person for the Subject and that the personal particulars of the Subject provided in the statement in writing were incorrect.

6.14 The LEA considered that, despite that the Type 2 surveillance had all along been intended to be conducted on the Subject, the fact that the Person's personal particulars being furnished in the statement in writing had rendered the surveillance operation conducted without the authority of a prescribed authorization, thereby constituting a case of non-compliance.

6.15 My predecessor asked the LEA if it was a norm for it to match one person with another person in an on-going or completed enquiries simply based on their names. The LEA clarified that the handling approach adopted by the Officer in this case was not a norm. As an improvement measure, the LEA had reminded officers of the report centre that they should adopt a more cautious approach when preparing information reports in order to avoid linking wrong persons from the computer system to the reports.

6.16 My predecessor had reviewed the case and found that the particulars in the information report was presented in a way that might have caused the Case Officer and his supervisor to form the wrong impression that the Subject and the Person were the same person. However, according to the LEA, the information provided by officers of the report centre was only for the reference of investigators who should in the course of investigation, verify the information through their own enquiries. In the examination of protected products relating to the executive authorization, no irregularity was revealed.

6.17 My predecessor agreed with the findings of the LEA that the case did not involve any bad faith or ulterior motive on the parts of any of the officers concerned. He also agreed with the LEA's recommendation that a written warning (disciplinary) be given to the supervisor, a verbal warning (disciplinary) be given to the Case Officer and an advice (non-disciplinary) be given to each of the head of the investigation team and the duty officer of the report centre.

6.18 As regards the Officer, the LEA proposed issuing an advice (non-disciplinary) to him, which my predecessor considered too lenient. He noted that the Officer did not follow the established practice and his inadequacy in the preparation of the information report concerned precipitated the mistakes of officers of the investigation team in

performing ICSO-related duties. My predecessor noted that the Officer had already left the LEA about two months after the LEA's submission of investigation report; and decided not to take the matter further, otherwise, he might request the LEA to review the action against the Officer.

6.19 In this case, the identity of a subject of covert operation was confirmed by just a Chinese name and the LEA officers of different levels performed their duties based on their erroneous assumptions. The situation was not satisfactory. My predecessor emphasised to the LEA that its officers must not rely on their assumptions when performing any duties or preparing any documents under the ICSO regime.

Case 6.2 : Delay in reporting to the panel judge a material change in circumstances in relation to a prescribed authorization

6.20 An LEA reported an incident where the reporting of a material change in the circumstances in relation to a prescribed authorization had been delayed for a few days. This incident related to two LPP cases referred to in Chapter 4.

6.21 Two interception operations were conducted on two different subjects ('Subject A' and 'Subject B'). At the grant of a prescribed authorization in respect of Subject A, the panel judge imposed additional conditions to guard against the risk of obtaining LPP information. One of the additional conditions was that officers of the LEA should refrain from accessing interception products involving a telephone number ('prohibited number'). This prohibited number, used by Subject B, was the subject of an interception under another prescribed authorization in respect of Subject B.

6.22 One day, the LEA learnt that there was another telephone number ('new telephone number') used by Subject B. For the interception on Subject B, the LEA made an application to the panel judge for interception of this new telephone number. However, for the interception on Subject A, the responsible officer did not, at the time, realise the need to report to the panel judge the use of the new telephone number by Subject B as a material change in circumstances. It was a few days after the learning of the use of the new telephone number by Subject B that the responsible officer, during a review of the respective interception operations on Subject A and Subject B, realised the need for the submission of an REP-11 report to the panel judge on the material change in circumstances. Subsequently, the LEA submitted an REP-11 report to the panel judge to report the material change in circumstances. Upon consideration of the REP-11 report, the panel judge revised the additional conditions of the prescribed authorization in respect of Subject A by including the new telephone number as an additional prohibited number.

