LC Paper No. CB(2) 1823/05-06(01)

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Secretary for Security
(Attn : Mr Ying Yiu Hong, Stanley, JP
Permanent Secretary for Security)
Security Bureau
6/F, Main and East Wings
Central Government Offices
Hong Kong

24 April 2006

BY FAX
Fax No. : 2868 5074
Total no(s) of page(s) : 7

Dear Mr Ying,

Interception of Communications and Surveillance Bill

We write further to our letter of 10 April.

Legal professional privilege

Please confirm whether legal professional privilege (LPP) applies to communications between a client and his legal adviser for the purpose of obtaining legal advice in furtherance of a civil wrong, i.e. a non-criminal purpose (eg. to commit a tortious act).

According to paragraph 6 of the Administration's Response for the meeting on 12 April 2006 (LC Paper No. CB(2) 1693/05-06(01) (SB Ref : ICSB 4/06)), it is necessary to retain postal interception and covert surveillance products "for the prosecutor to carry out his duty to ensure a fair trial in a future proceeding". Please clarify whether this is the same as the test set out in Clause 56(2)(b), i.e. that it is necessary for the purposes of any civil or criminal proceedings before any court that are pending or are likely to be instituted.

Paragraph 7 of the said Administration's Response sets out the policy intent of the proposed amendments to the Bill in relation to the use and destruction of products protected by LPP. Would the prosecutor "carry out his duty to ensure a fair trial" in the same way as provided in Clause 58 in relation to telecommunications interception products?

Clause 58(6) provides that a judge may direct the person conducting the prosecution of any offence to make any admission of fact as the judge considers essential to secure the fairness of the trial of that offence. Would this procedure apply to products protected by LPP? Is this the same as proof by formal admission under section 65C of the Criminal Procedure Ordinance (Cap. 221)(**Annex A**)?

Public security

In paragraph 6 of the Administration's Response for the meeting on 19 April 2006 (LC Paper No. CB(2) 1742/05-06(01) (SB Ref : ICSB 5/06)), the Administration explains that there are difficulties in giving the term "public security" and similar terms an exhaustive definition. The case of *Esbester v UK* of 1993 is cited in footnote 2 where the European Commission of Human Rights has stated that the term "national security" is not amenable to exhaustive definition.

You may note that "**national security**" is defined both in the Societies Ordinance (Cap. 151) and the Public Order Ordinance (Cap. 245) as "the safeguarding of the territorial integrity and the independence of the People's Republic of China". The definition was introduced by two Amendment Bills in July 1997 and according to the Administration, the definition is taken from the United Nations publication "Freedom of the Individual under Law: an Analysis of Article 29 of the Universal Declaration of Human Rights" (Paper No. 72 on the National Security (Legislative Provisions) Bill at **Annex B**). It would assist the Bills Committee if you could consider this definition when responding to the Bills Committee's request to explain whether "national security" would be covered by "public security".

Before the introduction of the 1997 Amendment Bill to the Societies Ordinance, the Secretary for Security may prohibit the operation of a society if he reasonably believed that the operation or continued operation might be prejudicial to the "security of Hong Kong, or to public safety or public order". This provision was introduced by the Societies (Amendment) Ordinance 1992 (75 of 1992), and on resumption of the Second Reading debate on 15 July 1992, the then Secretary for Security explained that the expression "**security of Hong Kong**" could refer only to the survival or well-being of the territory as a whole and not simply to the well-being of sectional or lesser interests, or to the interests or well-being of the Government. The power to prohibit societies would be exercised only in situations where there were strong reasons for believing that the operation or continued operation of a society would prejudice either the security of Hong Kong, in the restrictive sense to which he had

referred, or would constitute a real and serious threat to public safety or public order in the territory, for example, because it promoted terrorism. It would assist the Bills Committee if the Administration could compare "public security" with "security of Hong Kong" when responding to the Bills Committee's request to explain whether risks with no direct relevance to Hong Kong would be covered by "public security".

