



THE
LAW SOCIETY
OF HONG KONG

香港律師會

3/F WING ON HOUSE · 71 DES VOEUX ROAD
CENTRAL · HONG KONG DX-009100 Central J
香港中環德輔道中71號
永安集團大廈3字樓

TELEPHONE (電話): (852) 2846 0500
FACSIMILE (傳真): (852) 2845 0387
E-MAIL (電子郵件): sg@hklawsoc.org.hk
HOME PAGE (網頁): http://www.hklawsoc.org.hk

Our Ref :
Your Ref : Criminal
Direct Line : CB2/SS/3/02

11 November 2003

BY FAX (25099055) AND BY POST

Mrs. Percy Ma
Clerk to the Subcommittee on the draft
Criminal Jurisdiction Ordinance
(Amendment of Section 2(2))
Ordinance 2002
Legislative Council Secretariat
Legislative Council Building,
8 Jackson Road, Central, Hong Kong.

Dear Mrs. Ma,

DRAFT CRIMINAL JURISDICTION ORDINANCE (AMENDMENT OF SECTION 2(2)) ORDER 2002

Further to a letter dated 16 October 2003 from Mr. Patrick Moss, our Secretary General, I am pleased to advise that the Law Society Criminal Law and Procedure Committee has met to consider the draft Criminal Jurisdiction Ordinance (Amendment of Section 2(2)) Order 2002 at its recent meeting.

The Committee notes the proposal to extend the jurisdiction of the Hong Kong Courts to three computer-related offences being committed or planned outside the territories. One such offence is the offence of "Access to Computer with Criminal or Dishonest Intent" under Section 161 of the Crimes Ordinance. Members note that the equivalent provision, Section 2 of the UK Computer Misuse Act 1990, was more carefully drafted to differentiate between adult and juvenile offenders and with sentences split to cater for different degree of seriousness of the offence. The Committee believes that the local legislation should also take into account these factors and in particular, the fact that computer related crimes can easily involve juvenile offenders.

On a more general note, the Committee would reiterate its previous concerns on the way the law enforcement bodies are seizing computers and the possible adverse impact it can cause to the normal functioning or worse skill, the collapse of a business. In this regard, I attach a copy of the Committee's submissions on the Report of the Inter-departmental Working Group on Computer Related Crimes in February 2001 for your information.

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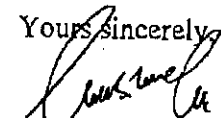
The Law Society of Hong Kong

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Whilst the Committee fully appreciates the need to give to the law enforcement bodies the power to seize computer hardware for investigation purpose, given this computer age when businesses rely heavily on computers, such power needs to be well balanced out by including appropriate safeguards in the system so as to ensure the power will be well exercised. This is particularly essential when the experience of our members indicates that, as a result of blanket seizure of computer hardware, injustice can well occur when the timeframe within which the computers should be returned is not specified.

We propose that there should be provisions entitling the defence, as of right, to have: (a) the computer hardware back within a reasonable time; and (b) the right to compensation in case of unlawful or wrongful seizure of computer hardware.

Yours sincerely,



Christine W. S. Chu

Assistant Director of Practitioners Affairs

Encl.

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Submissions on the Report of the Inter-departmental Working Group on Computer Related Crime by the Criminal Law & Procedure Committee of The Law Society

The Society's Criminal Law & Procedure Committee has preliminarily reviewed the various recommendations made by the Inter-departmental Working Group in its Report on Computer Related Crime. While the Committee welcomes most of the recommendations put forward in the Report, it has the following concerns:

1. *Jurisdiction*

The Working Party has made various recommendations regarding the jurisdictional issue. One recommendation is to expand the Hong Kong jurisdictional net regarding the offence of "*obtaining access to a computer with intent to commit an offence*" so that Hong Kong courts would have jurisdiction if the computer to which access is obtained for committing the offence is in Hong Kong. This would appear to catch the distributor of a virus that is causing damage in Hong Kong.

In order to ensure that this proposal will have the desired effect, the Committee recommends that that it should be made clear that access to a computer includes access to files stored on the machine. The Committee further believes that there should be appropriate extradition provisions at the international level to strengthen the Working Party's various proposals.

2. *Encryption*

The Working Party has recommended that appropriate legislation be introduced to enable law enforcement agencies to be provided with decryption tools and decrypted text when necessary and justified.

In deciding whether such investigatory powers should be given to the law enforcement agencies and the scope and manner of exercising such power, the Committee has the following concerns:

- (a) implications of the proposed legislation on the development of e-commerce;
- (b) potential infringements of privacy;
- (c) implications for the disclosure of encrypted information, which may include legally privileged information;
- (d) the right of individuals against self-incrimination,
- (e) the need for disclosure of keys when access to plain text would be sufficient; and
- (f) the need for the empowered agencies to be fully accountable to democratic institutions and subject to public scrutiny.

It should be noted also that cryptography is usually used to thwart criminals rather than to help them and care should be exercised before breaking security.

The Committee recommends that the following safeguards be embodied in the proposed legislation regarding access to encryption keys:

- (a) there should be disclosure only where obtaining the key is really necessary;
- (b) disclosure should be "*proportionate*" to what might be achieved;
- (c) there should be provisions for the protection of the relationship between solicitors and clients;
- (d) there should be provision for the destruction of the encrypted information once it is obtained; and
- (e) there should be a right to sue law enforcement agencies if any material is leaked as a result of the negligence of the law enforcement agencies

The Committee observes that the Working Party's proposals for access to encryption keys may be outdated. The proposals are confined to encryption but other encoding techniques are already available such as biometrics, where identification is based on the biological and behavioural characteristics of individuals or quantum cryptography, which no longer relies on keys. With this technique messages are sent using photons of different polarities. Attempts to observe signals irrevocably alter the polarity of many photons and destroy the message before it can even be read. The Committee recommends that the proposal should be updated to embrace other encoding techniques.

There is a further concern with the way the law enforcement agencies are presently seizing computers for evidence and investigation purpose. It is observed that under the current practice, enforcement agencies would seize the entire set of computer hardware that causes tremendous and unnecessary inconvenience sometimes resulting in the collapse of businesses. The Committee recommends that sufficient safeguards be introduced to the current system, in particular, requiring a warrant to specify the ambit of what is to be seized from a particular hard disk of a computer.

3. *Penalties for Offenders*

The Working Party has recommended increases in the penalties for several computer-related offences without giving any information on the different age groups of offenders involved. To consider whether such increases are appropriate, the Committee would urge the Administration to provide statistical information setting out the age groups of the offenders committing these computer-related offences.

The Criminal Law & Procedure Committee
The Law Society of Hong Kong
9 February 2001