

**For information**

**12 April 2006**

**SB Ref: ICSB 4/06**

**Bills Committee on  
Interception of Communications and Surveillance Bill**

**Response to issues raised  
at the meetings of 3 and 6 April 2006**

**Introduction**

This paper sets out the Administration's response to a number of issues raised at the Bills Committee meetings on 3 and 6 April 2006. We shall revert separately in due course on matters concerning the issue of public security.

**Response to issues raised**

*Issue 1 : To confirm the circumstances under which interception of communications and covert surveillance operations would be conducted in respect of a lawyer, and to consider suitable amendments to the Bill to tighten up the provisions in respect of the protection of legal professional privilege (LPP).*

2. As pointed out in papers SB Ref. ICSB 2/06 and ICSB 3/06 presented to the Bills Committee (relevant extracts at **Annex A**), the Administration fully respects LPP, which is firmly established under the common law. Under the common law, LPP applies to communications between a client and his legal advisor, whether oral or in writing, **IF** –

- those communications are for the purpose of obtaining legal advice, whether or not legal proceedings are in train,
- except when such communications are in furtherance of a criminal purpose.

There can be no exceptions to this privilege, unless the client waives it, or it is overridden by statute, either expressly or by necessary implication.

3. We have drafted our Bill with a view to preserving and giving full effect to this common law principle at various stages of the covert operations covered by the Bill. At the stage of **approval of operation or collection of information**, –

- (a) our Bill preserves LPP by not overriding it, thereby requiring the law enforcement agencies (LEAs) and the panel judges to observe it when formulating and considering applications respectively; and
- (b) our Bill further mandates that the LEAs and the panel judges consciously take into account the likelihood of obtaining information which may be subject to LPP in the application for and consideration of authorizations – it would be mandatory for the LEAs to provide an assessment of the likelihood in their applications for authorization, and hence the panel judge would necessarily have to take into account the likely impact on LPP in deciding whether the proposed operation is proportionate to the purpose sought to be furthered by carrying out the operation.

These provisions would in operation ensure that **no covert operations under the Bill would knowingly seek to obtain information subject to LPP.**

4. In other cases **where it is not known in advance that information subject to LPP would be collected**, the above provisions would also require the panel judges and the LEAs to have full regard to LPP. Therefore, as we have explained previously, **we do not envisage that a judge will approve an operation targeting the communications at a lawyer's office or residence, unless the judge agrees that there are reasonable grounds to believe that the communications in question would be used for the furtherance of a crime, or the lawyer himself / herself is criminally involved in an alleged offence.**

5. Although we believe that the Bill as drafted would in practice rule out operations targeting communications at a lawyer's office or residence, given some Members' advice we would be prepared to consider making that policy intention express in the Bill. In this regard, we may take reference from a similar provision in the Canadian Criminal

Code, i.e., –

*“s.186(2) No authorization may be given to intercept a private communication at the office or residence of a solicitor, or at any other place ordinarily used by a solicitor and by other solicitors for the purpose of consultation with clients, unless the judge to whom the application is made is satisfied that there are reasonable grounds to believe that the solicitor, any other solicitor practising with him, any person employed by him or any other such solicitor or a member of the solicitor’s household has been or is about to become a party to an offence.”*

6. As information subject to **LPP may be inadvertently collected**, the Bill’s other provisions controlling the **use and destruction of products** are relevant. Clause 56(1) of the Bill currently provides that the extent to which interception or surveillance product may be disclosed should be kept to the minimum necessary and the protected product has to be destroyed as soon as its retention is not necessary. As explained previously, given that the LPP principle is well-established and that our Bill does not override it, it can be expected that the LEAs and the Commissioner on Interception of Communications and Surveillance would give it full effect in terms of the use and destruction of any materials subject to LPP. In practice, any information obtained in the course of a duly authorized operation that is found to be subject to LPP will remain privileged, and such information cannot be used for any law enforcement purposes. The disclosure and retention of the relevant products would not be necessary unless, for postal interception and covert surveillance products, it is necessary to retain them for the prosecutor to carry out his duty to ensure a fair trial in a future proceeding. The effect of the inadvertent interference with LPP, if any, would be kept to a minimum.

