

**For information  
4 October 2005**

**Legislative Council Panel on Security**

**Law Enforcement (Covert Surveillance Procedures) Order**

**Administration's response to issues raised  
at and subsequent to the special meeting of 15 August 2005**

**Introduction**

This paper provides the response of the Administration to various issues raised in relation to the Law Enforcement (Covert Surveillance Procedures) Order (the Order) at the meeting of the Panel on 15 August 2005, and subsequent queries from Hon Lau Kong-wah (the Clerk's letter of 1 September 2005) and Hon Audrey Eu (the Clerk's letter of 2 September 2005).

**Issues raised at the Special Meeting of the Panel on 15 August 2005**

*Distribution of the authorising officers among departments*

2. The number of authorising officers can change from time to time depending on operational needs. The rough distribution in the number of authorising officers among the law enforcement agencies (LEAs) is as follows -

<b><u>Department</u></b>	<b><u>Number of authorising officers</u></b>
Police	below 20
Independent Commission Against Corruption	about 10
Customs and Excise Department	about 10
Immigration Department	below 5

*Offences under Article 23 of the Basic Law where legislation has not been enacted*

3. Under the Order, covert surveillance will not be conducted for those BL23 offences that have yet to be created.

*Statistics on covert surveillance currently undertaken by law enforcement officers*

4. Hitherto there has not been a standard procedure across the board for keeping the relevant statistics. How best such statistics should be provided to the Legislative Council in future is one of the issues being considered in our formulation of our legislative proposals on covert surveillance. We will consult the Legislative Council on the legislative proposals within the first half of 2005/06 session of the Council.

**Issues raised by of Hon Lau Kong-wah**

*Right to carry out covert surveillance under common law*

5. Under the common law, people are free to do anything which is not prohibited by law. This rule applies equally to the Government. The common law in Hong Kong does not recognise any free-standing general right to privacy<sup>1</sup>. It follows that surveillance operations that can be carried out without committing any breach of the law (such as the tort of trespass) do not require any statutory or common law power to justify it, whether it is carried out by the law enforcement agencies or by a non-government party.

6. The effect of Articles 30 and 39 of the Basic Law on the common law position above and whether it remains lawful for a law enforcement agency to undertake covert surveillance in a public place in the absence of express legislative authority are two of the issues to be determined in a pending judicial review case, and the appeals in the case of LI Man-tak.

*Use of the terms "legal procedure" and "inspect communication" under Article 30 of the Basic Law*

7. The Administration is not the official repository of all the materials relating to the drafting of the Basic Law. Nonetheless, based on publicly available materials, a summary of relevant information is provided at **Annex A** for Members' reference.

*Details of "covert surveillance" as stipulated under section 2 of the Order*

8. Covert surveillance is defined as the systematic surveillance of any person for the purposes of a specific law enforcement investigation or operation, in the circumstances set out under section 2 of the Order. Any form of systematic surveillance, including aural and visual, which satisfies the criteria

---

<sup>1</sup> See, for example, *Kaye v Robertson* [1991] FSR 62; *Khorasandjian v Bush* [1993] QB 727; *Wainwright v Home Office* [2003] 4 All ER 969; *Martin v United Kingdom* (2003) EHRR CD 91

under section 2, is covered under the Order, if it is not already covered by law (section 4). (For example, interception of communications is authorized under the Telecommunications Ordinance, and therefore would not be covered by the Order even if the operation otherwise satisfies section 2 of the Order.) (Please see paragraph 10 below.)

*Detailed overseas experience on covert surveillance, and statutory or common law powers in the United Kingdom for carrying out covert surveillance*

9. We are not best placed to comment on the detailed operational experience in implementing the legislation in other jurisdictions. For the UK, the Security Service Act 1989, the Intelligence Services Act 1994 and the Police Act 1997 appear to be relevant, in addition to the Regulation of Investigatory Powers Act 2000. Also, under common law, there is a power for law enforcement officers to provide an immediate response to unforeseen events.

#### **Issues raised by Hon Audrey Eu**

*Coverage of covert surveillance under the Order and whether interception is included*

10. The Order covers systematic surveillance as defined under section 2 of the Order. As provided under section 4, the Order does not apply to any covert surveillance which is or has been authorized, permitted or required to be carried out by or under any law. Since interception of communications is currently covered under section 33 of the Telecommunications Ordinance, the Order does not apply to interception of communications. Recordings of conversations are covered if they fall under the criteria under section 2 of the Order.

11. Providing the detailed operational techniques or procedures would divulge sensitive details of such operations which are by their nature covert. This would adversely affect our ability to prevent and detect criminal activities, and would not be in the public interest.