"Acting judicially"

Paragraph 18 of the Administration's Response for the meeting on 19 April 2006 (LC Paper No. CB(2) 1742/05-06(01) (SB Ref : ICSB 5/06)) sets out the policy intent of the expression "acting judicially". It describes the manner in which a panel judge should exercise his powers, and it does not require him to act as a judge.

The expression is given a particular meaning in the Oaths and Declarations Ordinance (Cap. 11), which is not relevant to the present context. The expression in the Evidence Ordinance (Cap. 8) and the Companies Ordinance (Cap. 32) relates to taking judicial notice and is also irrelevant. Section 64(4) of the Interpretation and General Clauses Ordinance (Cap. 1) is similar to the present context because it compares the difference between acting in an administrative or executive capacity and judicial or quasi-judicial capacity. You will appreciate that "司法身分" is used to describe "judicial capacity". In light of the above analysis, it is our view that "以司法方式行事" would be a more accurate term for "acting judicially" in the Bill and would be grateful if you could reconsider it.

Code of Practice

Clause 59(1) provides that the Code of Practice is issued for the purpose of providing practical guidance to officers of the departments. Under Clause 59(4), such officers shall have regard to the provisions of the Code in performing any function under the Bill. However, "relevant requirement" is defined in Clause 2 to include any applicable requirement under the Code of Practice. One of the functions of the Commissioner under Clauses 39 and 40 is to oversee the compliance with the relevant requirements and to conduct reviews as he considers necessary. It is also the obligation of the head of department under Clauses 52 and 54 to arrange for regular review and to submit to the Commissioner a report of failure by the department or its officers to comply with the relevant requirements. Please clarify the status of the Code of Practice.

It is stated in paragraph 12 of the Administration's Response for the meeting on 6 April 2006 (LC Paper No. CB(2) 1623/05-06(01) (SB Ref : ICSB 3/06)) that provisions will be included in the Code of Practice to clearly set out the possible consequence of any breach of the relevant requirements. Would the Administration make any distinction between a breach of a provision in the Bill, a breach of the Code of Practice and a condition in a prescribed authorization or device retrieval warrant?

How would the Code be published and made public? There is no express provision in Clause 59. Clause 59(3) provides for revision of the whole or any part by the Secretary for Security in a manner consistent with his power to issue the Code, but the manner has not been specified in Clause 59(1).

Under Clause 49(2), where the Commissioner makes any recommendation to the Secretary for Security for revision of the Code, is the Secretary obliged to implement them or would the Secretary be only required to notify the Commissioner if he implements them?

Section 3 Schedule 2 Provisions for documents and records compiled by or made available to panel judge

What is the significance of a panel judge affixing his seal to a packet sealed by his order? Does every panel judge have his own seal?

We are still studying the Chinese text of the Bill and may seek further clarifications from you if necessary.

Yours sincerely,

(Bernice Wong)
Assistant Legal Adviser

Encl

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(7) 本條規定送達任何人的文件，可藉以下方式送達——
- (*a*) 交付該人或其律師；或
- (*b*) 如屬法人團體，則交付法人團體的註冊辦事處或總辦事處的秘書或文員，或以掛號郵遞寄交，並以法人團體該辦事處的秘書或文員為收件人。

(8) 在本條中，"法庭" (court) 包括區域法院及裁判官。 *(由1972年第34號第11條增補。由1998年第25號第2條修訂)*

(由1971年第5號第6條增補)
[比照 *1967 c. 80 s. 9 U.K.*]

65C. 藉正式承認提出證明

(1) 在符合本條的規定下，任何可在刑事法律程序中提出口頭證據證明的事實，可由檢控人或被告人或其代表就該等法律程序而言作出承認，而任何一方根據本條對任何該等事實的承認，就針對該一方而言，在該等法律程序中須為已獲承認事實的不可推翻的證據。

