

INTERCEPTION OF COMMUNICATIONS ACTS 1988 AND 2001

To: His Excellency Lieutenant General Sir John Lorimer, Lieutenant Governor of the Isle of Man, in Council

REPORT OF SUSIE ALEGRE, INTERCEPTION OF COMMUNICATIONS COMMISSIONER

for the year ended 31st December 2020.

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 re-appointed on 15th November 2019 for a period of 5 years 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. This report is submitted later than usual in the year due to the practical difficulties of visiting the Island caused by the pandemic.
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.
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 working on interception of communications, the Attorney General and the Solicitor General, the outgoing Lieutenant Governor, Sir Richard Gozney, and staff from the Registry and Cabinet Office. In addition, this year, I have met with the recently elected Chief Minister, Alfred Cannan MHK and the Minister for Justice and Home Affairs, Jane Poole-Wilson MHK.
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, over several years I have engaged with the Cabinet Office to discuss areas for potential reform with a particular focus on international human rights law as noted in my previous reports. I have also discussed areas of common concern with the Surveillance Commissioner and his Deputy as well as the Information Commissioner in previous years. We have prepared a Joint Statement regarding areas of concern that would benefit from reform as part of an overall review of legislation and practice relating to interception, surveillance and other forms of investigative or intelligence gathering techniques which I include as an Annexe to this report.

Further to my meetings this year, in this report, as well as reporting on the implementation of the Act over the year to 31st December 2020, I have included an assessment of the areas that the new Government may wish to consider updating as part of their legislative agenda.

Scope of Warrants

6. During the year to 31st December 2020, 22 new warrants were issued under the Act. Three warrants were issued under the Theft Act 1981 section 9A.
7. I have reviewed all IOCA and Theft Act warrants lodged with the Registry and have discussed the basis on which these warrants were issued. 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.
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.
9. In my meetings with the Isle of Man Constabulary over recent years, I have discussed the reasons behind the significant drop in the number of IOCA warrants being requested as compared to the numbers recorded prior to my appointment in 2014. It appears that this is a complex picture. Interception is a resource intensive activity and as intercept evidence cannot be used in criminal proceedings, any information gathered through interception needs to be complemented by other forms of evidence gathering that can be used to secure a prosecution. Developments in communication technology mean that interception may not be the most effective way of gathering information. This means that other investigatory techniques may be more effective in many cases. I have not seen any evidence that resource constraints have prevented the use of interception in cases where it would have been necessary. Rather it seems that alternative methods have been deployed. I am satisfied that careful thought is given as to whether or not interception would be a necessary and proportionate approach in a particular case and, as a result, the number of warrants is minimal.

Issue and Duration of IOCA Warrants

10. At the time of my review no warrants were outstanding from the year ending 31st December 2020. All warrants were cancelled or expired within the time scales required by the Act.
11. I note that the numbers show an ongoing significant decline in the use of IOCA warrants as compared to 2014. Because of the way warrants on the Island are drawn up, these figures give the impression that interception is more widespread than it really is but don't reflect

the amount of time that may be spent on interception relating to one subject. The extremely low number of warrants on the Island seems to show that such intrusive investigatory techniques are really only considered as an option where they are necessary for the prevention or detection of serious crime. While the number of warrants is slightly higher than recent years, the number of warrants does not reflect the very small number of subjects targeted. I understand the level of interception being carried out on the Island is relatively low compared to comparable jurisdictions and there is no sign that the technique is used excessively.

Theft Act Warrants

12. Three Theft Act warrants were issued in the period under review but the issues I highlighted about the Theft Act in my previous reviews remain relevant.
13. Theft Act warrants are only required when it is necessary to enter into 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.
14. Section 9A (6) of the Theft Act provides that warrants may be issued to allow for trespass to install surveillance devices. It says that sections 2(2) and 2(3), 4, 5, 6 and 7 of IOCA should apply to these warrants. Section 9A (4) clarifies that:

*“In this section, ‘install’ means the integration of a surveillance device into –
Any land or any building; or
A fixture or any other object in the building,*

*and includes placing, leaving, concealing or affixing any surveillance device on, in or to
any land, building, fixture or object”*

15. It is silent about the removal of a surveillance device and this seems to give rise to some practical difficulties and a lack of legal certainty. The installation of surveillance devices is a clear interference with the right to private life and I am concerned that the legislation as it stands isn't clear enough to meet the requirement for legality under the Human Rights Act 2001 as the basis for removing the devices when they are no longer necessary is unclear.

Safeguards

16. 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

17. 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.

