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OF HONG KONG

香港律師會

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19 July 2006

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

Dear Mrs. Tong,

**Re: Interception of Communications and Surveillance Bill**

I attach the Law Society's submissions on the Committee Stage Amendments of the Bill.

Yours sincerely,

Patrick Moss  
Secretary General

Encl.

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## **Interception of Communications and Surveillance Bill Submission of the Law Society of Hong Kong on the Committee Stage Amendments**

**The Law Society has reviewed the Committee Stage Amendments (“CSAs”) to the Bill and has the following comments:**

### **1. Legal Professional Privilege (“LPP”)**

#### **(a) Clause 30A: What a prescribed authorisation may not authorise**

The Law Society welcomes the proposal by the Administration to address the Law Society’s concerns on the principle of LPP.

Nonetheless, the Law Society remains concerned that where exceptional circumstances exist and communications of a lawyer are intercepted by a Law Enforcement Agency (“LEA”), the mechanism to screen the communications for the furtherance of a criminal purpose from other communications (which are likely to consist of a preponderance of privileged communications) is inadequate. We note the representations that such communications will be segregated by officers who are not connected to the investigation of the crime in question.

The Law Society remains concerned because:

- (1) The person performing the screening of communications to identify which are of significance to an investigation and which are otherwise irrelevant and / or privileged may have an insufficient understanding of the task at hand.
- (2) The act of screening the communications itself breaches LPP.

The Law Society further notes that when Identity Parades are conducted, the senior officer must hold the rank of Chief Inspector or above and must not be involved in the investigating team.

**While we remain concerned that communications that are privileged are subject to the screening process, we submit that the screening of intercepted materials under clause 30A(2)(a) should be conducted under the supervision of an LEA officer of the rank of Chief Inspector or above. The officer should be completely independent of and not be involved in the investigating team. This will provide a reasonable and proportionate safeguard on the interception of LPP material.**

**This should not be provided for only in the Code, but given the importance of LPP, should be included in clause 30A or elsewhere in the legislation. Furthermore, any authorization under the exceptional circumstances envisaged by clause 30A(2) should be**

**(1) forthwith made known to the Commissioner on Interception of Communications and Surveillance to enable him to monitor the manner in which the interception and the screening of communications is performed; and**

**(2) an authorization to only a limited number of officers designated by name and rank, and for no longer in duration than is absolutely necessary.**

**(b) Clause 3: Conditions for issue, renewal or continuance of prescribed authorization and New Clause 55A: Reports to relevant authorities following arrest**

**(i) Clause 3(b)(iii)**

The Administration has added a new clause 3(b)(iii) to address the Law Society's concerns on "balancing the relevant factors" for the issue, renewal or continuation of prescribed authorization. We indicated in our earlier submissions there should be clear protection of other fundamental rights of individuals such as LPP and the right to silence.

**(ii) Clause 55A**

Clause 3(b)(iii) must be read in conjunction with the new Clause 55A(2) which has been proposed by the Administration to address the Law Society's concerns on the protection of LPP and other fundamental rights.

Clause 55A(2) currently states:

*"Where the relevant authority receives a report under subsection (1), he shall revoke the prescribed authorization, if he considers that the conditions for the continuance of the prescribed authorization under Section 3 are not met".*

As drafted Clause 3(b)(iii) fails to fully address our concerns as there has been a failure to make sufficient cross-reference to LPP with the new Clause 55A(2) and the right to silence etc. as the drafting is too general, The only provision which may be indirectly referred to LPP and the right to silence is in the wording:

*"(iii) considering such other matters that are relevant in the circumstances."*

**The Law Society submits that specific reference should be made to the following in the new Clause 3(b)(iii):**

- **LPP**
- **the right to silence**
- **journalistic material**

**A clear reference to the above will help to remove doubt of the Administration's intention to protect these rights and materials. It will also clarify the drafting in**