6.23 The investigation by the LEA concluded that the delay in reporting was mainly due to a lapse of concentration of the responsible officer, who, at the material time, focused on the preparation of the application for the interception of the new telephone number and was heavily engaged in other urgent interception-related duties. There was no indication of any foul play or ulterior motive. The LEA also pointed out that, when monitoring the interception on Subject A, no interception products involving the new telephone number were accessed to by any officer after the LEA learnt of the use of the new telephone number by Subject B. The LEA proposed to give the responsible officer a verbal advice (non-disciplinary) for her lack of vigilance in making a timely report to the panel judge.

6.24 During review of the case, my predecessor checked the related ATR and confirmed that the relevant interception products were not

listened to by any officer after the LEA became aware of the use of the new telephone number by Subject B. My predecessor accepted the explanations provided by the LEA and considered the proposed action against the responsible officer appropriate.

Case 6.3 : Non-reporting of a call with heightened LPP likelihood

6.25 In checking the protected products of a case, it was noticed that the contents of one call, which appeared a few days before a Reported LPP Call, contained information indicating heightened LPP likelihood. The LEA concerned was requested to confirm whether any assessment of the likelihood of obtaining LPP information arising from the call was made and to provide the assessment result. The LEA replied that the officer concerned who monitored the interception operation was not aware of the content of the call which indicated heightened LPP likelihood due to the circumstances in which the call was made. Consequently, the LPP likelihood arising from this call was not noticed and therefore not reported to the panel judge. Notwithstanding this, checking of the protected products of this case did not reveal that any LPP information was obtained. The LEA proposed to give a verbal advice (non-disciplinary) to the officer for reminding him to maintain a high level of vigilance when performing his duty.

6.26 While I accepted the LEA's explanation for missing out the reporting of LPP likelihood from the concerned call, I emphasised to the LEA that all officers should handle all information gathered from interception operations with high vigilance to guard against the risk of obtaining LPP information. The LEA's proposed action against the officer concerned was considered acceptable.

CHAPTER 7

RECOMMENDATIONS TO HEADS OF LAW ENFORCEMENT AGENCIES

7.1 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.

7.2 In the discussions with the LEAs during my visits 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 to the LEAs to better carry out the objects of the Ordinance:

(a) Assessment of LPP likelihood

In making an application for a covert operation that is assessed to be likely to obtain LPP information and reporting to the panel judge through an REP-11 report on heightened likelihood of obtaining LPP information or a section 58 report on arrest of the subject, LEAs, instead of adopting a mechanical approach, should explain in the application document, REP-11 report or section 58 report the considerations taken into account in their assessment of LPP likelihood. This will facilitate the panel judge's assessment of the LPP likelihood, determination on the application or continuation of the operation and imposition of additional conditions to guard against the risk of obtaining LPP information.

(b) Reasonable duration of prescribed authorizations

In accordance with sections 10, 13, 16 and 19 of the Ordinance, the maximum duration of a prescribed authorization for interception or covert surveillance allowed is three months. In making an application for a prescribed authorization, LEAs should apply for a reasonable duration of the prescribed authorization based on the operational need with full justifications provided instead of keeping to a fixed duration which may not properly reflect the operational need.

(c) Detailed description of the operation in applications for covert surveillance

The panel judge may not be familiar with the details involved in the execution of covert surveillance operations. When making an application for covert surveillance, LEAs should set out clearly in the application document details of the operation as well as all the constraints and difficulties likely to occur in the course of the operation. This will facilitate the panel judge's consideration of the application before making suitable orders.