18. In previous reviews, I raised concerns about the lack of clear guidelines to implement the safeguards. In response, the Cabinet Office in cooperation with the Isle of Man Constabulary reviewed procedures to ensure adequate safeguards were in place. The issue of data protection and data security is particularly important in the context of a small community like the Isle of Man where there are higher chances of someone subject to a warrant being known to staff. Effective data protection in relation to interception of communications and surveillance is also necessary to provide assurance for cooperation with other jurisdictions including the UK and the EU that standards on the Island are of an adequate level. I am satisfied that the new processes and procedures to improve data protection in recent years have improved practical aspects of the procedure.

B – Warrants Involving Co-operation with Other Jurisdictions

19. 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 in the event of a request for interception from another jurisdiction. There is no formal procedure to ensure the safeguards required by the Act would be respected in relation to the way intercept material is handled where that material is shared with another jurisdiction.

20. The Council of Europe Commissioner for Human Rights in a recent issue paper on democratic and effective oversight of national security services¹ pointed out that: “In view of the extensive international co-operation between security services (and the impact that such co-operation can have on human rights) it is essential that overseers are able to scrutinise information about such co-operation, including information that has been received from or sent to foreign bodies..... Democratic oversight is seriously undermined when foreign bodies have an effective veto (by virtue of security services having to request the permission of foreign partners before their overseers can view information) on what an oversight body can scrutinise.”

21. Co-operation with the UK in particular could be an important tool in preventing and

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<https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2796355&SecMode=1&DocId=2286978&Usage=2>

detecting serious crime and protecting national security, but it needs to be done within a clear legal framework. This means that the arrangements for safeguards set down in the Act would need to address the circumstances where intercept material is shared with other jurisdictions including the oversight role of the Interception of Communications Commissioner. I understand that discussions on these issues are generally carried out in practice by the Isle of Man Constabulary, I would therefore suggest that the Chief Constable should request information from the UK agencies about the legal framework for handling any intercept material that may be acquired through co-operation with the Isle of Man and the applicable procedural safeguards. For future reference, it would also be helpful to establish a memorandum of understanding with UK agencies for co-operation by way of interception of communications, including arrangements to ensure effective oversight from the statutory bodies in both jurisdictions.

C - Consultation

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

D – The Register

23. 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. This register has been maintained over the period in question.
24. Unlike the records kept by the Cabinet Office and the Isle of Man Constabulary, the register of warrants has no time limit. The information submitted to the Registry is minimal following the overhaul of data protection in the system. However, as the potential for a complaint to be made to the Tribunal under the Act is currently open-ended in terms of time, it may be necessary to include names in the summary of warrants submitted to the Registry so that checks can be made by the Interception of Communications Commissioner in the event that a complaint is made.

Need for Reform

25. The Act dates back to 1988, a time before the invention of the Internet and many of the communications methods we are familiar with in our daily lives. 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 under human rights law and be ready to react to the increasingly international nature of serious crime and threats to national security. I understand that legislative reform in this field is a labour intensive and complex process which may not be a government priority but a failure to update the legislation and procedural framework to reflect modern standards does pose a serious risk. While the Chief Minister is the primary person responsible for signing warrants under the Act, the subject matter of IOCA and the Theft Act and related areas fall more naturally within

the remit of the Department for Home Affairs which may be the most appropriate Department to lead on wider reform in this field.

26. The Act has, in the past, been the subject of costly litigation relating to human rights² and there is a legal risk in failing to reform the very outdated legislation in this field even if the implementation of the Act itself does not raise significant concerns. While I believe it is time to review the legislation, this is not to suggest in any way that the type of legislation recently passed in the UK would be appropriate in the Isle of Man. There are several obvious gaps in the current legislation which could be amended as discrete reforms if there is no capacity for a general reform of legislation in this field, for example:

- 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. While I have seen no evidence of abuse of the process in practice, 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.³
- There is no digital or urgent procedure which would allow for some form of remote authorization. This would be particularly important where a warrant was required urgently in an operation to protect life.⁴
- There is a lack of detail in the legal basis for cooperation with other jurisdictions, including the UK in terms of requests for assistance on interception of communications. This means that it is currently unclear what safeguards should apply to intercept material shared with other jurisdictions and how those safeguards can be secured.⁵
- S. 9A of the Theft Act provides powers to trespass on private property for the installation of surveillance devices and extends the safeguards in IOCA to this practice. It does not, however, provide a legal basis for removing those devices when a warrant is cancelled or a time limit on the use of these devices. This undermines legal certainty in the process and leaves open the potential for devices to be left in place opening up the possibility of abuse in the system. From an operational perspective, the installation of surveillance devices and the use of evidence extracted through this is more akin to the other surveillance techniques covered by the ROSE Act.⁶

27. From a broader perspective, there may be new operational areas that the Manx authorities may want to be able to use but for which there is no, or a somewhat limited legal basis. As technology has developed, so have the techniques and needs for surveillance and interception. There are a number of powers included in the recent UK IPA that do not appear to have clearly defined and identifiable equivalents in Manx law along with procedural safeguards such as to meet the requirement of legal certainty.