(2) 根據本條作出的承認——
- (*a*) 可在該等法律程序進行之前或進行期間作出；
- (*b*) 如非在法庭上作出，須以書面作出；
- (*c*) 如由個人以書面作出，須宣稱由作出的人簽署，如由法人團體作出，則須宣稱由法人團體的董事或經理、秘書或文員，或另一名相類的高級人員所簽署；
- (*d*) 如是代表屬個人的被告人作出，須由其大律師或律師作出；
- (*e*) 如是由屬個人的被告人在審訊前的任何階段作出，必須在有關法律程序進行之前或進行期間經其大律師或律師同意 (不論是在承認作出時或在其後)。
- (*f*) 可用其中一種法定語文作出。 *(由1995年第51號第14條增補)*

(3) 根據本條為關於任何事宜的法律程序作出的承認，須視作為關於該事宜的任何繼後的刑事法律程序 (包括任何上訴或重審) 作出的承認。

(4) 根據本條為某法律程序作出的任何承認，如經法庭許可，在該法律程序中或關於同一事宜的任何繼後的刑事法律程序中，可予以撤回。

(7) A document required by this section to be served on any person may be served—
- (*a*) by delivering it to him or to his solicitor; or
- (*b*) in the case of a body corporate, by delivering it to the secretary or clerk of the body at its registered or principal office or by sending it by registered post addressed to the secretary or clerk of that body at that office.

(8) In this section, "court" (法庭) includes the District Court and a magistrate. *(Added 34 of 1972 s. 11)*

(Added 5 of 1971 s. 6)
[*cf. 1967 c. 80 s. 9 U.K.*]

65C. Proof by formal admission

(1) Subject to the provisions of this section, any fact of which oral evidence may be given in any criminal proceedings may be admitted for the purpose of those proceedings by or on behalf of the prosecutor or defendant and the admission by any party of any such fact under this section shall as against that party be conclusive evidence in those proceedings of the fact admitted.

(2) An admission under this section—
- (*a*) may be made before or during the proceedings;
- (*b*) if made otherwise than in court, shall be in writing;
- (*c*) if made in writing by an individual, shall purport to be signed by the person making it and, if so made by a body corporate, shall purport to be signed by a director or manager, or the secretary or clerk, or some other similar officer of the body corporate;
- (*d*) if made on behalf of a defendant who is an individual, shall be made by his counsel or solicitor;
- (*e*) if made at any stage before the trial by a defendant who is an individual, must be approved by his counsel or solicitor (whether at the time it was made or subsequently) before or during the proceedings in question;
- (*f*) may be made in either official language. *(Added 51 of 1995 s. 14)*

(3) An admission under this section for the purpose of proceedings relating to any matter shall be treated as an admission for the purpose of any subsequent criminal proceedings relating to that matter (including any appeal or retrial).

(4) An admission under this section may with the leave of the court be withdrawn in the proceedings for the purpose of which it is made or any subsequent criminal proceedings relating to the same matter.

Annex A

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(5) 在本條中，"法庭"(court)包括區域法院及裁判官。 *(由1972年第34號第12條增補。由1998年第25號第2條修訂)*

(由1971年第5號第6條增補)
[比照1967 c. 80 s. 10 U.K.]

65D. 不在犯罪現場的通知

(1) 在循公訴程序進行的審訊中，被告人除非是在訂明期間完結前提交不在犯罪現場詳情的通知，否則未經法庭許可，不得援引證明不在犯罪現場的證據。

(2) 在不損害第(1)款的原則下，在任何該等審訊中，被告人未經法庭許可，不得傳召任何其他人提供證明不在犯罪現場的證據，但如屬下述情況，則不在此限——

(*a*) 根據第(1)款提交的通知包括證人的姓名及地址，或如被告人提交通知時並不知悉證人的姓名及地址，則包括他所管有的對找尋該證人可能有關鍵性幫助的資料；

(*b*) 如該通知並無包括該姓名或地址，但法庭信納被告人在提交該通知之前，並在提交該通知後繼續採取一切合理步驟使該姓名或地址得以確定；

(*c*) 如該通知並無包括該姓名或地址，但被告人其後發現該姓名或地址或獲得其他對找尋該證人可能有關鍵性幫助的資料，他立即就該姓名、地址或資料(視屬何情況而定)提交通知；

(*d*) 如檢控人或他人代檢控人通知被告人謂未能根據所提交的姓名或地址找到該證人，而被告人立即就他當時所管有的任何該等資料提交通知，或在其後獲得任何該等資料時，立即提交有關的通知。