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	577	0
	Average duration	31 days	–
(ii)	Number of authorizations renewed	680	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	27	Not applicable
(vi)	Number of applications for the issue of authorizations refused	2	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	21	4	0
	Average duration	27 days	12 days	—
(ii)	Number of authorizations renewed	7	1	Not applicable
	Average duration of renewals	30 days	7 days	—
(iii)	Number of authorizations issued as a result of an oral application	0	1	0
	Average duration	—	14 days	—
(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 3}
[section 49(2)(b)(i)]

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
Offence of importing or exporting unmanifested cargo	Cap. 60	Section 18, Import and Export Ordinance
Arranging passage to Hong Kong of unauthorized entrants	Cap. 115	Section 37D, Immigration Ordinance
Trafficking in dangerous drug	Cap. 134	Section 4, Dangerous Drugs Ordinance
Bookmaking	Cap. 148	Section 7, Gambling Ordinance
Bribery	Cap. 201	Section 4, Prevention of Bribery Ordinance
Corrupt transactions with agents	Cap. 201	Section 9, Prevention of Bribery Ordinance
Robbery	Cap. 210	Section 10, Theft 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
Dealing with property known or believed to represent proceeds of indictable offence	Cap. 455	Section 25, Organized and Serious Crimes Ordinance
Conspiracy to defraud	—	Common Law

^{Note 3} 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 4}
[section 49(2)(b)(i)]**

Offence	Chapter No. of Laws of Hong Kong	Ordinance and Section
Arranging passage to Hong Kong of unauthorized entrants	Cap. 115	Section 37D, Immigration Ordinance
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
Robbery	Cap. 210	Section 10, Theft 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
Forcible taking or detention of person, with intent to sell him	Cap. 212	Section 42, Offences against the Person Ordinance
Aiders, abettors and accessories	Cap. 221	Section 89, Criminal Procedure Ordinance
Dealing with property known or believed to represent proceeds of indictable offence	Cap. 455	Section 25, Organized and Serious Crimes Ordinance

Note 4 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 5}		
	Subject	Non-subject	Total
Interception	76	24	100

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 6}		
	Subject	Non-subject	Total
Surveillance	18	6	24

^{Note 5} Of the 100 persons arrested, 22 were attributable to both interception and surveillance operations that had been carried out.

^{Note 6} Of the 24 persons arrested, 22 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 102.

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)]

(i)	Number of device retrieval warrants issued	1
	Average duration	27 days
(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	33	Interception & Surveillance	During the report period, 33 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 745 applications and 571 related documents/matters had been checked. (See paragraph 2.23 of Chapter 2 and paragraphs 3.21 and 3.22 of Chapter 3.)
(c) Examination of protected products at the LEAs' offices	34	Interception & Surveillance	In 2021, 34 visits were made to the LEAs for examination of protected products. Specific cases such as LPP cases reported by the LEAs, interception products of 364 selected

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
			<p>authorizations and surveillance products of six selected authorizations were examined.</p> <p>(See paragraph 2.26 of Chapter 2 and paragraph 3.26 of Chapter 3.)</p>
(d) LPP cases reviewed by the Commissioner	138	Interception (10 reviews)	<p><u>Outstanding LPP cases in 2020</u> Ten cases of heightened/assessed LPP likelihood were still on-going beyond 2020 and the authorized operations of these cases were discontinued in 2021.</p> <p>The review of these cases had been completed. Other than one case which involved an incident referred to in Case 6.6 of Chapter 6 of the Annual Report 2020, nothing untoward was revealed.</p> <p>(See paragraph 4.7 of Chapter 4.)</p>
		Interception	<p><u>Cases of obtaining LPP information – Case 1</u> An LEA found an intercepted call with heightened LPP likelihood. The Commissioner considered that LPP information was obtained inadvertently. Details are set out in paragraphs 4.13 and 4.14 of Chapter 4.</p>
		Interception	<p><u>Cases of obtaining LPP information – Case 2</u> An LEA reported that information suspected to be subject to LPP might have been obtained from an intercepted call. The then Commissioner considered that the information concerned was LPP information which was obtained by the LEA inadvertently. Details are set out in paragraphs 4.15 to 4.19 of Chapter 4.</p>

