

INTERCEPTION OF COMMUNICATIONS ACTS 1988 AND 2001

To: His Excellency Adam Kenneth Compton Wood, Lieutenant Governor of the Isle of Man, in Council.

**REPORT OF SUSIE ALEGRE, INTERCEPTION OF COMMUNICATIONS COMMISSIONER
for the year ended 31st December 2014.**

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.
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.

Approach to the Review

4. I realise that this report is quite different in terms of its form and content to the reports of my predecessors. My approach to the review has been informed by my consideration of the recent reports of my counterparts in the UK and in Jersey and Guernsey as well as the last report of the Isle of Man Surveillance Commissioner and the general trend for greater transparency in the scrutiny of public functions. I note that the Chief Constable's current strategic plan includes a desire to seek and embrace greater scrutiny and I hope that this review will feed into that.
5. In preparation for my annual review of the Act, I met with the Interception of Communications Commissioner's Office in the UK in order to inform myself of recent developments and best practice in oversight of the interception of communications. While it is clear that the law, scale and political context of interception of communications are very different in the UK, I believe that the overarching principles of effective oversight in this area apply equally to the Isle of Man. I have therefore decided to approach the annual review through an end to end assessment of the process for the issuing and implementation of warrants, highlighting any areas of concern or recommendations for potential improvement.
6. 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 Acting Attorney General and

Government Advocate, the Chief Registrar and his staff and staff from the Cabinet Office as well as representatives from communications service providers (CSP's) on the Island. I am very grateful for the valuable insights they have provided which have helped to give me a practical picture of the functioning of the Act. Unfortunately the Chief Minister and the Minister for Home Affairs weren't available to meet with me in time for the drafting of this review but I hope to meet with them during the course of the year to inform my next annual review.

7. Since the Act was last amended in 2001, there have been significant developments in law and technology as well as in the nature of serious crime and threats to national security. The functioning of the Act needs to be considered in the wider context of relevant law and practice. I therefore met with the Surveillance Commissioner and with the Data Protection Supervisor on the Island as elements of their work touch on the functioning of the Act. I have also taken into account the impact of the Human Rights Act 2001 and relevant international developments in human rights law in my assessment of the adequacy of safeguards and other arrangements for the implementation of the Act.

Scope of Warrants

8. During the year to 31st December 2014, 43 warrants were issued under the Act and 6 further warrants were issued under the Theft Act 1981 section 9A. I note that this is a slight decrease in numbers as compared to 2013 but is still a relatively high number of warrants compared to previous years.
9. I don't believe that the number of warrants gives a true picture of the relatively small scale of interception activity that is going on. Having reviewed the supporting documentation for the warrants, I am satisfied (as was my predecessor) that the main reason for the increased numbers is the need to keep pace with technological advances. I believe format and process may also contribute to the apparently high figures. Overall, it appears to me that the scale of interception activity is appropriate to the identified needs.
10. I have reviewed all 49 warrants and have conducted an audit of the supporting documentation provided. I am satisfied that all these warrants were necessary either in the interests of national security or for the purpose of preventing or detecting serious crime as required by section 2(2) the Act. It is also clear that consideration had been given as to whether or not the information needed could be acquired by any other means.
11. 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. I have no particular concerns about any of the warrants issued under the Act or the Theft Act this year and I've been impressed with the professionalism of all those I've met who are involved in the process. But I believe that those involved in the assessment of necessity and proportionality of warrants would welcome and benefit from

further capacity building on developments in the law in this area and from the opportunity to learn from colleagues in other jurisdictions who are dealing with these issues on a more frequent basis.

Issue and Duration of Warrants

12. The majority of the warrants were cancelled within the 'relevant period' as defined by the Act but a small number of warrants were allowed to expire without official cancellation due to the fact that neither the Chief Minister nor the Minister for Home Affairs were available to approve the requested cancellation within the relevant time limits. I am satisfied, however, that this delay was purely administrative and didn't have a practical impact on the interception. All the warrants under the Act had expired or been cancelled by the year end. Three of the warrants under the Theft Act were outstanding at end of the year but all had been cancelled within the relevant time limit prior to my review.
13. I note that a small number of warrants were the subject of multiple renewals before they were cancelled. The Act is silent as to the number of renewals that are permissible and therefore it is unclear what the total duration of a warrant might be in practice. I think that this could be problematic in light of the requirement for legal certainty under the Human Rights Act 2001 and I would recommend that consideration should be given to amending the Act to reflect a total maximum period for any given warrant. Having said that, I am satisfied on the paperwork that I have seen that the renewals in these cases were entirely appropriate and that the total duration of any given warrant during the year was not, in fact, excessive.

Safeguards

14. Section 6 of the Act provides a number of safeguards for the implementation of the Act and a part of my review is dedicated to assessing the adequacy of the safeguards.
15. The safeguards include the need 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. From what I have been able to ascertain within the time frame of this review, the arrangements in place in relation to warrants which only involve the Isle of Man Constabulary seem to be adequate for the purposes of the Act. I am concerned, however, that the arrangements for dealing with warrants involving a cross-jurisdictional aspect are less clear. This is an issue which I intend to look into further over the next year.
16. The Act includes a requirement for consultation with the Attorney General. I can see that this has been done in relation to all warrants. I understand that there was a brief issue with the Acting Attorney General's ability to delegate but that this didn't affect any warrants in practice and has now been resolved through the Interpretation (Amendment) Act 2015.

17. Section 6 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. I am satisfied that this register has been maintained and that the required information has been provided. As the years pass, the number of documents included in the register is growing steadily. I will keep under review the practical requirements for the efficient and secure storage of this register.