7. Again, taking into account Members’ wish to make the protection in respect of LPP more explicit, we propose to introduce amendments to the Bill with the following effect –

(a) Use of Products Protected by LPP

Expressly provide that products obtained in the course of a duly

authorized interception of communications or covert surveillance operation that is protected by LPP remains privileged and shall not be used in any way unless they are necessary for the prosecutor to carry out his duty to ensure a fair trial in a future proceeding in respect of postal interception and covert surveillance products.

(b) Destruction of Products Protected by LPP

Expressly provide that –

- (i) in respect of products from interception of telecommunications operations, they should be destroyed as soon as possible and no copy of the products should be retained; and
- (ii) in respect of products from postal interception and covert surveillance operations, they should be destroyed as soon as possible unless their retention is required for pending legal proceedings.

Subject to any further views Members may have, we shall work on the exact wording of the proposed amendments set out above for discussion with Members in due course.

***Issue 2 : Panel of Judges***

- ***To clarify whether the notice to be made by the Chief Executive (CE) in Council for amending Schedule 2 of the Bill (setting out, inter alia, procedures relating to the panel judge) is subject to scrutiny by LegCo.***

8. Subsidiary legislation is defined by section 3 of the Interpretation and General Clauses Ordinance (Cap. 1) as meaning any proclamation, rule, regulation, order, resolution, notice, rule of court, bylaw or other instrument made under or by virtue of any Ordinance and having legislative effect.

9. Clause 63 of the Bill provides that CE in Council may, by notice published in the Gazette, amend Schedules 1, 2, 3 and 4 of the Bill. As the Schedules to the Bill will be part of the legislation, notices to be

made by CE in Council providing for amendments thereto have legislative effect and hence fall under the definition of subsidiary legislation. Such notices are therefore required to be laid on the table of the Legislative Council under section 34 of the Cap. 1 for “negative vetting”.

- ***To provide information on the other instances involving appointment of judges to statutory positions and whether they are all made by CE.***

10. Judges are appointed to various statutory positions. CE is the appointment authority for the statutory positions set out in **Annex B** to which serving judges are currently appointed. In some cases, e.g. the Market Misconduct Tribunal and the Securities and Futures Appeals Tribunal, it is stipulated in the relevant legislation that the chairman shall be appointed by CE on the recommendation of the Chief Justice (CJ). In the case of the Electoral Affairs Commission, it is stipulated in the legislation that the chairman shall be appointed by CE in consultation with CJ. As we have pointed out previously, the fact that they are appointed by CE in no way affects their independence in carrying out their statutory functions.

- ***To advise if there are requirements governing post-retirement employment or service for members of the Judiciary.***

11. According to the Judiciary, specific provisions concerning cases where retired judges and judicial officers take up employment or an appointment after retirement are contained in the Pension Benefits (Judicial Officers) Ordinance (Cap. 401), relevant extracts of which are at **Annex C** for Members’ reference.

- ***To consider including express provision in the Bill to the effect that judges who have issued authorizations for covert operations would not be involved in the subsequent trial of the case.***

12. As set out in the paper by the Judiciary for the Panel on Security for discussion at its meeting on 21 February 2006, it is the intention of the Judiciary that, instead of just excluding a panel judge from trying cases where he/she has given judicial authorization in the course of investigation by an LEA, to avoid any possible problems and to

ensure that justice is seen to be done, all panel judges should be excluded from hearing any cases where in the course of investigation a judicial authorization had been obtained.

13. We have consulted the Judiciary. The Judiciary believes that this matter can be adequately dealt with by the Judiciary's approach referred to above which takes into account the relevant common law principles relating to disqualification of judges from sitting. And it is unnecessary to have an express statutory provision on this matter.

***Issue 3 : To consider providing for, under clause 29(5), the provision of a copy of the authorization to the affected service providers, and to clarify the present position on search warrants on service providers.***

14. As far as the current arrangements for search warrants are concerned, generally, the search warrant will be shown to the affected person. A copy of the warrant will be made available on request.

15. In the Bill, it is provided under clause 29(5) that a copy of a prescribed authorization would be shown to a person specified in the prescribed authorization for the provision to any of the officers of the department concerned specified assistance for the execution of the authorization. There is no provision on providing a copy of the authorization.