Number of reviews conducted under section 41(1)		Interception/ Surveillance	Summary of reviews
		Interception	<p><u>One case of obtaining information suspected to be subject to LPP</u> The LEA encountered a call which contained information suspected to be subject to LPP. The then Commissioner considered that the information concerned was not LPP information. Details are set out in paragraphs 4.20 and 4.21 of Chapter 4.</p>
		Interception & Surveillance (125 reviews)	<p><u>109 cases of heightened LPP likelihood and 16 cases of assessed LPP likelihood</u> All the relevant documents and records were checked and the protected products were examined. Except for the two LPP cases mentioned in Case 6.2 and Case 6.3 of Chapter 6, nothing untoward was found. (See paragraph 4.22 of Chapter 4.)</p>
(e) Non-compliance/irregularities/incidents reviewed by the Commissioner	2	Interception	<p><u>Case 6.2</u> There was a delay in reporting to the panel judge a material change in circumstances in relation to a prescribed authorization. Details are set out in paragraphs 6.20 to 6.24 of Chapter 6.</p>
		Interception	<p><u>Case 6.3</u> A call with heightened LPP likelihood was not reported to the panel judge. Details are set out in paragraphs 6.25 and 6.26 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	1	Surveillance	<u>Case 6.1</u> The information concerning the subject provided in the executive authorization and the application document in support of the authorization was incorrect. Details are set out in paragraphs 6.6 to 6.19 of Chapter 6.

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 cases	2	Interception	<u>Case 6.2</u> Delay in reporting to the panel judge a material change in circumstances in relation to a prescribed authorization.
		Interception	<u>Case 6.3</u> Non-reporting of an intercepted call with heightened LPP likelihood to the panel judge.
			(For details, see item (e) 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	1	Surveillance	<p><u>Case 6.1</u> Provision of incorrect information concerning the subject in the statement in writing in support of an application for an executive authorization, resulting in a non-compliance that the surveillance operation was conducted without the authority of an authorization.</p> <p>(For details, see item (c) under section 41(2) in Table 5 and Chapter 6.)</p>

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
4	0	0	3	1

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 7}	3	0	0	3

Note 7 Of the three notices, two 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]	Nil	Not applicable	Not applicable
Recommendations to departments for better carrying out the objects of the Ordinance or the provisions of the COP [section 52]	3	Interception & Surveillance	<p>(a) Explaining in the application document, REP-11 report or section 58 report the considerations taken into account in the assessment of LPP likelihood in respect of a covert operation.</p> <p>(b) Applying for a reasonable duration of the prescribed authorization for interception or covert surveillance based on the operational need with full justifications provided in the application.</p> <p>(c) Setting out clearly in the application document details of the covert surveillance operation as well as all the constraints and difficulties likely to occur in the course of the operation.</p> <p>(See paragraph 7.2 of Chapter 7.)</p>

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	2
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>(i) An officer-in-charge took charge of the conduct of a Type 1 surveillance which involved a non-compliance with the term of the prescribed authorization concerned and irregularities in the issue of surveillance devices.</p> <p>(ii) The supervisor of the officer-in-charge mentioned in (i) above overlooked the additional condition imposed on the prescribed authorization of which she was the applicant and failed to give proper instructions to the officer-in-charge.</p> <p>(iii) A directorate officer, who was the head of the section overseeing the performance of the supervisor mentioned in (ii) above, failed to spot the imposition of the additional condition in the prescribed authorization during the review process.</p> <p>(iv) An officer of the device store did not notice the additional condition imposed in the prescribed authorization and issued a surveillance device with a specific function which was incompatible with the additional condition to the frontline officers on three occasions.</p>	<p>Verbal warning</p> <p>Written warning</p> <p>Verbal warning</p> <p>Verbal warning</p>

