



HONG KONG BAR ASSOCIATION

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Your Ref: CB2/BC/2/05

7 June 2006

Mrs. Sharon Tong
 Clerk to Bills Committee on Interception of
 Communications and Surveillance Bill
 Legislative Council, 8 Jackson Road
 Hong Kong.

Dear Mrs. Tong,

Re: Interception of Communications and Surveillance Bill

I refer to the letter dated 2nd June 2006 inviting representatives of the Hong Kong Bar Association to attend the meeting of the Bills Committee on 10 June 2006.

I write in relation to the submissions of the Law Society of Hong Kong and other matters that members of the Bill Committee may take an interest. Members should continue to refer to the earlier submissions of the Bar on matters that this letter has not touched upon.

Legal Professional Privilege

The Law Society rightly takes a robust view against interception or surveillance operations against lawyers.

The Bar Council has recently amended paragraph 116 of the Code of Conduct of Barristers of the HKSAR to reflect the prevailing common law position. Thus "a barrister's duty not to divulge confidential information without the consent of his client, express or implied, subsists unless he is compelled or permitted to do so by law". See Hong Kong Bar Association Circular No 056/06, which also explains the Bar's views on the absolute nature of legal professional privilege, which may be abrogated or curtailed only by statute by clear and express words or by necessary implication to an extent reasonably necessary to meet the ends which justify the curtailment.

香港大律師公會

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The Bar Association would say that the Bill, as presently drafted, does not use clear and express words to abrogate or curtail legal professional privilege. Nor do its provisions provide the necessary implication for abrogation or curtailment. If the Administration hold a contrary view it should say so.

The Bar Association would also indicate that while legal professional privilege is subject to the common law exception excluding communications or documents made or brought into existence as a step in a "crime-fraud" enterprise, or for the purpose of stifling or covering up a "crime-fraud", a strong prima facie case of such wrongdoing must be shown before the exception can be relied on. See *'The Law of Professional-Client Confidentiality'* by Rosemary Pattenden (2003) O.U.P. at 16.37. The Bill, as presently drafted, does not seek to incorporate a lower threshold.

Covert Surveillance of Activities in "Public Places"

The Bar agrees with the Law Society that the Administration's response to the Bar's submissions on this issue fails to address the fundamental concerns of the legal profession.

The Bar, like the Law Society, takes the view that an issue involved in the consideration of a person's reasonable expectation of privacy, which is a function of fact and degree, should not, as a matter of principle, be "defined" out of the way in a "one size fits all" manner. Like the Law Society, the Bar affirms its view that clause 2(2) is inconsistent with the ICCPR and Art 39 of the Basic Law of the HKSAR and should be deleted.

It is useful to note in this connection that the Law Reform Commission's Report on Privacy: Regulation of Covert Surveillance describes a person's reasonable expectation of privacy in terms of three aspects, all of which involving an expectation against being the subject of *deliberate* observation, overhearing, interception, recording, examination, or copying. The same categories of expectation subsist in the proximity of strangers.

Conditions for Prescribed Authorization

The Bar agrees with the Law Society that the problems with the vague and undefined expression of "public security" are its broad potential reach and the consequential difficulty in achieving a proper and consistent approach in decision-making.

The Bar has considered the suggestion of the Law Society that the definition of "serious crimes" in the Bill be supplemented with a provision to cover conduct that would amount to a serious crime if committed in Hong Kong. The Bar, while reiterating its view that the definition of "serious crimes" in the Bill should be replaced with a comprehensive list of offences, finds no inherent conflict in incorporating into the said list conduct that would amount to a serious crime if committed in Hong Kong.

Law Reform Commission's Report on Privacy: Regulation of Covert Surveillance

The Law Reform Commission's Report recommends the enactment of two criminal offences of general application. A member of the Bills Committee has suggested that those two criminal offences be incorporated into the Bill.

While the Bar supports the proposition that non-compliance with the substantive provisions of the Bill be made a criminal offence, the Bar is of the view that this can be achieved by introducing penalty provisions alongside, for example, clauses 4 and 5 of the Bill. Introducing the two criminal offences recommended by the Law Reform Commission, on the other hand, may have complications, since, for example, the Bar does not agree with the Law Reform Commission's acceptance that there is no reasonable expectation against photographic recording of persons in their private premises while in plain view from the outside. See Hellewell v Chief Constable of Derbyshire [1995] 1 WLR 804 at 807, CA (Eng); Campbell v Mirror Group of Newspapers Ltd [2004] 2 AC 457, HL; and Douglas v Hello! Ltd [2005] 4 All ER 128, CA (Eng).

Yours sincerely,



Philip Dykes SC
Chairman

Cc: Mr. Stanley Ying (Permanent Secretary for Security)
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