HONG KONG BAR ASSOCIATION

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6th April 2006

Mrs. Sharon Tong
Clerk to the Interception of Communication
and Surveillance Bill Committee
Legislative Council
Legislative Council Building
8 Jackson Road
Hong Kong.

Dear Mrs. Tong,

Re: Interception of Communications and Surveillance Bill

I refer to the meeting of the Bills Committee on 3 April 2006, which was attended by representatives of the Bar. I write in relation to matters that need supplementation at the conclusion of the meeting.

"Judicial authorization"

The Bar's position does not appear to be readily understood by some members of the Bills Committee. Although I have asked members to refer to and consider paragraphs 87 to 100 of the Bar's Comments, it may be useful to state the "basics" underlying the Bar's views in this manner.

The Basic Law of the HKSAR endows the HKSAR with independent judicial power, which is vested in the courts of the HKSAR. The executive authorities and the legislature are not meant to exercise judicial power, such as the determination of a sentence for a criminal offence.

The other side of the coin is that courts and judges ought not to exercise non-judicial powers.

The reality in Hong Kong is that judges and judicial officers are conferred with certain non-judicial powers such as issuing search warrants, determining legal aid appeals, conducting inquiries and presiding over different administrative tribunals. Appointments are sometimes made by the Chief Executive: for example, see s.2 Commissions of Inquiry Ordinance, Cap. 86 and s.6 Administrative Appeals Board Ordinance Cap. 86.

Issuing authorizations for intercepts is not a function that is inextricably bound up with the discharge of judicial functions. In some countries such authorizations are made by the executive. The United Kingdom is one such country. Long experience in that country leads the Bar to understand that executive authorization of intercepts is not *per se* incompatible with Article 8 of the European Convention on Human Rights (right to privacy).

Jurisprudence from the Commonwealth and, particular Australia (which has a written constitution), suggest that there is constitutional tolerance of judges being conferred with non-judicial powers as designated persons subject to the conditions that the conferral must be consented to by the judge or judicial officer and the function must not be incompatible either with the judge or judicial officer's performance of judicial functions or with the proper discharge by the Judiciary of its responsibilities as an institution exercising independent judicial power.

The Bar has referred in its Comments to the case of Grollo v Palmer (1995) 184 CLR 348 (High Court of Australia). This case deserves a careful reading as it involved a challenge on the exercise by judges of a power of authorization of interception of communications under the Telecommunications (Interception) Act 1979 [Cth].

The Bar's position is nuanced. It has not considered the Administration's core proposal of appointing panel judges to authorize interception of communications and certain types of surveillance to be objectionable on constitutional grounds but rather questions the details of the proposal and the drafting of the relevant provisions on constitutional and legal policy grounds.

It considers that the core proposal should be more accurately described as "executive authorization by judges" or simply "authorization by judges". Members of the Bills Committee may wish to further scrutinize the "package" in the proposal (including the administrative accompaniments such as "extended checking") by reference to the incompatibility criteria set out in Grollo v Palmer (supra) both in relation to the institutional integrity of the Judiciary and the individual integrity of its members (such as individual judges who are invited to be candidates of panel judges).

As for the special vetting of judges, if there are no national security implications (and we are told there is not) as I said yesterday, the Bar simply does not see the justification for it.

Legal Professional Privilege

Members of the Bills Committee may wish to refer to paragraphs 70 to 83 which set out detailed discussion and proposals for amendment of the Bill to safeguard legal professional privilege by reference to similar legislation in Canada and New Zealand.

Part II of the Crimes Ordinance Cap. 200

A member of the Bills Committee referred to Part II of the Crimes Ordinance and asks if the provisions therein shed light on the concept of "public security". The present provisions of Part II of the Crimes Ordinance appear to have been enacted in the 1930s. It cannot be readily discerned how they could inform the meaning of a concept deployed in 1990 in the Basic Law. The closest of those provisions and the concept of "public security" has to be the various "seditious intentions" prescribed in s 9(1) of the Crimes Ordinance, which of course have to be read with the innocuous objectives set out in s 9(2) of the same.

Law Reform Commission's Report

A member of the Bills Committee suggested that the two criminal offences proposed in the Law Reform Commission's recent report on covert surveillance should be studied. The Bar will consider this suggestion and communicate with the Bills Committee in due course.

I hope that the above would be useful to the Bills Committee's deliberations.

Yours sincerely,

Philip Dykes SC
Chairman

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Cc Security Bureau (Attn: Mr Stanley Ying, Permanent Secretary)