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
	<p>(v) The device store manager did not notice the additional condition imposed in the prescribed authorization and approved the issue of a surveillance device with a specific function which was incompatible with the additional condition to the frontline officers on three occasions.</p> <p>(See paragraphs 6.14 to 6.42 of Chapter 6 of Annual Report 2020.)</p>	Written warning
<p><u>Case 2</u> Surveillance</p>	<p>(i) An officer, after becoming aware of an alias of a subject of both interception and covert surveillance, only prepared an REP-11 report in respect of the prescribed authorization for interception but omitted to prepare an REP-11 report in respect of the prescribed authorization for surveillance for submission to the panel judge concurrently.</p> <p>(ii) The supervisor of the officer mentioned in (i) above was not aware of the omission of an REP-11 report in respect of the prescribed authorization for surveillance when a report in respect of the prescribed authorization for interception reporting the alias of the same subject was submitted to the panel judge, and did not provide to the panel judge a full picture on the delay in the reporting in the belated REP-11 report in respect of the prescribed authorization for surveillance.</p>	<p>Verbal warning</p> <p>Verbal warning</p>

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
	<p>(iii) A senior officer failed to ascertain if a separate report in respect of any prescribed authorization for surveillance was required for concurrent submission with the REP-11 report in respect of the prescribed authorization for interception and failed to provide to the panel judge a full picture on the delay in the reporting in the belated REP-11 report in respect of the prescribed authorization for surveillance.</p> <p>(See paragraphs 6.44 to 6.56 of Chapter 6 of Annual Report 2020.)</p>	Verbal warning
<p><u>Case 3</u> Interception</p>	<p>(i) A supervisor of the interception unit conducted supervisory check on a facility and listened to seven calls during suspension of monitoring of interception on that facility due to detection of a call with information indicating heightened LPP likelihood.</p> <p>(ii) A supervisor of a registry, after knowing that a subject of interception had entered a building in which some premises in relation to legal proceedings and lawyers were accommodated, did not actively follow up on the matter and timely report the information to a senior officer, leading to a considerable delay in determining whether there might be a heightened LPP likelihood.</p>	<p>Written warning</p> <p>Verbal warning</p>

Case number and nature of operation	Brief facts of case	Broad nature of the disciplinary action
	<p>(iii) A senior officer made assessments on the LPP likelihood in respect of the interception operation upon receipt of separate reports from the supervisor of the interception unit mentioned in (i) above concerning the LPP call, and the supervisor of the registry mentioned in (ii) above concerning the subject's visit to premises in relation to legal proceedings and lawyers and considered that there might be an irregularity in the handling of the information about the subject's visit to the said premises.</p> <p>(See paragraphs 6.77 to 6.94 of Chapter 6 of Annual Report 2020.)</p>	Verbal warning
<p><u>Case 4</u> Surveillance</p>	<p>(i) An officer wrongly assumed that a subject of an investigation case and a person of another completed investigation case were the same person despite the discrepancies in the information provided by an informant and the information obtained from the completed case.</p> <p>(ii) The supervisor of the officer mentioned in (i) above mistook a person of a completed investigation case for the subject of an investigation case and provided incorrect personal particulars of the subject in the statement in writing in support of an application for an executive authorization for Type 2 surveillance, rendering a surveillance operation conducted on the subject without the authority of a prescribed authorization.</p> <p>(See paragraphs 6.6 to 6.19 of Chapter 6.)</p>	<p>Verbal warning</p> <p>Written 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 2021 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 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, only two of the 1,259 applications for interception were refused and the reason for refusal was that the materials supporting the applications were insufficient. As regards covert surveillance, all the 34 applications 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 but they tended to apply for a fixed duration of the prescribed authorization which may not properly reflect the operational need. I have advised the LEAs that they should apply for a reasonable duration of the prescribed authorization based on the operational need of individual cases with full justifications provided.