**clause 55A(2) such that if matters such as LPP, and the right to silence, or journalistic material are involved, the relevant authority will be specifically on the lookout for such and the authorisation will be revoked and the “relevant authority” will not have any discretion to continue the interception or covert surveillance.**

**We do not consider this will affect the operational concerns of the LEAs as the target person will be under arrest and in custody, and under Clause 25 the LEA will be entitled to make urgent oral applications. By making a separate application the relevant authority will have notice of the current state of the investigation and can assess the need for continued interception of communications, given the likelihood that the person arrested may remain in custody, and is more likely to be engaged in privileged communications with lawyers than before his arrest.**

**(c) Clause 58A: Information subject to legal professional privilege to remain privileged**

**The Law Society welcomes the new clause recognising the continuing status of LPP.**

**2. Clause 25: Oral Applications and its effects**

**The Bill currently lacks any provision requiring the LEA to maintain a clear documentary trail in relation to oral applications. We consider this should be remedied in light of the Administration's CSAs in Clause 46A on “Notifications to relevant persons”.**

**We submit that appropriate measures be put into place to require such oral applications to be recorded and for such recordings to be fully transcribed in order to provide a full documentary record.**

**3. Part IV: The Commissioner Clauses 38-53**

**We note that the office of the Commissioner will be a statutory one and clauses 38 to 53 describe the functions and duties of the Commissioner. However there does not appear to be any provisions enabling the Commissioner to delegate any of his duties to members of his staff. The Commissioner will only be able to perform effectively if he is supported by a staff.**

**The Administration should note that staff working for the Office of the Commissioner will be dealing with highly sensitive material and adequate safeguards must be put in place to protect the rights and privacy of those persons the subject matter of the reports from the legal enforcement agencies.**

**We submit there should be provisions in place to provide clear delineation of powers and duties of the Commissioner and the support staff of the Commissioner’s Office.**

**4. Clause 56: Safeguards for protected products**

The new clause 56(1A)(a) states:

*“Where any protected product described in subsection (1) contains any information that is subject to legal professional privilege, subsection (1)(c) is to be construed as also requiring the head of the department concerned to make arrangements to ensure that any part of the protected product that contains the information-*

*(a) in the case of a prescribed authorization for a postal interception or covert surveillance, is destroyed not later than 1 year after its retention ceases to be necessary for the purposes of any civil or criminal proceedings before any court that are pending or are likely to be instituted;*

We do not accept that the Administration should have the right to make a determination that retention of any protected product *“ceases to be necessary”* as this concerns the rights of the parties involved and who may be entitled to make a claim for wrongful interception or covert surveillance.

We submit that it would be appropriate to delete the words *“its retention ceases to be necessary for the purposes of”*, such that the new clause would read as follows:

*“(a) in the case of a prescribed authorization for a postal interception or covert surveillance, is destroyed not later than 1 year after any civil or criminal proceedings before any court that are pending or are likely to be instituted;”.*

**5. Sanctions for Abuse**

We note that the Administration has failed to introduce any provisions to address our concerns about the LEAs acting in bad faith. We repeat our earlier submissions:

(a) Two separate criminal offences should be created for:  
(i) unauthorized covert surveillance; and  
(ii) dealing with protected products in an improper manner (e.g. disclosure of protected products to third parties).

(b) The appropriate threshold should be *“deliberately”* or *“recklessly”*.

**6. A “Sunset Clause”**

The Law Society proposes that a “Sunset Clause” be inserted into the Bill, thus rendering the new law effective for only a limited period of time, unless extended by the Legislative Council.

The time that has been available for all parties concerned to examine and consider the full implications of the Bill has been too short. It would therefore be sensible to enable a full examination of the legislation in 3 years time. It is

**noted that during this period, the Commissioner will have had the opportunity to make 3 Reports which should provide sufficient material to enable a timely discussion to take place on the effectiveness and proportionality of the provisions.**

**The Law Society of Hong Kong**  
**19 July 2006**  
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