Overarching Themes

Need for Reform

18. I note that the Surveillance Commissioner, in his recent reports, has consistently pointed out the need for reform of the Act. There have been radical changes in the legislation in the UK over the past three decades in response to developments in human rights law, changes in technology and the evolving and increasingly international nature of threats to national security and the threat of serious crime. The UK framework has seen itself, in recent years, criticised for the scale of its interceptions and this public concern has been met with increasingly transparent oversight and recommendations for reform.

19. The Isle of Man system isn't comparable in scale and scope to the UK system, but it does need to meet the same standards of human rights law and be ready to react to the increasingly international nature of serious crime and threats to national security. I believe that there is a need for a comprehensive review of the legislative framework in light of these challenges. I have been told that new legislation in this area is not currently a priority for the Department for Home Affairs and I can understand that this is a labour intensive and complex process. I would, however, recommend that an interim review should be carried out of the adequacy of the Act in light of the Human Rights Act 2001. Any urgent amendments to the law or procedures could then be carried out pending comprehensive new legislation. The Act has, in the past, been the subject of costly litigation relating to human rights and a review leading to appropriate amendments, could serve to prevent that happening again in the future.

20. The law relating to the Act has been developing over time and there are some historical anomalies which I think should be addressed. In particular:

- a. warrants under the Theft Act more properly relate to surveillance activities rather than to interception. I think it would make sense to amend the legislation so that warrants under the Theft Act come under the purview of the Surveillance Commissioner and are dealt with in the same way as other warrants for surveillance under the ROSE Act.
- b. as technology has developed so far since 1988 or even 2001, there should be a review of the definitions of the scope of what can be intercepted to ensure that the law is sufficiently clear to allow for the type of interception that may be necessary in light of developing methods of communication.

Transparency and Freedom of Information

21. Article 8 of the European Convention of Human Rights 1959 (ECHR) protects the right to private life and article 10 protects freedom of expression including freedom of information. These are transposed into Manx law by the Human Rights Act 2001. One of the requirements of these articles is that adequate arrangements need to be in place for the purpose of ensuring compliance with the statutory framework including human rights law in relation to interception of communications. In a recent judgment from the UK Investigatory Powers Tribunal (IPT – the UK equivalent of the Tribunal set up under the Act), the tribunal clarified that an important part of compliance with articles 8 and 10 was to ensure that those arrangements were sufficiently accessible to the public. This means that, where disclosure of the detail of the arrangements is not possible, the arrangements should, at least, be signposted publicly.
22. As part of my review, I considered what information was publicly available about the interception of communications regime on the Isle of Man and made suggestions about ways that arrangements could be better signposted without compromising the operational effectiveness of the system. In the UK, I note that the Home Office publishes its Interception of Communications Code of Practice on its website. Although the Act is silent on the explicit requirement for codes of practice or their publication, I think that it would be appropriate for the Isle of Man Constabulary and the Cabinet Office to make available any policies or codes that they have relating to the functioning of the Act which could be published without compromising the operational effectiveness of the system. This would also be in the spirit of greater transparency as signalled by legislative developments on freedom of information. I understand that some steps have been taken towards this and I will keep this under review over the coming year.
23. I also note that, in the UK, the Interception of Communications Commissioner and the Investigatory Powers Tribunal as the key oversight mechanisms are clearly accessible through dedicated websites. I am grateful to the Registry for their speed in arranging a website for the Interception of Communications Tribunal and for the Commissioner's role so that information on Commissioners' reports and on the ways of making an application to the Tribunal will be more accessible to the public. A link to this information has also been made available through the Surveillance Commissioner's website which should help to make it more accessible.

Urgent Procedures

24. Under the Act, only the Chief Minister or the Minister for Home Affairs have the power to issue, amend, renew or cancel warrants. While this reflects the serious nature of these decisions, there may be situations in the future where urgent action is required, for example to protect life, but where neither the Chief Minister nor the Minister for Home Affairs may be available on the Island. At present there is no urgent procedure which would allow the powers to be delegated or for some form of remote authorisation but I think that this is something that should be considered as part of a review for possible amendment of the Act

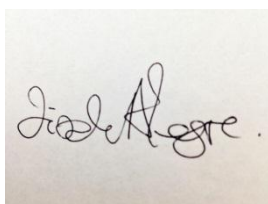
or arrangements for implementation taking into consideration the Human Rights Act 2001. This could also incorporate a review of access to secure means of communication and the numbers of people required to have the appropriate level of security clearance to ensure the smooth running of the system.

Storage and Data Protection

25. During my review, I became aware that the methods of storage and destruction of the warrants and associated documentation vary amongst the relevant agencies and CSP's. I think that it would be helpful to have a consistent approach taking into account both the need for oversight and accurate record keeping and the need for adequate data protection. Over the coming year, I intend to keep this matter under review.

Conclusions

26. I am satisfied that the warrants issued by the Chief Minister or the Minister for Home Affairs in the year ending 31st December 2014 were all properly issued and I believe that the scale of the interception activity is appropriate to the context of the Isle of Man. I do, however, have some concerns about the adequacy of procedures and safeguards which I have outlined in this report that I believe merit further consideration, in particular in light of the application of the Human Rights Act 2001. I intend to keep these matters under review throughout the year.
27. Finally, I would like to commend the diligence and professionalism of all the people I have met with as part of this review. I am extremely grateful for their insights and their openness to discussion and scrutiny which have been invaluable in carrying out my review. I look forward to further engagement with them in the coming year to make sure that the arrangements and safeguards put in place around the Act are as robust and effective as they can be within the current legislative framework.

A photograph of a handwritten signature in black ink on a light-colored background. The signature is written in a cursive style and reads "Susie Alegre".

Susie Alegre
Interception of Communications Commissioner