(3) 如法庭覺得被告人未曾按照《裁判官條例》(第227章)第85A條或《區域法院條例》(第336章)第77B條或《複雜商業罪行條例》(第394章)第4條的條文(視屬何情況而定)知悉本條的規定，則法庭不得拒絕給予本條所指的許可。 *(由1988年第57號第30條修訂；由1992年第59號第7條修訂；由1998年第25號第2條修訂)*

(4) 任何提出以反駁不在犯罪現場的證據，可在證明不在犯罪現場的證據提供之前或之後提供，但如法庭就提供該證據的時間另有指示，則屬例外。

(5) In this section, "court" (法庭) includes the District Court and a magistrate. *(Added 34 of 1972 s. 12)*

(Added 5 of 1971 s. 6)
[cf. 1967 c. 80 s. 10 U.K.]

65D. Notice of alibi

(1) On a trial on indictment the defendant shall not without the leave of the court adduce evidence in support of an alibi unless, before the end of the prescribed period, he gives notice of particulars of the alibi.

(2) Without prejudice to subsection (1), on any such trial the defendant shall not without the leave of the court call any other person to give evidence in support of an alibi unless—

(*a*) the notice under subsection (1) includes the name and address of the witness or, if the name and address is not known to the defendant at the time he gives the notice, any information in his possession which might be of material assistance in finding the witness;

(*b*) if the name or the address is not included in that notice, the court is satisfied that the defendant, before giving the notice, took and thereafter continued to take all reasonable steps to secure that the name or address would be ascertained;

(*c*) if the name or the address is not included in that notice, but the defendant subsequently discovers the name or address or receives other information which might be of material assistance in finding the witness, he forthwith gives notice of the name, address or other information, as the case may be;

(*d*) if the defendant is notified by or on behalf of the prosecutor that the witness has not been traced by the name or at the address given, he forthwith gives notice of any such information which is then in his possession or, on subsequently receiving any such information, forthwith gives notice of it.

(3) The court shall not refuse leave under this section if it appears to the court that the defendant was not informed in accordance with the provisions of section 85A of the Magistrates Ordinance (Cap. 227), section 77B of the District Court Ordinance (Cap. 336) or section 4 of the Complex Commercial Crimes Ordinance (Cap. 394), as the case may be, of the requirements of this section. *(Amended 57 of 1988 s. 30; 59 of 1992 s. 7)*

(4) Any evidence tendered to disprove an alibi may, subject to any directions by the court as to the time it is to be given, be given before or after evidence is given in support of the alibi.

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Annex B

Paper No. 72

National Security (Legislative Provisions) Bill: Definition of "National Security" in the Societies Ordinance

Introduction

This paper sets out the Administration's response on the question regarding the background of the definition of term "national security" in the existing Societies Ordinance (Cap. 151), as raised at the meeting of the Bills Committee on 20 May 2003.

Definition of "national security"

2. The term "national security" is defined in both the Societies Ordinance and the Public Order Ordinance (Cap. 245) as "the safeguarding of the territorial integrity and the independence of the People's Republic of China." It is proposed to adopt the same definition in the Official Secrets Ordinance (Cap. 521).

3. The definition of "national security" is taken from the United Nations publication "Freedom of the Individual under Law: an Analysis of Article 29 of the Universal Declaration of Human Rights"[1], which says in regard to national security (para. 1028) -

> "National security means peace and stability in the community. The concept would seem to relate to measures enacted with a view to **safeguarding territorial integrity and national independence** from any external threat. It covers any activity prejudicial to the very existence of the State. Nevertheless, this requirement should not be used as a pretext for imposing arbitrary limitations or restrictions on the exercise of human rights and freedoms." (emphasis added)

Security Bureau
June 2003

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1 Erica-Irene A. Daes, *Freedom of the Individual under Law: An Analysis of Article 29 of the Universal Declaration of Human Rights,* Human Rights Study Series No. 3, United Nations publication (Sales No. E.89.XIV.5), 1990