16. Given the covert nature of the operations concerned (as opposed to the overt nature of the operations provided for by search warrants), making it a necessary requirement for the person on whom the authorization is served to be given a copy of the authorization would not be in the interest of preserving the confidentiality of the operations and would make the arrangement too inflexible. Rather, we propose to make it clear to LEA officers, in the context of the Code of Practice to be issued by the Secretary for Security under clause 59 of the Bill, that in all cases the persons on whom the authorizations are served should be given reasonably sufficient time to read the authorizations, and detailed explanation should be given in case of any doubt so that they could have a clear idea of the requirement on them.

***Issue 4 : To consider if the legislation should provide that, if LEAs were provided with products from covert surveillance or interception or***

***communications that had not been properly authorized, the evidence should not be admissible as evidence.***

17. Under our common law system, the admissibility of unlawfully obtained information / materials as evidence would be determined by the court balancing the probative value of the evidence and prejudicial effect on parties concerned. This would allow the court to make its judgment having regard to the unique circumstances of each and every case. We believe that this should continue to apply.

18. In the context of the authorization regime provided for under the Bill, this issue only arises for products obtained for postal interception and covert surveillance since telecommunications interception products would not be admissible. According to the common law principle set out above, in any prosecution, a search warrant and the documentation in support will be disclosed by the prosecution, unless having considered the continuing sensitivity of the material, the trial judge rules that it is subject to public interest immunity and that fairness to the defendant does not require it to be disclosed. If the defence find any impropriety in the issue of these warrants, they may apply to the court to have the evidence obtained under the warrant excluded from trial, or, if the impropriety is serious enough, to have the proceedings permanently stayed. There is no reason why the well-established process should not continue to apply.

***Issue 5 : To advise whether interception might be performed on roaming calls on Hong Kong registered mobile phone numbers.***

19. Under the Bill, “telecommunications interception” means interception of any communication transmitted by a telecommunications system. As long as the interception is conducted in Hong Kong, the location of both the caller and recipient is immaterial. In the case of telephone calls to / from a Hong Kong mobile phone number, even when the mobile phone operates outside Hong Kong using roaming service, the calls will be routed through the telecommunications network in Hong Kong. Subject to appropriate authorization under the authorization regime, interception operations may be conducted under the Bill in respect of such roaming calls.

Interception of Communications and Covert Surveillance

Legal professional privilege

Relevant extracts from the Information Paper SB Ref: ICSB 2/06

*Issue 2 : To explain the exceptions to the protection of legal professional privilege and the effect of Article 35 of the Basic Law, and to provide the Administration's response to the views given by the judge in the English case of Three Rivers District Council and Others v Governor and Company of the Bank of England .*

8. Communications between a client and his legal advisor, whether oral or in writing, are privileged from disclosure, **IF** –
- those communications are for the purpose of obtaining legal advice, whether or not legal proceedings are in train,
  - except when such communications are in furtherance of a criminal purpose .

In connection with the latter point, the courts of Hong Kong, like their counterparts in England, have made it abundantly clear that communications in furtherance of a criminal purpose are not protected by the privilege.

9. This principle of legal professional privilege (LPP) is firmly established under the common law. There can be no exceptions to this privilege, unless the client waives it, or it is expressly overridden by statute. Because LPP covers communications for the purpose of obtaining legal advice, it does not apply to other communications between a lawyer and his client. For example, communications between a lawyer and his client on social occasions not for the purpose of obtaining legal advice would in principle not attract LPP. Communications between a lawyer and persons who are not his clients are not covered by LPP.

10. More details of LPP and the effect of Article 35 of the Basic Law, and the Administration's response to the views given by the court in the case of *Three Rivers District Council and Others v Governor and Company of the Bank of England*, are at **Annex B**. In drafting our Bill, <sup>not</sup> attached



we have set out to protect LPP, as follows.