² See - In Re Graley [2007] MLR 133 and related cases communicated to the ECtHR and settled.

³ See IOCA Review 2014 para 13

⁴ See IOCA Review 2015 para 41 (developments since then?)

⁵ See IOCA Review 2016 paras 19 and 20

⁶ See IOCA Review 2016 para 13

These relate in particular to:

- Communications data
- Internet connection records
- Data retention
- Bulk data sets
- Targeted equipment interference

28. Careful consideration should be given as to whether or not any or all of these powers⁷ would be necessary or proportionate in the Manx context. The UK IPA 2016 continues to be the subject of much criticism and legal challenge for its extensive and widely drawn powers in particular its bulk powers. The resources and technical capabilities of UK law enforcement and security services are very different to those in the Isle of Man so care should be taken to ensure that any reformed legislation reflects the needs and the resources of the relevant Isle of Man services rather than replicating UK legislation so that it is fit for purpose. It may be that reformed law could distinguish between powers required for purely domestic operations and the legal basis for cooperation with other jurisdictions.

29. Minimum safeguards have been developed in the jurisprudence of the European Court of Human Rights⁸ including the following areas that are not sufficiently clear in the existing legislation:

- Details on the duration on surveillances
 - (no limit on number of renewals)
- Categories of persons affected by phone interceptions
 - (no detail on categories of person who can be targeted)
- Details on the examination, storage and destruction of data obtained
 - (further detail needed in the legislation)
- Details on the transfer of data to third parties
 - (no detail on legal basis for and safeguards around cooperation with other jurisdictions).

30. Warrants issued under IOCA and the Theft Act are just a small part of a complex legislative picture allowing for the use of interception, surveillance and other investigative techniques, some of which may not be covered by current legislation. IOCA forms part of a patchwork of laws that have developed over time to meet new operational needs in this area. Any reform of IOCA needs to take into account how it operates in relation to these other pieces of legislation to ensure that the legal framework is sufficiently clear and precise to allow law enforcement to take the actions they need in accordance with the law. In particular, reform of IOCA should consider incorporating aspects of or clarifying the relationship with the following pieces of legislation:

⁷ Additional powers relating to accessing smartphones, tablets, computers, fitbits, gps devices and apps may raise similar questions around privacy and data protection given the increasing quantity of data stored on these devices.

⁸ See Zhakarov v Russia (below fn12) para 231

- Theft Act 1981, section 9A
- Data Protection Act 2018
- Anti-Terrorism and Crime Act 2003, section 71
- Regulation of Surveillance Etc. Act 2006

31. Reform of IOCA should also take into account the potential for cooperation with other jurisdictions therefore relevant legislation in the UK and international legislation should also be considered in terms of their applicability and inter-operability with the Manx legal framework. Particular attention should be given to the practical implications of the following UK legislation as it may be extended to the Isle of Man:

- Investigatory Powers Act 2016 (UK IPA) – s.272(6) Her Majesty may by Order in Council provide for any of the provisions of this Act to extend, with or without modifications, to the Isle of Man or any of the British Overseas Territories
- Intelligence Services Act 1994 – s.5 warrants (extended by s.71 ATCA 2003)

32. I note the UK Investigatory Powers Act 2016⁹ includes a permissive extent clause so that all or any part of the UK Act can be extended to the Isle of Man by Order of the Queen in Council. I understand there are not currently any plans to extend the legislation to the Isle of Man in practice and that this issue was discussed in Tynwald on 17th January 2017¹⁰ with no further updates since then. The Investigatory Powers Act is contentious, not least because of its impact on the right to private life and data protection. It does contain provisions giving extra-territorial effect to UK agencies' powers which go further than the scope of the Isle of Man Act, but how the extra-territorial provisions would apply to the Isle of Man is very unclear. It would be helpful to know what exactly is intended in relation to the Isle of Man as this could give rise to questions around sovereignty, the requirement of legality for measures that interfere with the right to private life and also the capacity and legal obligations of communications service providers on the Island.

33. The Isle of Man legislation allows for the interception of communications on two grounds – serious crime and national security. The UK Investigatory Powers Act allows for the use of intrusive powers on these two grounds and an additional ground - for the economic well-being of the country¹¹. It should be noted that this ground can only be relied on if the information sought under a warrant is information “relating to the acts or intentions of persons outside the British Islands¹².” Therefore, in principle, it should not be used as a ground for warrants relating to acts or intentions in the Isle of Man.