*Breakdown of the number of instances of covert surveillance authorized or carried out*

12. Please see paragraph 4 above.

*Laws referred to under section 4 of the Executive Order, and relevant*

*safeguards and remedies (including protection of Legal Professional Privileges (LPP))*

13. As mentioned in paragraph 10 above, section 4 of the Order provides that for those acts of covert surveillance which are at present authorized, permitted or required by law, they are not governed by the Order. In its “Report on Privacy : Regulating the Interception of Communications” of December 1996, the Law Reform Commission (LRC) has listed a number of existing legislative provisions governing interception of communications. The Ordinances in question are set out below<sup>2</sup> -

- (a) Telecommunications Ordinance (Cap. 106)
- (b) Post Office Ordinance (Cap. 98)
- (c) Import and Export Ordinance (Cap. 60)
- (d) Mental Health Regulations (Cap. 136A)
- (e) Prisons Rules (Cap. 234A)

The applicable safeguards in respect of these Ordinances are set out at **Annex B**<sup>3</sup>.

14. The Order does not purport to change the law relating to LPP, which continues to apply with existing remedies as before. LPP is firmly established as a common law principle which, subject to recognised exceptions, is binding on LEAs. A breach of LPP may make the conduct unlawful and could lead to evidence being rejected or even a stay of prosecution. In addition, officers who wilfully commit a breach could be subject to disciplinary proceedings.

15. Depending upon the circumstances, if covert surveillance is conducted without authorization, an aggrieved person might have a civil remedy under the Hong Kong Bill of Rights Ordinance or under the Personal Data (Privacy) Ordinance.

**Security Bureau  
September 2005**

---

<sup>2</sup> The Bankruptcy Ordinance (Cap. 6), which was considered as one of the Ordinances which authorized interception in the LRC report, is not covered herein as the re-direction of the correspondence of a bankrupted person is ordered by the court upon application, and would not be covert.

<sup>3</sup> Following footnote 2, the annex only deals with operations under relevant provisions that may be related to covert surveillance.

**Use of the term "legal procedure" and "communication"**

**References made in the Collection of Documents of the 1<sup>st</sup> to 9<sup>th</sup> Plenary Sessions of the Basic Law Drafting Committee**

Various references have been made to Article 30 of the Basic Law in the Collection of Documents of the 1<sup>st</sup> to 9<sup>th</sup> Plenary Sessions of the Basic Law Drafting Committee (BLDC)<sup>1</sup>. On the use of the terms "legal procedure" and "communication" under the Article, the following references are relevant -

- (a) The term “legally prescribed procedure” (法律規定程序) was used in the corresponding draft for the 3<sup>rd</sup> Plenary Session (p 24 of the Collection of Documents of the 3<sup>rd</sup> Plenary Session of the BLDC).
- (b) The term “legal procedures” (法律程序) was used in the relevant draft from the 4<sup>th</sup> Plenary Session onwards (p 26 of the Collection of Documents of the 4<sup>th</sup> Plenary Session of the BLDC).
- (c) In the relevant draft for the 4<sup>th</sup> Plenary Session, the following explanatory note on why the term “correspondence” rather than “communication” was adopted can be found: “According to normal understanding, the scope of [the term] ‘communication’ is wider than ‘correspondence’, [the former] not only includes ‘correspondence’, but also telephone and telegraph etc. Under current Hong Kong laws, there is freedom of correspondence. No application is required [for correspondence]. But not all communication is like that. For example, no radio-station may be established without prior application. Therefore, it is considered appropriate to provide for “freedom of correspondence”.
- (d) The term “correspondence” was changed to “communication” in the relevant draft for the 5<sup>th</sup> Plenary Session, “so as to broaden the scope [of protection]” (p 31 of the Collection of Documents of the 5<sup>th</sup> Plenary Session of the BLDC).
- (e) The term “communication” was used in the relevant drafts from the 5<sup>th</sup> Plenary Session onwards.
- (f) In the relevant draft for the 6<sup>th</sup> Plenary Session, the following explanatory note can be found: “A member has suggested that the

---

<sup>1</sup> The Collection of Documents was compiled by the Liaison Office of the Central People's Government in the Hong Kong Special Administrative Region in August 2004. A copy is available at the Basic Law Library at the City Hall.

following be deleted: ‘No department or individual may, on any grounds, infringe upon the freedom and privacy of communication of residents except that the relevant authorities may inspect communication in accordance with legal procedures to meet the needs of public security or of investigation into criminal offences’. After study by the sub-group, this sentence is retained.” (p 28 of the Collection of Documents of the 6<sup>th</sup> Plenary Session of the BLDC). No reason, however, is provided (in the Collection of Documents) for the retention of that sentence (cf p 94 of the Collection of Documents of the 7<sup>th</sup> Plenary Session of the BLDC).