11. Under our Bill, interception of communications and more intrusive (Type 1) covert surveillance operations would be considered by judges. For less intrusive (Type 2) covert surveillance operations, our general regime is for them to be approved executively. However, as a protection of LPP, we propose that in cases that may involve LPP, the applications should be considered by judges. Clause 2(3) now reads –

“For the purpose of this Ordinance, any covert surveillance which is Type 2 surveillance under the definition of “Type 2 surveillance” in subsection (1) is regarded as Type 1 surveillance if it is likely that any information which may be subject to legal professional privilege will be obtained by carrying it out.”

Our judges can be expected to be conscious of the principles governing LPP.

### **Relevant extracts from the Information Paper SB Ref: ICSB 3/06**

#### ***Issue 1 : Legal professional privilege (LPP)***

- ***To explain, quoting the relevant provisions in the Bill, how LPP would be safeguarded, and consider reflecting the right to confidential legal advice provided in Article 35 of the Basic Law in clause 56(1)(c) of the Bill.***

2. At present law enforcement agencies (LEAs) do not knowingly seek to obtain information subject to LPP, whether by interception of communications, covert surveillance or other means, except where there is a statutory exemption. Officers of our LEAs have been fully briefed on the legal requirements in this regard and will seek legal advice when in doubt.

3. Under the Bill, information that may be subject to LPP is given special protection. The relevant clauses are as follows –

(a) Clause 2(3) :

*“For the purposes of this Ordinance, any covert surveillance which is Type 2 surveillance under the definition of “Type 2 surveillance” in subsection (1) is regarded as Type 1*

*surveillance if it is likely that any information which may be subject to legal professional privilege will be obtained by carrying it out.”*

The effect of the provision is that applications for all covert operations under the Bill that may involve LPP (including Type 2 surveillance operations which, in normal circumstances, are to be authorized by the executive authorities), should be considered by panel judges, who can be expected to be conscious of the principles governing LPP.

(b) Paragraph (b)(viii) of Part 1 of Schedule 3 and paragraphs (b)(ix) of Parts 2 and 3 of Schedule 3 :

*“An affidavit supporting an application for the issue of a judicial authorization for interception is to –*

*(a) ...*

*(b) set out –.....*

*(viii) the likelihood that any information which may be subject to legal professional privilege will be obtained by carrying out the interception”*

*“An affidavit supporting an application for the issue of a judicial authorization for Type 1 surveillance is to –*

*(a)...*

*(b) set out –.....*

*(ix) the likelihood that any information which may be subject to legal professional privilege will be obtained by carrying out the Type 1 surveillance”*

*“A statement supporting an application for the issue of an executive authorization for Type 2 surveillance is to –*

*(a)...*

*(b) set out –*

- (ix) *the likelihood that any information which may be subject to legal professional privilege will be obtained by carrying out the Type 2 surveillance”*

These requirements would have the effect of compelling LEAs to assess the likelihood of interference with LPP so that the authorizing authority could make an informed decision on whether authorization should be granted. For an operation that would otherwise be Type 2 surveillance but where information which may be subject to LPP is likely to be obtained, clause 2(3) would then apply so that the application would have to be made to a panel judge instead. The assessment of the likelihood of information that may be subject to LPP being obtained would also facilitate subsequent reviews by the Commissioner on Interception of Communications and Surveillance (the Commissioner) on whether the appropriate authorization has been sought.

(c) Clause 3 :

*“(1) In this Ordinance, the conditions for the issue or renewal, or the continuance, of a prescribed authorization, are that, in the circumstances of the particular case –*

(a) ...

(b) *the interception or covert surveillance is proportionate to the purpose sought to be furthered by carrying it out, upon –*

(i) *balancing, in operational terms, the relevant factors against the intrusiveness of the interception or covert surveillance on any person who is to be the subject of or may be affected by the interception or covert surveillance; and*

(ii) *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.*

(2) *In this section, “relevant factors” means –*

- (a) the immediacy and gravity of [the serious crime to be prevented or detected or the particular threat of public security]; and*
- (b) the likely value and relevance ... of the information likely to be obtained...”.*

In his consideration of the application by applying the tests of proportionality and hence necessity, the panel judge would take into account the impact on LPP in deciding whether the proposed operation is proportionate to the purpose sought to be furthered by carrying out the operation.