34. The UK Investigatory Powers Act covers a range of different activities that can be undertaken by several agencies including the police and the Security and Intelligence Services. These powers go beyond those covered by IOCA and the Theft Act and For

⁹ <http://www.legislation.gov.uk/ukpga/2016/25/contents/enacted>

¹⁰ <http://www.tynwald.org.im/business/hansard/20002020/t170117.pdf>

¹¹ <http://www.legislation.gov.uk/ukpga/2016/25/section/20/enacted>

¹² Section 20(4)

warrants covering activity not covered by IOCA, the Theft Act and the ROSE Act, it is difficult to identify what oversight mechanisms would apply on the Island. The scale of the powers available to the UK and the technical capabilities of the UK mean that this legislation would not provide a useful model for the Isle of Man given its much more limited needs and capacity.

35. Although not directly applicable, in order to be able to cooperate with other neighbouring and EU jurisdictions, the reformed legislation should also take account of European Union legislation that may be relevant.

Urgent Procedures

36. The pandemic has meant that many of those involved in the process of interception were working from home for at least part of 2020, this highlighted the fact that the procedures for authorizing warrants on the Isle of Man are still paper based which meant that the process requires the physical presence of all involved. I understand that in other jurisdictions like the UK and the Channel Islands, the systems for implementing warrants are entirely digital which means that once a warrant is issued, it can be implemented remotely which can facilitate urgent procedures. Transforming and updating the system could be extremely costly and may not be warranted given the limited use of intercepts on the Island, however modernization of the system should be considered in the scope of a wider review of the legislation and procedures.

Transparency and Freedom of Information

37. 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. Compliance with articles 8 and 10 requires that those arrangements are 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.
38. Interception of communications is, by its nature, clandestine. But in order to meet human rights obligations there should be as much information made publicly available as is possible without compromising operational needs. The Cabinet Office now publishes its updated guidance online and these can be found here: <https://www.gov.im/about-the-government/departments/cabinet-office/interception-of-communications/> .
39. I understand that issues relating to cooperation with the UK on interception should be covered in discussions on updating a Memorandum of Understanding with the UK Police and that the Isle of Man Constabulary will take the lead on this. Any changes in policy related to cooperation with the UK and the extension of the Investigatory Powers

Act 2016 should be in the public domain as far as possible to the extent that this would not have a negative operational impact.¹³

Conclusions

40. The current legislation is outdated and contains many anomalies. It needs to be read in light of wider legal developments in human rights and data protection and would benefit from a thorough review. Technological developments in this field mean that there may be new forms of investigative technique that do not appear to be covered by current legislation. In order for the use of those techniques to be lawful, they would need a legal basis. Review and reform of the current legislative framework would allow for it to be made fit for purpose in the context of 21st Century investigative techniques.
41. As ever, I have been very impressed with the openness and engagement of all concerned in taking steps to modernise the system within the current framework and to support effective oversight. I look forward to discussions on ways to continue to improve the process within the current framework and would be happy to provide input if a decision is made to reform the legislation.



Susie Alegre
Interception of Communications Commissioner

16th November 2021

¹³ See Liberty/Privacy No 2 IPT/13/77/H etc: Reported in [2015] 3 AER 212 regarding the violation of human rights law for failure to publicise arrangements.

Annexe

1st March 2019

Joint Statement on the Need for Legislative Reform on Investigatory Powers in the Isle of Man

by

Interception of Communications Commissioner, Susie Alegre

Surveillance Commissioner, Brendan O’Friel

Information Commissioner, Iain McDonald

This joint statement is supplemental to our respective annual reports and brings together areas of common concern about the need for a comprehensive review of the legislation governing investigatory powers on the Isle of Man to meet modern standards and operational needs.

The current legal framework has been developed piecemeal over the past thirty years. Our respective oversight roles and powers are set out in several different pieces of legislation including the Interception of Communications Act (IOCA) 1988, the Theft Act 1981, the Regulation of Surveillance Etc Act (ROSE Act) 2006 and the Data Protection Act 2018. But the legislation has not kept up with the pace of change in technology, criminality or in the standards required for effective oversight of intrusive investigatory powers.

This has resulted in significant gaps in the legislative framework. These may limit the ability of the relevant authorities to use the most effective investigatory techniques when they need them. And it means that some investigatory powers have little or no effective oversight because of the legal basis they rely on. In some cases, the legal basis for actions is unclear which risks undermining the requirement for legal certainty set out in the Human Rights Act 2001.

There is an urgent need for reform of the legal framework governing intrusive investigatory techniques to ensure that the Isle of Man Constabulary and other agencies have the tools they need to keep the Island safe with the appropriate checks and balances required to ensure democratic accountability and respect for human rights in this sensitive area.

We have consistently raised these concerns in our respective annual reports, and we issue this statement collectively to reinforce importance and urgency of the issue. We engage with Government stakeholders on a regular basis and would welcome the opportunity to contribute our expertise to a comprehensive consultation on legislative reform in this area.