

INTERCEPTION OF COMMUNICATIONS ACTS 1988 AND 2001

To: His Excellency Sir Richard Gozney, Lieutenant Governor of the Isle of Man, in Council.

REPORT OF SUSIE ALEGRE, INTERCEPTION OF COMMUNICATIONS COMMISSIONER

for the year ended 31st December 2018.

1. I was appointed pursuant to section 9(1) of the Interception of Communications Act 1988 (as amended) [the Act] by warrant dated 15th November 2014 and I have the honour to submit this report made pursuant to section 9(6) of the Act.
2. The Act requires me to keep under review the carrying out by the Chief Minister of the functions conferred on him by sections 2 to 5 of the Act and the adequacy of any arrangements made for the purposes of section 6 of the Act which provides for safeguards in the implementation of the Act. Section 9A of the Theft Act 1981 extends those requirements to warrants issued under that legislation as well.
3. If it appears to the Governor in Council, after consultation with the Commissioner, that the publication of any matter in an annual report would be prejudicial to national security or to the prevention or detection of crime, the Governor in Council may exclude that matter from the copy of the report as laid before Tynwald. I haven't included a confidential annexe on this occasion as I don't believe that there is any such matter in this report. I have, however, submitted a separate report under section 9(5) of the Act which provided detailed suggestions on practical and operational issues which would be inappropriate to include in the annual report as they could be prejudicial to the prevention or detection of crime and are relevant purely on an operational level.
4. As part of my review, I have met with many of the people responsible for implementing the Act including the Chief Constable and other police officers, the Attorney General and the Solicitor General, and staff from the Registry and Cabinet Office. I met with the representative of one of the communications service providers but was unable to meet with others. In addition, to inform the review with the wider context in the Isle of Man I met with the Isle of Man Information Commissioner and the Surveillance Commissioner. I have also met with my counterpart for Jersey and Guernsey to gain insights into the workings of similar sized jurisdictions. And I met with staff from the UK Investigatory Powers Commissioner Office (IPCO). I am very grateful for the valuable insights they have provided which are extremely useful in understanding the functioning of the Act in a wider context.

5. It is not my role to dictate policy and legislative change, but I think it is important to highlight areas where the current legislative framework is problematic. To this end I am working with the Information Commissioner and the Surveillance Commissioner and his Deputy to produce a joint statement on the issues that merit urgent attention which is currently being finalised separately.

Scope of Warrants

6. During the year to 31st December 2018, 43 new warrants were issued under the Act. But 10 of those warrants were issued in error because they should more properly have been processed as renewals of existing warrants. This mistake was noted before the warrants were actioned and therefore it had no practical impact. Taking this into account, a total of 33 warrants were issued and actioned during the year. No certificates were issued under s. 3(3)(b) of the Act.

7. I have reviewed all IOCA warrants and have conducted an audit of the supporting documentation provided. I am satisfied that all these warrants were considered as necessary for the purpose of preventing or detecting serious crime, one of the grounds required by section 2(2) the Act. It appears that consideration had been given in the applications as to whether or not the information needed could be acquired by any other means that would be less intrusive.

8. The requirement in the Act that a warrant for interception should be necessary and proportionate to its stated aims reflects the case law of the European Court of Human Rights. The application of the Human Rights Act 2001 along with developments in international human rights standards relating to interception of communications has reinforced this requirement. The 2015 European Court of Human Rights judgment in [Zhakarov v Russia](#)¹ provides a very useful summary of the applicable international human rights law standards. This includes an indication that the content of the interception authorisation must clearly identify a specific person to be placed under surveillance or a single set of premises as the premises in respect of which the authorisation is ordered. Such identification may be made by names, addresses, telephone numbers or other relevant information.²

9. The Act sets out the Scope of purely domestic warrants in s.3:

“(1) Subject to subsection (2), the interception required by a warrant shall be the interception of –

(a) Communications described in the warrant which are likely to be, or to include, communications from, or intended for, one particular person named or described in the warrant, or

(b) Communications described in the warrant which are likely to be or to include, communications originating on, or intended for transmission to, a single set of premises named or described in the warrant,

And such other communications (if any) as it is necessary to intercept in order to intercept communications falling within paragraph (a) or (b).

(2) The warrant shall describe the communications the interception of which is required by it by reference to addresses, numbers, apparatus or other factors specified in the warrant as the factors or combination or factors to be used for identifying those communications.....”

¹ (Application no. 47143/06), Grand Chamber Judgment of 4 December 2015

² Ibid At para 264

10. The model of warrants has evolved over time to meet the varying needs of confidentiality, data protection and operational practicality. In my report under section 9(5) of the Act I have highlighted the requirement that a domestic warrant relates to a particular person or a single set of premises although the Act permits the interception of communications both from or intended for that person or premises. I understand that the format of the warrants is currently under review to ensure that this is made clear and to minimise the risk of errors.

Issue, Duration and Amendment of IOCA Warrants

11. At the time of my review no warrants were outstanding from the year ending 31st December 2018. No warrants were amended. All warrants and renewals were carried out within the relevant time frames under the Act. Several of the warrants were renewed up to 3 times before they were cancelled. All warrants were cancelled within 5 months of their start date. It is worth noting that the relevant periods under s. 4 of the Act (2 months for a warrant and 1 month for a renewal) are significantly shorter than the relevant periods under the UK Investigatory Powers Act 2016 (6 months). This means that the Act guarantees regular review and consideration of renewals to ensure that a warrant continues to be necessary and proportionate.