(d) Clause 31 :

*“A prescribed authorization may be issued or renewed subject to any conditions specified in it that apply to the prescribed authorization itself or to any further authorization or requirement under it (whether granted or imposed under its terms or any provision of this Ordinance).”*

A panel judge may prescribe such conditions as he considers appropriate in the case. He may, therefore, prescribe conditions to minimize possible interference with information which may be subject to LPP.

(e) Clause 56(1) :

*“(1) Where any protected product has been obtained pursuant to any prescribed authorization issued or renewed under this Ordinance on an application by any officer of a department, the head of the department shall make arrangements to ensure –*

- (a) that the following are limited to the minimum that is necessary for the relevant purpose of the prescribed authorization –*

- (i) *the extent to which the protected product is disclosed;.....*
- (b) *that all practicable steps are taken to ensure that the protected product is protected against unauthorized or accidental access, processing, erasure or other use; and*
- (c) *that the protected product is destroyed as soon as its retention is not necessary for the relevant purpose of the prescribed authorization.”*

The extent to which interception or surveillance product may be disclosed should be kept to the minimum necessary and the protected product has to be destroyed as soon as its retention is not necessary. In practice, any information obtained in the course of a duly authorized operation that is found to be subject to LPP remains privileged, and such information cannot be used for any law enforcement purposes. The disclosure and retention of the relevant products would not be necessary unless, for covert surveillance products, it is necessary to retain them for the prosecutor to carry out his duty to ensure a fair trial in a future proceeding. The effect of the inadvertent interference with LPP, if any, would be kept to a minimum. The compliance with the clause is also subject to review by the Commissioner.

4. Given the design of the scheme, in practice, we envisage that interception of communications or covert surveillance which has a relatively higher of likelihood of inadvertently making available information subject to LPP would only arise where the lawyer himself is criminally involved in an alleged offence, and hence the relevant communications sought would likely not be protected by LPP. In the course of carrying out the covert operation on the lawyer, e.g. by intercepting his telephone conversations, the LEA may inadvertently pick up other information that is subject to LPP. In other cases, we do not envisage that an authorization to, for example, intercept a lawyer's telephone or place a listening device in his office would be viewed as proportionate, and an application would unlikely be made in the first place. Where the lawyer is the target, the panel judge may also impose

appropriate conditions under clause 31 of the Bill to protect information subject to LPP.

5. We consider that the present scheme is consistent with Article 35 of the Basic Law. Nonetheless, taking into account Members' views, we will consider whether clause 56(1) should make an express reference to LPP materials.

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**Statutory Offices to which Serving Judges are Currently Appointed**

Chairman/President of the –

- Clearing and Settlement Systems Appeals Tribunal under Cap. 584
- Electoral Affairs Commission under Cap. 541
- Long-term Prison Sentences Review Board under Cap. 524
- Market Misconduct Tribunal under Cap. 571
- Securities and Futures Appeals Tribunal under Cap. 571
- Release under Supervision Board under Cap. 325

**Relevant Extracts of the Pension Benefits (Judicial Officers)  
Ordinance (Cap. 401) concerning cases where retired judges and  
judicial officers take up employment or an appointment after retirement**

**Section 34(1) of the Ordinance**

*“The Chief Executive may direct that a pension granted to a person shall be suspended as from a date the Chief Executive shall specify if the person has, within 2 years after his retirement and without the prior permission in writing of the Chief Executive –*

- (a) entered business on his own account;*
- (b) become a partner in a partnership;*
- (c) become a director of a company; or*
- (d) become an employee,*

*if the principal part of the business or the business of the partnership or company or of his employment is, in the opinion of the Chief Executive, carried on in Hong Kong, and the Chief Justice shall forthwith notify in writing the person concerned of the direction.”*

The Chief Executive’s power under section 34(1) has been delegated to the Chief Justice.

**Section 28(1) of the Ordinance**

*“If an officer who is eligible for a pension or to whom a pension has been granted is re-appointed to the public service, or appointed to service in any subvented organization which is determined to be public service for the purposes of this section by the Chief Executive by notice in the Gazette, the payment of the pension may be suspended during the period of his service after his re-appointment or appointment, as the case may be.”*

No subvented organization has so far been gazetted by the Chief Executive.

The Chief Executive has not delegated his power under section 28(1).