**Safeguards under Ordinances that may authorize  
covert surveillance operations**

**Telecommunications Ordinance (Cap. 106)**

Section 33 of the Telecommunications Ordinance provides that when the Chief Executive considers that the public interest so requires, he may order to intercept messages brought for transmission by telecommunications.

2. As required by the provision, the Chief Executive only authorizes such operations where he deems the public interest so requires, and in practice, such operations are only authorized for the purpose of prevention or detection of serious crime, including serious cases of corruption, and monitoring threats to our security.
3. The relevant procedures are confidential in nature.
4. Depending upon the circumstances, if an operation is conducted without authorization, an aggrieved person might have a civil remedy under the Hong Kong Bill of Rights Ordinance or under the Personal Data (Privacy) Ordinance.

**Post Office Ordinance (Cap. 98)**

5. Section 13 of the Post Office Ordinance provides that the Chief Secretary for Administration can grant a warrant to open and delay postal packets.
6. In practice, the Chief Secretary for Administration only authorizes an interception for the purpose of prevention or detection of serious crime, including serious cases of corruption, and monitoring threats to our security.
7. The relevant procedures are confidential in nature.
8. Depending upon the circumstances, if the operation is conducted without authorization, an aggrieved person might have a civil remedy under the Hong Kong Bill of Rights Ordinance or under the Personal Data (Privacy) Ordinance.

**Import and Export Ordinance (Cap. 60)**

9. The Import and Export Ordinance provides, under section 20(1)(f), that

a member of the Customs and Excise (C&E) Service may examine any article if he considers it necessary to do so to ascertain whether or not the provisions of the Ordinance are being, or have been, complied with by any person in respect of that article. Under section 35(3) of the Ordinance, any member of the C&E Service may, in the presence of and under the directions of an officer of the Post Office, open and examine any postal packet held in the custody of the Post Office.

10. Internal orders are promulgated within the C&E Service for officers to comply with. All such orders are to be followed by C&E members, and their duties / actions are supervised and monitored by respective supervisors and commanders. Internal orders are issued to guide officers in handling items subject to legal professional privilege.

### **Mental Health Regulations (Cap. 136A)**

11. The Mental Health Regulations provide powers for medical superintendents of mental hospitals to impose restrictions on the communications to and from mental patients, such as the power to open and examine articles. A number of safeguards are provided -

- (a) Regulation 5(2) under the Mental Health Regulations provides that articles intended to be sent by a patient to certain specified persons or bodies — including the Chief Executive, members of the Executive Council, Legislative Council or District Council, public officers, and a solicitor acting for the patient — may not be opened or examined.
- (b) The Hospital Authority has an internal mechanism to ensure proper management and condition of the mental hospitals and the patients therein. Furthermore, under section 72(2) of the Mental Health Ordinance (Cap 136), contravention of the Mental Health Regulations would constitute a criminal offence and would be subject to a maximum penalty of a fine at level 2 (\$5,000) and imprisonment for 6 months.

12. Section 5(2) of the Mental Health Ordinance stipulates that all patients in a mental hospital should have the chance of seeing two or more Mental Hospital Visitors (i.e. visiting Justices of the Peace) at least once every month so far as circumstances permit. Patients are informed via pamphlets and notice boards of their rights to raise their complaints and grievances.

### **Prison Rules (Cap. 234A)**

13. Prison Rule 47A (3) and (4) provide that the letters to and from a



prisoner can be read subject to prescribed conditions, such as for the prevention or detection of crime or for the good order and discipline of the prison.

14. Under Prison Rule 47B, special safeguards are provided for the correspondence of prisoners with solicitors or counsels. Such letters shall not be opened or searched except in the presence of the prisoner concerned or unless the prisoner indicates that he does not wish to be present. In rare cases, such letter may be read by an officer not below the rank of Principal Officer under the conditions as specified in Prison Rule 47B(2) & (3).

15. Safeguards are also provided in case the letters are sent from or to a specified person such as a member of the Legislative Council, the visiting justice etc. Such letters shall be opened and searched by an officer not below the rank of Principal Officer in the presence of the prisoner under Prison Rule 47C.

16. The appointment of an officer responsible for the registration, opening and searching of mail in a prison is promulgated in the "Head of Institution Orders" of the correctional institution concerned. The head of institution is responsible for monitoring the strict compliance of the related provisions on mail handling.