Theft Act Warrants

12. There were 3 Theft Act warrants issued in the period under review of which 2 were deployed. The issues I highlighted about the Theft Act in my previous reviews remain relevant. In particular, the lack of provision to remove a surveillance device is of concern with regard to the requirement of legality under the Human Rights Act 2001 as the legal provisions relied upon to remove devices when they are no longer necessary are opaque. This means that warrants are essentially open-ended, and the Chief Minister is not informed when a surveillance device is no longer in use.

13. Theft Act warrants are only required when it is necessary to enter onto private property to install a surveillance device. When the device can be installed in a public space, the Regulation of Surveillance Etc. Act 2006 (ROSE Act) provisions apply, and this comes under the purview of the Surveillance Commissioner. This creates an unnecessary administrative burden whereby warrants may need to be sought under both the Theft Act and the ROSE Act to cover all eventualities. In my view, this does not serve to improve accountability but rather is an unnecessary use of resources. I would recommend that consideration should be given to resolving the anomalies in the Theft Act and streamlining the system with other surveillance measures contained in the ROSE Act.

Safeguards

14. Section 6 of the Act provides several safeguards for the implementation of the Act and a part of my review is dedicated to assessing the adequacy of the safeguards.

A – Purely Domestic Warrants

15. The safeguards include an obligation on the Chief Minister to make arrangements to limit the extent of disclosure and copying of intercepted material to that which is strictly necessary under the Act and to ensure that any material is destroyed as long as its retention is no longer necessary. They apply to intercept material but also to summaries of the material and other information arising out of the intercept. These safeguards are important both from a data protection and a security perspective.

16. In previous reviews, I raised concerns about the lack of clear guidelines to implement the safeguards. In response, new guidelines have been put in place and I note that they are now operational and have greatly improved the process.

B – Warrants Involving Co-operation with Other Jurisdictions

17. Another issue I raised in previous reviews was the question of safeguards as required by section 6 of the Act in cases of co-operation with other jurisdictions like the UK. It is still not clear to me what safeguards would apply to intercepted material in the event of a request for interception from another jurisdiction.

18. As regards the UK, I have had some clarifications from the Investigatory Powers Commissioner's Office for which I am grateful. I understand that any request for interception of communications covered by the scope of the Manx Act would be made through the Isle of Man authorities so that a warrant could be issued under the Act. However, there is still a lack of clarity as to the safeguards that would apply for the disclosure, copying, retention and destruction of intercepted material once it has been shared with the relevant authorities off the Island. In addition, the UK Investigatory Powers Act (IPA) 2016 brings in new and extensive powers³ such as equipment interference⁴ and bulk powers⁵ that have no parallel in Manx legislation. The IPA includes provisions on extra-territorial application. It is unclear how those provisions would apply on the Island for investigatory powers that are not reflected in Manx legislation.

19. While I do not have any concrete concerns regarding this review period, it may be helpful for the Manx authorities to establish a memorandum of understanding with their UK counterparts to clarify the way in which cooperation should take place if needed in the future. This should cover both the applicable safeguards for processing of intercept material acquired through Manx warrants and the procedures relating to the use of investigatory powers where there is no relevant Manx legislation in place.

C - Consultation

18. Section 6 of the Act includes a requirement for consultation with the Attorney General. I can see that this has been done in relation to all warrants.

D – The Register

19. The Act charges the Chief Registrar with maintaining a register of warrants including particulars provided by the Chief Minister of every warrant along with renewals, amendments and cancellations. As at the date of submission of this report, the relevant paperwork had not been submitted to the Registry. While I was able to consult the paperwork at the Cabinet Office, the warrants will need to be submitted to the Registry in order to comply with the Act and ensure future accountability. I would recommend that submissions should be made throughout the year as warrants are issued in order to avoid any gaps in the register in the future.

20. Unlike the records kept by the Cabinet Office and the Isle of Man Constabulary, the register of warrants has no time limit and therefore the Registry has a significant amount of historical

³ For details of the powers provided for in the Investigatory Powers Act 2016 see: <https://www.legislation.gov.uk/ukpga/2016/25/contents/enacted>

⁴ See Part 5 of the IPA 2016

⁵ See Part 6 of the IPA 2016

records. Due to the quantity of papers, a review of the storage arrangements has been made and I understand there are plans to store historical records in an alternative high security location.

Conclusions

21. The scale of interception activity under the Act on the Island has been steadily dropping over the past three years. This should be viewed as a positive development in terms of respect for the principles of necessity and proportionality in the use of intrusive investigatory techniques. However it may be useful to carry out a review of the use of investigatory techniques as a whole on the Island in order to assess any gaps in the operational and oversight frameworks that apply to intrusive techniques in general.

22. While I have not repeated them here, the issues raised in my previous reports about the shortcomings of the current legislation in terms of international human rights law and the lack of clarity about arrangements for cooperation with other jurisdictions remain. I would welcome the opportunity to engage further on possible ways of addressing these issues.

A handwritten signature in black ink, appearing to read 'Susie Alegre'.

Susie Alegre
Interception of Communications Commissioner

7th March 2019