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 2.17 of Chapter 2 and paragraph 3.18 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 also 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. A few cases of non-compliance/irregularity/

incident are 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 In 2021, 147 new LPP and no JM cases were reported. Except 19 LPP cases which were still on-going beyond the report period, review of 128 LPP cases had been completed. Of the 128 LPP cases, except for those specifically mentioned in Cases 6.2 and 6.3 of Chapter 6, nothing untoward was found. There were two cases on actual obtainment of information subject to LPP as detailed in paragraphs 4.13 to 4.19 of Chapter 4. At the grant of the relevant prescribed authorizations, the interception operations were not assessed to have a likelihood of obtaining LPP information. In each case, when the LEA concerned encountered a call which indicated heightened LPP likelihood or 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 authorizations to continue with

additional conditions imposed. The review of one of these two cases was completed by me. In this case, both my predecessor and I had listened to the call concerned and considered that the information contained therein was subject to LPP instead of indicating heightened LPP likelihood as assessed by the LEA. I considered that the LPP information was obtained by the LEA inadvertently and no further irregularity was found. For the other case which was reviewed by my predecessor, after listening to the relevant call, my predecessor confirmed that the information concerned was LPP information and no other irregularity was found. My predecessor considered that although the LPP information was obtained by the LEA inadvertently, it could have been avoided by prohibiting the telephone numbers concerned at the outset and he had provided the LEA with proper advice to avoid similar occurrence.

9.10 With regard to the ten on-going LPP cases reported in the Annual Report 2020, the authorized operations concerned were discontinued in 2021. Other than one case which involved an incident referred to in Case 6.6 of Chapter 6 of the Annual Report 2020, nothing untoward was revealed by various forms of checking of the other nine LPP cases.

9.11 The LEAs were observed to have recognised the importance of protecting information which might be subject to LPP. They continued to adopt a very cautious approach in handling these cases. However, their assessment of LPP likelihood has been rather mechanical. I appreciated the continued and tireless 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 but I advised the LEAs that when making an assessment on the likelihood of obtaining LPP information, they should take into account the background of the cases

and all the relevant circumstances instead of adopting a mechanical approach.

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 2021, there were three cases of non-compliance/irregularity/incident.

9.13 For all the cases reported in Chapter 6, my predecessor and I did not find any deliberate disregard of the statutory provisions or the COP nor have we found any ulterior motive or ill will on the part of the officers involved. The officers of the LEAs were nevertheless reminded that they should always stay alert and exercise care at 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 were positive to my recommendations and in reviewing and tightening up procedures and guidelines aiming for better operation of the ICSO regime. They also took initiative to implement system enhancements whenever necessary to prevent any technical mistakes or to avoid human errors.

CHAPTER 10

ACKNOWLEDGEMENT AND WAY FORWARD

Acknowledgement

10.1 Since my assumption of office as the Commissioner in August 2021, I have received great assistance and support from various parties including the panel judge, the Security Bureau, the LEAs and the communications services providers. Their cooperation and support is vital and valuable to me in performing the oversight and reviewing functions under the ICSO smoothly and efficiently. I would like to express my sincere thanks to all of them.

10.2 I would also point out that despite the occasional but rare incidents of non-compliance as a result of inadvertence, the LEAs have performed their duties with enthusiasm and professionalism.

Way forward

10.3 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. I am very glad to see that various suggestions and recommendations on the procedural matters and control mechanism put forth by my predecessors in previous years were well implemented by the LEAs to enhance compliance with the Ordinance and the COP. It is unavoidable that new problems and issues may surface from time to time and also I believe that there is always room for improvement and fine-tuning, even for established procedures and systems. The attitude of the relevant officers and the methodology used in discharging their ICSO duties may need to be updated from time to time.

In the course of discharging my duties in overseeing the performance of the LEAs over the compliance with the requirements of the Ordinance and in performing my reviewing functions as the Commissioner, I will use my best endeavour to do whatever is necessary to ensure that the highest standard of compliance by the LEAs will be observed.

10.4 I look forward to the continuous support and cooperation of all the parties involved in facilitating the work of the Commissioner under the ICSO.